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# Unique, Special, or Simply a Primus Inter Pares? *The European Union in International Law*

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Emanuel Castellarin. ***La participation de l'Union européenne aux institutions économiques internationales***. Paris: Editions A. Pedone, 2017. Pp. 664. €74. ISBN: 9782233008374

Marise Cremona, Anne Thies and Ramses A. Wessel (eds). ***The European Union and International Dispute Settlement***. Oxford: Hart, 2017. Pp. 302. £75. ISBN: 9781509903238

Andrés Delgado Casteleiro. ***The International Responsibility of the European Union: From Competence to Normative Control***. Cambridge: Cambridge University Press, 2016. Pp. 259. £69.99. ISBN: 9781107090545

## Abstract

*The three books under review analyse for the main part the impact of the European Union (EU) on the practice of international law. All three show the difficulties the EU faces in reconciling its ambition to fully participate in international life with the preservation of certain special features that characterize its internal structure. They also illustrate how the international action of the EU is characterized by a constant effort to ensure that its special features are accepted by the other actors. In this review essay, I discuss the legal challenges faced by the EU at the international level by focusing on the sui generis nature of the EU as an international subject. I consider the different visions of the EU that transpire from each of these books, highlighting the tendency that sometimes emerges to overemphasize the 'special features' of the EU at the expense of a balanced consideration of the possible implications of EU-centred solutions for the other actors involved. While no doubt the EU presents particular features that have no parallel in any other international organization, this, in itself, can*

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*hardly be used as an argument to justify that a special treatment be accorded to the EU. The recognition of a special status requires some degree of acceptance by the other actors on the international stage. I conclude by noting that the EU's 'specialness' appears to have the effect of limiting its capacity to contribute to international law-making.*

## 1 Introduction

The international practice of the European Union (EU) is progressively having an impact on international law. One example may be sufficient to illustrate this point. In its current work on the '[i]dentification of customary international law', the International Law Commission (ILC) has addressed the relevance of the practice of international organizations for the purposes of determining customary rules. Paragraph 2 of Draft Conclusion 4, adopted on second reading in 2018, provides that '[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law'.<sup>1</sup> In the ILC's view, cases in which the practice of international organizations may count as practice for the determination of customary rules are rather limited.<sup>2</sup> Among these cases, the 'most clear' one is 'where member States have transferred exclusive competences to the international organization, so that the latter exercises some of the public powers of its member States and hence the practice of the organization may be equated with the practice of those States'.<sup>3</sup> The reference to the 'exclusive competences' of an international organization is striking and does not seem to have precedents in texts adopted by the ILC. Its use in the commentary of a provision dealing comprehensively with the role of international organizations in the formation of customary international law may give the impression that this concept, and, indirectly, the distinction between exclusive and shared competences, is widely employed and recognized in the practice of international organizations. Yet the concept has been developed only within the context of EU law and reflects the very peculiar way in which powers are allocated between the EU and its member states.<sup>4</sup> The acceptance of exclusive competences of the EU, as noted by Jan Klabbbers, 'is a far cry from the regular situation with respect to international organizations, whose powers typically remain in parallel with those of their member states'.<sup>5</sup>

<sup>1</sup> 2018 Draft Conclusions on the Identification of Customary International Law, reprinted in International Law Commission (ILC), Report on the Work of Its Seventieth Session (30 April–1 June and 2 July–10 August 2018), UN Doc. A/73/10 (2018), Draft Conclusion 4, at 130.

<sup>2</sup> For an overview, see Blokker, 'International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?', 14 *International Organizations Law Review (IOLR)* (2017) 1, at 8–9.

<sup>3</sup> ILC, Report on the Work of Its Seventieth Session (30 April–1 June and 2 July–10 August 2018), UN Doc. A/73/10 (2018), at 131, para. 6.

<sup>4</sup> It is not by chance that the ILC took care to specify that '[t]his is the case, for example, for certain competences of the European Union'. *Ibid.*

<sup>5</sup> Klabbbers, 'Sui Generis? The European Union as an International Organization', in D. Patterson and A. Södersten (eds), *A Companion to European Union Law and International Law* (2016) 1, at 8.

The fact that an authoritative body such as the ILC, whose task is to codify and promote the progressive development of international law, makes use of an EU-specific concept in addressing a legal issue that, in principle, concerns all international organizations may be taken as a sign of the influence that the EU is nowadays able to exert on the development of rules of public international law, particularly those that are addressed to international organizations. This influence reflects, in the first place, the activism of the EU as a global actor in international relations; it also reflects the almost unparalleled – at least when compared to other international organizations – ability of the EU's legal service in making its voice heard, including through comments addressed to the ILC,<sup>6</sup> whenever it has the possibility of expressing its views about the rules of international law applicable to the EU. At the same time, however, the use of concepts typical of the EU's legal framework raises the problem of whether the ILC has taken into account adequately the 'specialness' or 'exceptionalism' of the EU. If the concept of 'exclusive competence' is unknown to any international organization other than the EU, what is the point of using it in a work that aims to address in general terms the role of international organizations in the formation of customary international law? One is tempted to believe that, by attaching importance to a concept with limited wider significance for international organizations, the ILC simply wished to convey the message that international organizations do not substantially contribute to the formation of customary international law.

The impact of the EU on the practice of international law constitutes the core issue addressed in the three books under review. Taken together, they provide an insightful account of the way in which the EU has increasingly contributed to the practice of international law in different areas. They not only contribute to filling the gap in the existing legal literature, which so far had prevalently focused on the reception of international law in EU law, while neglecting the influence of the EU on international law.<sup>7</sup> They also shed light on the general issue of the 'specialness' of the EU at the international law level by offering different views on the consequences deriving from certain peculiar features of the EU that appear to differentiate it from other international organizations.

In *La participation de l'Union européenne aux institutions économiques internationales* (hereinafter *Participation de l'Union européenne*), Emanuel Castellarin examines the role of the EU in different international economic institutions, both international organizations and informal institutions, covering situations in which the EU participates as a full member, as an observer or only indirectly through the participation of its member states. Based on an accurate and impressively extensive review of the

<sup>6</sup> In a statement made in the United Nations (UN) Sixth Committee and relating to the ILC's work on '[i]dentification of customary international law', the European Union (EU) had expressed the view that, 'in areas where, according to the rules of the EU Treaties, only the Union can act it is the practice of the Union that should be taken into account with regard to the formation of customary international law alongside the implementation by the Member States of the EU legislation'. See Statement on Behalf of the European Union, 3 November 2014, available at [www.un.org/en/ga/sixth/](http://www.un.org/en/ga/sixth/).

<sup>7</sup> For this observation, see Wessel, 'Flipping the Question: The Reception of EU Law in the International Legal Order', 35 *Yearbook of European Law* (2016) 533, at 534.

(sometimes little known) EU practice, this thoughtful book is particularly remarkable in that it offers a complete overview of the legal implications stemming from the participation of the EU to international economic institutions. Its coverage extends from the participation in the rule making by international organizations to the reception of these normative acts within the EU legal order, from the respective role of the EU and its member states within dispute settlement mechanisms established by international organizations to the allocation of international responsibility.

By contrast, *The International Responsibility of the European Union* (hereinafter *International Responsibility of the EU*) by Andrés Delgado Casteleiro focuses on a narrower legal issue; it discusses how different international bodies deal with the allocation of international responsibility between the EU and its member states. In particular, the question is whether it is possible to infer from this (mainly judicial) practice the existence of a rule of general international law applying specifically to the EU, whereby the conduct of member states is to be attributed to the EU when they act under the normative control of the organization. The examination of this thorny issue is conducted through a careful assessment of international practice in the area of environmental law, World Trade Organization (WTO) law and international investment law, while the case law of the European Court of Human Rights (ECtHR) is only fleetingly addressed.

The third book under review, *The European Union and International Dispute Settlement* (hereinafter *The EU and Dispute Settlement*), edited by Marise Cremona, Anne Thies and Ramses A. Wessel, has a twofold purpose. As the editors make clear, it first aims at assessing 'the EU's contribution to the development of international dispute settlement under international law'.<sup>8</sup> Second, it evaluates the same issue by adopting a European perspective, thereby examining how the constitutional structure of the EU may constrain the reception of international rulings or affect the EU's interaction with other international courts and tribunals. The book provides a comprehensive coverage of the practice concerning the EU's participation in dispute settlement mechanisms as well as of the case law developed by the Court of Justice of the European Union (CJEU) in this field, particularly with regard to the preservation of the autonomy of the EU legal order and of its exclusive jurisdiction in the interpretation and application of EU law.

*Participation de l'Union européenne* and *The EU and Dispute Settlement* take a somewhat similar approach in addressing their respective topics. They do not focus on a given international organization or dispute settlement mechanism, nor do they concentrate upon a specific legal issue related to the EU's international action in these two contexts. Rather than adopting a sectoral or problem-specific approach, they identify a number of broad horizontal themes and address them in the light of the pertinent practice and case law. Perhaps as a consequence of this approach, the two books do not develop a unitary theory or a specific legal thesis. Their main strength lies rather in the systematic coverage of the many different issues arising in connection to the overall theme of

<sup>8</sup> Cremona, Thies and Wessel, 'Introduction', in M. Cremona, A. Thies and R.A. Wessel (eds), *The European Union and International Dispute Settlement* (2017), at 1.

the two books as well as in the thoughtful and sometimes original perspective offered on these different issues. By contrast, as already noted, *International Responsibility of the EU* has a narrow focus and develops a precise legal thesis. In this respect, the title of the book is slightly misleading, as it might suggest a wider coverage that includes a comprehensive analysis of the different issues of international responsibility that may arise in connection to the EU's international activity. Apart from this, the choice of focusing on the allocation of responsibility between the EU and its member states in cases in which member state acts under the EU's normative control appears appropriate and understandable. Indeed, it is almost exclusively in relation to such an issue that the existence of a special international rule of responsibility applicable to the EU has been prospected.

In this review essay, I will not attempt to discuss, or even simply to summarize, all of the different legal arguments developed by the authors on the many legal issues addressed in these books. I will confine my analysis to an overarching theme underlying all three books – namely, the 'specialness' of the EU as an international subject. Proceeding from an international law perspective on this theme, I will specifically inquire as to the relevance assigned to the 'specialness argument' in the books under review; what the key aspects of this 'specialness' are and how international law accommodates them; to what extent the 'specialness' of the EU has come to be generally accepted by the international community; finally, and somewhat provocatively, assuming that all international organizations are somewhat special, in what way the 'specialness' of the EU differs from the 'specialness' of the other international organizations.

## 2 Two Visions of the EU

When it comes to defining the nature of the EU, scholars tend to divide into two camps – an opposition that frequently reflects a disciplinary divide between international law and EU law scholars.<sup>9</sup> On the one side, there are those who place an emphasis on the fact that the EU came into existence as, and continues to be, an international organization based on international law. While recognizing that the competences and internal structure of the EU have no parallel substantially in any other international organization, they regard this difference as one of degree and not of nature. On the other side, there are the supporters of the *sui generis* status of the EU. They emphasize its special features and regard it as a new construct, something in between a traditional international organization and a federal state. If, for want of a better definition, they accept to regard it as an international organization, they still insist that it is a *sui generis* organization. The choice of one vision over the other is sometimes reflected in the way in which international and EU law scholars approach legal problems relating to the position of the EU in international law. Proponents of the 'EU as a *sui generis* organization'

<sup>9</sup> On this divide, suffice it to mention de Witte, 'The European Union as an International Legal Experiment', in G. De Burca and J.H.H. Weiler (eds), *The Worlds of European Constitutionalism* (2012) 19; Latty, 'L'Union Européenne vue du droit international', 2 *Annuaire de droit de l'Union européenne* (2014) 181.

tend to highlight the deficiencies of international law, which, in their view, would not take adequately into account the specificities of certain new categories of global actors. They plead in favour of a development of the current rules of international law, including through the emergence of new rules of customary international law specifically addressing the position of the EU, and search for signs in the practice that may reveal a trend towards this development. By contrast, proponents of the ‘EU as an international organization’ tend to downplay the idea that there are gaps or deficiencies in the current rules of international law in regard to the treatment to be accorded to subjects such as the EU. They accept that the internal structure of the EU may render it difficult for that organization to act internationally but regard this as a technical problem that can be addressed through the traditional instruments of international law, particularly through mutually agreed solutions between the different actors involved.

The books under review wisely refrain from engaging in an abstract discussion of the legal nature of the EU. The analysis of the different legal issues is conducted primarily through an extensive and careful examination of the pertinent case law and practice. Yet traces of the above-mentioned divide can be easily detected. This is most evident in the works of Castellarin and Delgado Casteleiro, which appear premised on different visions of the EU’s nature. In Castellarin’s view, the EU fits perfectly within the definition of ‘international organization’.<sup>10</sup> He examines the *sui generis* argument but rapidly dismisses it on the ground that the presence of certain ‘constitutional features’ in the EU’s internal structure is not incompatible with its qualification as an international organization from the viewpoint of international law.<sup>11</sup> He recognizes the importance that the EU legal order attaches to the principle of autonomy but, at the same time, stresses that autonomy is a consequence of the legal personality and that, in this respect, it is a characteristic that is common to all international organizations endowed with legal personality.<sup>12</sup> By contrast, Delgado Casteleiro puts great emphasis on the elements that distinguish the EU from all of the other international organizations. In particular, at the core of his analysis, there is the observation that ‘[t]he constitutional principles of the EU combined with the institutional architecture to ensure compliance with the EU law create a sort of normative umbrella under which Member States no longer act in a completely independent manner but rather in compliance with an EU norm’.<sup>13</sup> This *sui generis* situation requires us, in his view, to reconsider the relationship between the EU and its member states under the international law of responsibility. On the one hand, because of the limitations imposed by EU law, member states have become ‘strange subjects’ of international law.<sup>14</sup> On the other hand, because of the mechanism of control placed at the centre of its constitutional design, the EU resembles more closely a federal state than any other international organization.<sup>15</sup>

<sup>10</sup> E. Castellarin, *La participation de l’Union européenne aux institutions économiques internationales* (2017), at 17.

<sup>11</sup> *Ibid.*, at 19.

<sup>12</sup> *Ibid.*, at 20.

<sup>13</sup> Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (2016), at 52–53.

<sup>14</sup> *Ibid.*, at 25.

<sup>15</sup> *Ibid.*, at 53.

The way in which the two authors approach their respective subjects also differs. When examining the hurdles faced by the EU when it acts at the international level, Castellarin tends to present them as the consequence of a combination of two factors. Some hurdles are external and derive from international law. This is most evident, for instance, in those cases in which membership of an international organization is open exclusively to states. Other hurdles, however, are, so to say, 'self-inflicted' and derive from the way in which EU law governs the relationship between the EU and its member states. Castellarin highlights, for instance, that EU law favours situations in which both the EU and its member states are entitled to become members of an international organization; he stresses that, in fact, in regard to international economic organizations, there are so far no cases in which the EU alone, but not its member states, is a member of the organization.<sup>16</sup> By taking into account this combination of internal and external constraints, Castellarin considers pragmatic solutions, based on the agreement between the actors involved and adapted to the specific circumstances of each case, to be the main, if not the only, instrument by which the EU may overcome the obstacles to its full participation in different international arenas.<sup>17</sup>

In assessing the rules of international responsibility applicable to the EU, Delgado Casteleiro follows a significantly different approach. In his analysis, emphasis is placed prevalently on the inadequacy of the current rules on international responsibility to take into account the special relationship that exists between the EU and its member states, a relationship that differs from that characterizing the other international organizations because of the capacity of the EU to exert a normative control over the conduct of its members. He proceeds from the assumption that a shift towards global governance is currently challenging the state-centred conception of international law.<sup>18</sup> In this respect, the problem faced by the EU is somehow presented as part of a larger problem of progressive adaptation of international law to the emergence of new subjects that do not entirely fit with the traditional categories of subjects. Within this framework, Delgado Casteleiro therefore seeks the response to the problem faced by the EU not in pragmatic solutions based on arrangements that have to be adapted to the different context in which the EU acts but, rather, in the development of new rules of international responsibility and, in particular, in the emergence of a new customary international rule applicable specifically to the situation of the EU.

The differences between Castellarin's and Delgado Casteleiro's approaches are striking. As a matter of substance, both visions of the EU can be defended. In fact, neither of the two appears to capture comprehensively the nature of the phenomenon, while both contain more than a grain of truth.<sup>19</sup> It is true that the EU presents certain 'federal' features, particularly for the control it is able to exert over the conduct of its member states. And, no doubt, the EU has the potential for pushing forward a development in international

<sup>16</sup> Castellarin, *supra* note 10, at 99, 143, 299. He notes that the only organizations of which the EU, but not its member states, is member, are those in the area of fisheries.

<sup>17</sup> *Ibid.*, at 529.

<sup>18</sup> Delgado Casteleiro, *supra* note 13, at 79.

<sup>19</sup> See Simon and Rigaux, 'Les Communautés et l'Union européenne comme organisations internationales', in E. Lagrange and J.-M. Sorel (eds), *Droit des organisations internationales* (2013) 114.

law leading to a general recognition of its ‘specialness’. At the same time, it is hard to deny that the EU continues to display the main characteristics of an international organization, without this affecting its special features or preventing it from acting at the international level. Where the *sui generis* argument is more problematic, instead, is in respect to the approach followed in the identification of the rules of international law that are applicable to the EU in its dealings with the third subject. The point is a methodological, rather than a substantive, one. It revolves around the importance to be attached to the EU’s special features for the purposes of establishing the existence of special rules of international law applicable to the EU. It is with regard to this point that Delgado Casteleiro’s analysis appears less persuasive. By stressing the exceptionalism of the EU and the transformation of its member states into ‘strange subjects’, he tends to present the emergence of a special international rule as a somewhat inevitable consequence of an objective situation.<sup>20</sup> Yet, from an international law viewpoint, the emergence of special rules cannot simply be based on the identification of certain particular features that characterize the EU’s internal structure and that distinguish it from other international organizations. It necessarily requires some degree of acceptance of these special rules by the other actors on the international stage.<sup>21</sup> In fact, the attitude of third subjects towards the recognition of the EU’s special features constitutes the central element for assessing the existence of a special regime at the international level. This point risks getting lost, or, at least, its importance risks being excessively downplayed, in many of the analyses that place great emphasis on the *sui generis* character of the EU. This may lead to a representation of the legal regime applicable to the EU that does not find adequate support in international practice.

### 3 Promoting the Recognition of the EU’s Special Features: Successes and Limits

In comments addressed to the ILC’s Draft Articles on the Responsibility of International Organizations, the EU Commission observed that ‘the European Communities [as it then was] is an international organization with special features as envisaged in the founding treaties’ and that ‘there is a need to address the special situation of the Community within the framework of the draft articles’.<sup>22</sup> This statement captures well the type of approach followed by European institutions and EU member states in seeking to promote the development of international law. The idea is that certain special features set by the EU treaties and characterizing the internal structure of the EU must have some consequences in the international sphere. In particular, these features should find some form of recognition in the international rules applicable

<sup>20</sup> I will revert to this point later in this review essay.

<sup>21</sup> See Ličková, ‘European Exceptionalism in International Law’, 19 *European Journal of International Law* (*EJIL*) (2008) 463, at 468.

<sup>22</sup> UN Doc. A/CN.4/556, 12 May 2005, at 31. On this statement, see also Klabbbers, *supra* note 5, at 9. International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83, 3 August 2001.

to the EU. This effort to be accepted as a subject endowed with special features, characterizes, by and large, the action of the EU on the international stage.

The books under review provide an extensive overview of the manner in which the EU has defended and promoted its special features in its dealings with other international actors. Among these features, the rigid division of competences characterizing the relationship between the EU and its members plays a prominent role. In particular, it has been a decisive element in shaping the EU's participation in international organizations. Castellarin underlines that many of the difficulties encountered by the EU in its activity as a member of another organization derive from the need to respect the internal division of competences.<sup>23</sup> Interestingly, he also notes that participation in international economic institutions that do not have a formal basis in an international treaty has taken place under much less rigid conditions.<sup>24</sup> Another special feature relates to the autonomy of the European legal order and the role of the CJEU in preserving such autonomy. The difficulty of reconciling the principle of autonomy, as interpreted in the case law of the CJEU, with the EU's or member states' participation in international dispute settlement is a recurring issue, as demonstrated most recently in relation to the dispute settlement mechanism provided by an intra-EU investment treaty in the *Achmea* judgment of the CJEU.<sup>25</sup> Many essays collected in *The EU and Dispute Settlement* focus on different aspects of this issue. Delgado Casteleiro's book concentrates on yet another special feature – namely, the capacity of the EU to exercise normative control over the conduct of its member states. Delgado Casteleiro identifies the basis of this normative control in a combination of the principle of primacy of EU law, the principle of direct effect, the duty of cooperation and the judicial control envisaged in the treaties.<sup>26</sup> Normative control being a special feature of the EU legal order, the question he addresses is whether there exists under general international law a special rule of attribution according to which the conduct of member states acting under the normative control of the EU has to be attributed exclusively to the organization.

The three books explore in detail the wide variety of means and procedures developed over time by the EU in order to reconcile its ambition to fully participate in international life with the need to preserve the peculiar nature of its legal order. Some of these means and procedures have not been adequate. Castellarin and Delgado Casteleiro dedicate several pages to the declarations of competence made by the EU when concluding mixed agreements, and they agree that these declarations create more problems than they solve.<sup>27</sup> In two highly interesting essays included in *The EU and Dispute Settlement*, Tobias Lock and Anne Thies address the difficulties that may arise when an international tribunal is seized of a dispute between two EU member states that may potentially fall within the exclusive jurisdiction of the CJEU.<sup>28</sup> The

<sup>23</sup> Castellarin, *supra* note 10, at 143.

<sup>24</sup> *Ibid.*, at 118–119.

<sup>25</sup> Case C-284/16, *Achmea* (EU:C:2018:158) (not yet reported).

<sup>26</sup> Delgado Casteleiro, *supra* note 13, at 227–228.

<sup>27</sup> Castellarin, *supra* note 10, at 153ff; Delgado Casteleiro, *supra* note 13, at 127.

<sup>28</sup> Lock, 'The Not So Free Choice of EU Member States in International Dispute Settlement', in Cremona, Thies and Wessel, *European Union*, *supra* note 8, 113; Thies, 'European Union Member States and State-State Arbitration: What's Left?', in Cremona, Thies and Wessel, *European Union*, *supra* note 8, 133.

examples can continue as the three books provide a full account of the obstacles still faced by the EU when acting on the international stage. On the whole, however, the general picture that emerges is encouraging. The EU appears to have substantially succeeded in receiving from its partners a treatment that allows it to accommodate its special needs.

The problem with some of the analyses offered by the books under review is that they tend to approach international law questions from a ‘European’ perspective. Their focus is on whether the EU is able to have a certain solution accepted by its partners or whether that solution is adequate to preserve the EU’s special features. Yet, by adopting a ‘European perspective’, they tend sometimes to downplay or not adequately consider the possible implications of an EU-centred solution for the other actors involved, be they third states, international institutions or international tribunals. In fact, the mechanisms and procedures by which the EU seeks to preserve its special features when acting on the international stage are rarely neutral or without costs for the other actors. They may affect the jurisdiction of international tribunals or the functioning of international institutions. They may also introduce an element of uncertainty in the relationship with third parties in regard to the allocation of international obligations and, eventually, of international responsibility between the EU and its member states.

Two examples can illustrate this point. The first concerns the existence of a rule under international law that may require an international court to divest itself of a case that has been brought by an EU member state in contravention of EU law. One may refer, for instance, to the *Mox Plant* case, where Ireland brought proceedings against the United Kingdom before the International Tribunal for the Law of the Sea in breach of Article 344 of the Treaty on the Functioning of the European Union.<sup>29</sup> This point is addressed by Lock, who argues that, in such a scenario, a solution could be found in the principles underpinning the International Court of Justice’s decision in the *Northern Cameroons* case.<sup>30</sup> Since, in the case of a dispute brought before an international tribunal in contravention of EU law, that tribunal would be unable to ‘render a judgment capable of effective implementation’, it should follow the precedent set in the *Northern Cameroons* and declare the case inadmissible.<sup>31</sup> While intriguing, this solution ends up putting a special burden on international tribunals; they would be required to assess, eventually even *proprio motu*, whether the dispute has been brought in contravention of EU law and invariably give priority to the parties’ obligations under EU law, irrespective of the wishes of the parties to obtain a judgment from that tribunal over the dispute at hand. However, what matters for an international tribunal is primarily whether the dispute falls within the scope of its jurisdiction; while, under certain circumstances, reasons of judicial propriety may advise the tribunal not to exercise its jurisdiction, it seems excessive to expect a tribunal to

<sup>29</sup> Treaty on the Functioning of the European Union (TFEU), OJ 2012 C 326/47. On the breach of Art. 344 of the TFEU by Ireland, see Case C-459/03, *Commission v. Ireland* (EU:C:2006:345).

<sup>30</sup> *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Judgment, 2 December 1963, ICJ Reports (1963) 15, at 33–34.

<sup>31</sup> Lock, *supra* note 28, at 129–131.

consider that its judgment would serve no purpose simply because one or even both parties have acted in contravention of EU law in bringing the case before it.

The second example relates to the problem addressed in Delgado Casteleiro's book – namely attribution of conduct to the EU in situations of normative control. When an international obligation is binding on both the EU and its member states, it may make little difference, from the standpoint of the EU's partners or other subjects affected by certain conduct, whether that conduct is to be attributed to the member state, the EU or both. What appears to be important to third parties is that, in any case, there will always be one subject belonging to the 'European bloc' that will bear responsibility for that conduct. Things change considerably when only member states are bound by a given obligation, for instance, because only the member states are parties to a treaty, as in the case, at least so far, of the European Convention on Human Rights (ECHR). In this kind of situation, attributing exclusively to the EU the conduct of a member state acting in situations of normative control allows that member to deny its international responsibility, thereby opening a problematic accountability gap. This appears to explain and justify a certain reluctance, including of the ECtHR, towards accepting normative control as a general criterion of attribution.

On a broader perspective, the quest for an adaptation of international law pursued by the EU raises the following problem: how far can the EU go in its search for a recognition of its special features? No doubt, as an important economic and political actor, the EU has significant leverage to convince its partners to accommodate the needs arising from its special features. As Castellarin repeatedly stresses, with regard to international economic institutions, there is generally a strong interest in establishing forms of cooperation with the EU.<sup>32</sup> This notwithstanding, a certain degree of resistance to the request for adaptation coming from the EU is inevitable and, for the above-mentioned reasons, understandable. The danger here lies in overemphasizing the need to adapt international law to the EU's special features without adequately considering the other dimension of the problem – namely, the fact that there may be also the need to adapt the internal architecture of the EU in order to render it more adequate to support the effective and full participation of the EU in the international arena.

This aspect of the problem is addressed in some of the essays collected in *The EU and Dispute Settlement*. On the whole, such essays highlight that, if the EU's participation in international dispute settlement has become extremely complex, this is the consequence of the strict interpretation of some internal 'constitutional' principles developed by the CJEU. The focus is primarily on Opinion 2/13, in which the CJEU had concluded that the EU could not itself accede to the ECHR.<sup>33</sup> While in her contribution to *The EU and Dispute Settlement*, Christina Eckes defends the CJEU's position as being coherent with its previous case law and justified in the light of the possible implication of the accession on the relationship between the EU and its member states,<sup>34</sup> others

<sup>32</sup> Castellarin, *supra* note 10, at 300, 529.

<sup>33</sup> Opinion 2/13 on ECHR Accession (EU:C:2014:2454) (not yet reported).

<sup>34</sup> Eckes, 'International Rulings and the EU Legal Order: Autonomy as Legitimacy?', in Cremona, Thies and Wessel, *European Union*, *supra* note 8, 161.

take a critical stand. According to Christophe Hillion and Ramses Wessel, the CJEU's position affects the very idea of joining the ECHR, particularly because for all the parties to the convention 'being bound by the fundamental rights in ECHR in the exercise of their internal powers is the very essence of joining the system in the first place'.<sup>35</sup> Niilo Jääskinen and Alicja Sikore look at the wider consequence of the CJEU's recent case law and note that 'overstating exclusive, interpretative authority can lead to the isolation of the EU at the global level'.<sup>36</sup>

In sum, the need for adaptation seems to go both ways: there is certainly a need to adapt international law to certain of the EU's special features; but there seems to be also an increasing need to adapt the EU's internal principles in a way that may facilitate the EU's action on the international stage. Too frequently, the debate over the difficulties encountered by the EU is one-sided, with most of the blame placed on a state-centred international law that would struggle to cope with new realities such as the EU. In fact, many of these difficulties come from within. They are the consequence of the resistance opposed by its member states towards solutions that would allow a smoother participation of the EU to international organizations. They are also the result of the attitude sometimes taken by the EU's institutions and, most recently, by the CJEU, whose interpretation of the principle of autonomy has been having the effect of limiting the capacity of the EU to accede to international dispute settlement systems. Rather than insisting on the EU's peculiarities, which, in some cases, risks becoming nothing more than a means for securing the EU privileges that are not accorded to its partners,<sup>37</sup> the debate should focus more on the changes to the EU's internal structure that are needed in order to make it easier for the EU to participate in international life.

#### 4 Rules of General International Law Recognizing a Special Status of the EU?

The EU is a very active global actor. By concluding treaties, becoming a member of international organizations, participating in international dispute settlement or by simply commenting on the ILC's work, the EU contributes to influencing public international law.<sup>38</sup> In particular, it may contribute to the development of international rules aimed at accommodating its own needs deriving from its special features. This has led some scholars to raise the question whether 'this EU-friendly treatment has reached the status of an international custom'.<sup>39</sup> Rules of general international law

<sup>35</sup> Hillion and Wessel, 'The European Union and International Dispute Settlement: Mapping Principles and Conditions', in Cremona, Thies and Wessel, *European Union*, *supra* note 8, 7, at 18.

<sup>36</sup> Jääskinen and Sikore, 'The Exclusive Jurisdiction of the Court of Justice of the European Union and the Unity of the EU Legal Order', in Cremona, Thies and Wessel, *European Union*, *supra* note 8, 101, at 111.

<sup>37</sup> With regard to the impact of Opinion 2/13 on a possible future accession of the EU to the ECHR, see Ziegler, 'Beyond Pluralism and Autonomy: Systemic Harmonization as a Paradigm for the Interaction of EU Law and International Law', 35 *Yearbook of European Law* (2016) 667, at 684.

<sup>38</sup> See Wessel, *supra* note 7, at 544ff.

<sup>39</sup> See Ličková, *supra* note 21, at 464.

according special treatment to the EU are theoretically possible. In regard to the participation of the EU in international dispute settlement or in international organizations, the emergence of such rules is rather unlikely; in fact, most of the relevant legal issues, such as those pertaining to the requirements for standing before international tribunals or the rights ensuing from membership in an international organization are regulated by treaty rules that are specific to each tribunal or organization. Among the essays collected in *The EU and Dispute Settlement*, Danae Azaria addresses the contribution of the EU to the development of international law in relation to international dispute settlement.<sup>40</sup> However, her contribution deals mainly with issues of international responsibility, particularly with the lawfulness of counter-measures in cases of breaches of *erga omnes (partes)* obligations. She also addresses the contribution of the EU to certain decisions of WTO panels and arbitrators on the question of standing, concluding that these decisions 'did not develop rules on standing specifically owing to the special nature of the EU'.<sup>41</sup> In Castellarin's analysis of the participation of the EU to international economic institutions, there are no references to rules of general international law dealing specifically with the position of the EU nor to trends that, in the author's view, might eventually lead to the emergence of such rules. As we will also see below, Castellarin does assess whether the practice of the EU and of its member states has given rise to customary rules, but he only conceives of them as customary rules operating within a specific treaty regime, not of general reach. Interestingly, he examines whether a customary rule has emerged within the context of the WTO to the effect that all of the rights arising from the membership of the WTO would have been transferred from the EU member states to the EU.<sup>42</sup>

The existence of a special rule of general international law applicable to the EU has been recently discussed with regard to the law of international responsibility. In particular, during the work of the ILC on the responsibility of international organizations, the EU expressed the view that the conduct of an organ of an EU member state implementing binding EU acts would have to be attributed exclusively to the EU and not to the state (as Article 4 of the ILC's Articles on State Responsibility would have required).<sup>43</sup> The ILC did not exclude that a *lex specialis* to that effect might have emerged and limited itself to refer to reciting the relevant case law in its commentary to Article 64 of the Articles on the Responsibility of International Organizations.<sup>44</sup> The existence of such a special rule of attribution constitutes the core issue addressed in Delgado Casteleiro's book. This issue is also examined in Castellarin's book as well as in a long essay by Gracia Marín Durán in *The EU and Dispute Settlement*.

<sup>40</sup> Azaria, 'The European Union's Contribution to the Law on Standing and Jurisdiction in International Dispute Settlement', in Cremona, Thies and Wessel, *European Union*, *supra* note 8, 55.

<sup>41</sup> *Ibid.*, at 77.

<sup>42</sup> Castellarin, *supra* note 10, at 163.

<sup>43</sup> UN Doc. A/C.6/59/SR.21, 18 November 2004, para. 18. For an overview of the position of the EU, see Hoffmeister, 'Litigating against the European Union and Its Member States: Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', 21 *EJIL* (2010) 723.

<sup>44</sup> 'Draft Articles on the Responsibility of International Organizations with Commentaries', 2(2) *ILC Yearbook* (2011) 40, at 102. ILC, Articles on the Responsibility of International Organizations, Doc. A/66/10 (2011).

Delgado Casteleiro's book constitutes by far the more elaborated attempt to define the contours of the notion of 'normative control' and to establish the extent to which the practice and the case law of international judicial bodies support the existence of a special rule based on such a notion.<sup>45</sup> His conclusion is that, while a special rule of general international law has not yet come into existence, 'it can be considered to be at an earlier stage of development'.<sup>46</sup> Whether this is the case or not, a number of remarks can be made about Delgado Casteleiro's analysis. As a whole, these remarks tend to attenuate the optimistic view that transpires in the book about a possible emergence of a *lex specialis* applicable to the EU. To begin with, in assessing whether judicial practice supports the existence of a special customary rule, the book does not give adequate attention to the pertinent case law of the ECtHR. The author clarifies that this is a deliberate choice motivated by the prospect of the EU's accession to the ECHR.<sup>47</sup> However, it appears to be an unfortunate one, given also the importance attached to this case law by the ILC in considering the existence of a *lex specialis*.<sup>48</sup>

Second, while the book examines a fairly large amount of practice and cases, the precedents that clearly point to the existence of a special rule of attribution are quite few. In fact, they tend to be restricted to some well-known *dicta* of WTO panels. It could be argued that the dearth of practice clearly supporting the existence of a *lex specialis* may be somewhat counterbalanced by the special nature of the relationship between the EU and its member states, which renders the 'federal state analogy' so compelling, with all of the ensuing consequences in terms of attribution. This argument seems to emerge between the lines of the book from time to time. The idea, as Delgado Casteleiro puts it, is basically that 'normative control, in the EU context, should have some consequences in the international sphere, especially in relation to the attribution of responsibility'.<sup>49</sup> In fact, it is not evident that it should be so. In particular, it is not evident that, for the purposes of international responsibility, the relationship between member states and the EU can be regarded as being equivalent to the relationship between member states of a federation and the federal state. Since EU member states remain sovereign states and are not subjected to any form of external coercive authority even when acting in areas of EU competence,<sup>50</sup> normative control alone may not be enough, at least from an international law perspective, to conclude that the conduct of an organ of the member state implementing a binding act of the EU is no longer conduct attributable to that state. Something more seems to be required to exonerate entirely the state for responding for the conduct of one of its organs. A last remark concerns the possible repercussions that the emergence of a *lex specialis* based

<sup>45</sup> On this issue, in addition to Hoffmeister, *supra* note 43; see also Paasivirta and Kuijper, 'Does One Size Fit All? The European Community and the "Codification" of the Responsibility of International Organizations', 36 *Netherlands Yearbook of International Law* (2005) 169.

<sup>46</sup> Delgado Casteleiro, *supra* note 13, at 229.

<sup>47</sup> *Ibid.*, at 7.

<sup>48</sup> See 'Draft Articles', *supra* note 44.

<sup>49</sup> Delgado Casteleiro, *supra* note 13, at 228.

<sup>50</sup> On the importance of this element, see Pellet, 'Les fondements juridiques internationaux du droit communautaire', in Academy of European Law (ed.), *The Protection of Human Rights in Europe* (1997) 193, at 230–231.

on the notion of normative control could have from an EU law perspective – an issue that would have deserved further consideration. Determining whether a member state was acting under the normative control of the EU may not be an easy task, particularly if one considers the many grey areas arising as a consequence of the complex division of competences. Applying such criterion might require that an international judge enter into a difficult assessment of questions of EU law. This would risk multiplying situations that the CJEU might regard as being contrary to the principle of autonomy of the EU legal order.

The analysis of Castellarin and Marín Durán differs from that of Delgado Casteleiro as they move from the assumption that, if there is a *lex specialis*, it can only be one that applies within the context of a specific treaty regime and not one that applies to the EU in all situations. They both mainly focus on the apportionment of international responsibility between the EU and its member states within the WTO. According to Castellarin, the practice that has developed before the WTO dispute settlement organs has given rise to a customary rule that operates exclusively within the WTO, to the effect that the EU is under a duty to accept responsibility for the acts of its organs as well as for the conduct of its member states.<sup>51</sup> This customary rule, however, would not prevent an EU member state from also being held responsible for its conduct, thereby giving rise to situations of joint responsibility.<sup>52</sup> Marín Durán takes an even more cautious stand. She argues that neither WTO dispute settlement bodies nor WTO members have so far accepted in an unequivocal way the exclusive responsibility of the EU.<sup>53</sup> Moreover, she insists that, if the special features of the WTO system may favour a certain model of allocation of responsibility between the EU and its member states, this model ‘remain[s] a case apart, unique to that dispute settlement regime’.<sup>54</sup> In sum, both authors refrain from the pretence of drawing from WTO practice criteria that may be generalized and applied in other contexts. While this response may look unsatisfactory, it sheds light on the fact that the articulation of international responsibility between the EU and its member states can hardly depend only on special features that characterize the EU internally; the particular treaty regime in which the EU operates, as well as the kind of remedies that a dispute settlement mechanism is empowered to accord, may also have a relevant influence.<sup>55</sup> In the end, all of these analyses appear to agree on one point: there is no special rule of attribution applicable to the EU or at least not yet.

<sup>51</sup> Castellarin, *supra* note 10, at 506.

<sup>52</sup> *Ibid.*, at 508.

<sup>53</sup> Marín Durán, ‘The EU and Its Member States in WTO Dispute Settlement: A “Competence Model” or a Case Apart for Managing International Responsibility?’, in Cremona, Thies and Wessel, *European Union*, *supra* note 8, 237, at 259–260.

<sup>54</sup> *Ibid.*, at 271.

<sup>55</sup> For this view, see Kuijper, ‘Attribution, Responsibility, Remedy: Some Comments on the EU in Different International Regimes’, 47 *Revue belge de droit international* (2013) 57.

## 5 A *Sui Generis* Organization in a World of *Sui Generis* Organizations?

It has been aptly noted that '[n]o two organizations are alike: they are all *sui generis*. But some international organizations ... are more *sui generis* than others'.<sup>56</sup> This sentence captures well the difficulty that sometimes arises in conceptualizing the position of the EU in relation to other international organizations. Each international organization has its own special features, and each one differs from the other. This raises the question as to whether it is possible to have general rules applicable to all international organizations, irrespective of their diversity. It also raises the question as to whether it is possible to identify different categories of international organizations to which different sets of general rules apply.

The issue of the diversity between international organizations and the impact of this diversity on the law applicable to international organizations have long been discussed. Most recently, it became a controversial issue within the framework of ILC's work on the responsibility of international organizations.<sup>57</sup> Several organizations, including the EU,<sup>58</sup> expressed doubts about the possibility of codifying general rules of responsibility applicable to all organizations and emphasized their diverse nature. The ILC's main response to the issue of diversity appears to lie in the introduction of Article 64, dealing with *lex specialis*, in the 2011 Articles on the Responsibility of International Organizations and in the recognition that this provision 'has particular importance in this context'.<sup>59</sup> Under the logic of Article 64, however, the presumption is that the general rules of responsibility apply unless it is demonstrated that there exists a special rule that applies to a specific organization or to a specific category of organizations. It may be asked whether, in the case of the EU, this approach, which requires the identification case by case of the existence of special rules, is the appropriate one or whether, instead, as suggested by Klabbers, the case of the EU should not lead one to recognize that the law of international organizations 'may well move towards greater recognition of the diversity of international organizations and create different regimes for different kind of entities'.<sup>60</sup>

The books under review do not directly deal with this important question. This is understandable given that the focus of their respective research lies elsewhere. However, they prompt two comments. The first is that, in many respects, the qualification of the EU as an international organization and the application to it of rules that are generally

<sup>56</sup> Bengoetxea, 'The EU as (More Than) an International Organization', in J. Klabbers and Å. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (2011) 448.

<sup>57</sup> For an overview, see Wouters and Oddermatt, 'Are All International Organizations Created Equal?', 9 *IOLR* (2012) 7, at 11.

<sup>58</sup> See ILC, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, UN Doc. A/CN.4/582, 1 May 2007, at 24. On this issue, see Blokker, 'Preparing Articles on Responsibility of International Organizations: Does the International Law Commission Take International Organizations Seriously? A Mid-term Review', in Klabbers and Wallendahl, *supra* note 56, 334.

<sup>59</sup> 'Draft Articles', *supra* note 44, at 47.

<sup>60</sup> Klabbers, *supra* note 5, at 12.

applicable to international organizations does not seem to create any major problem. Many of the analyses in the three books rest on the assumption that these general rules apply to the EU. Particular attention is paid, in this respect, to assessing different aspects of the international responsibility of the EU in light of the rules contained in the Articles on the Responsibility of International Organizations. A notable contribution is Catharine Titi's essay in *The EU and Dispute Settlement*, in which she conducts an extensive examination, in the light of the articles, of the risk for the EU to incur in international responsibility in relation to international investment dispute settlement.<sup>61</sup> She covers problems of attribution as well as cases of potential responsibility of the EU for the conduct of its member states, such as when the EU may be held responsible for aiding and assisting a member in breaching its obligation under an investment treaty. Delgado Casteleiro also refers to the 2011 Articles on the Responsibility of International Organizations to answer the problem of allocation of responsibility in areas, such as the Common Foreign Security Policy, where normative control would be missing.<sup>62</sup> So, while the authority of these articles as a codification of existing customary rules still is waiting to be confirmed by international practice, their importance in guiding scholarly analyses, including in relation to the EU, appears to be well established.

The second consideration concerns the notion of a regional economic integration organization (REIO). As Esa Paasivirta notes in his chapter in *The EU and Dispute Settlement*, the inclusion of 'REIO clauses' in multilateral treaties has become 'a key mechanism permitting an organization such as the EU to become party to a multilateral treaty'.<sup>63</sup> While 'REIO clauses' are nowadays included in dozens of treaties,<sup>64</sup> it is not clear what the special features that characterize REIOs are and what other organization apart from the EU may be qualified as a REIO. The books under review do not explore this issue, and the few references to it convey the impression that 'REIO clauses', rather than reflecting a trend in the international community towards the emergence of a new category of international organization, have been devised for practical purposes as a means for enabling the participation of the EU in multilateral agreements.

## 6 Concluding Remarks

It has been said that one of the most visible contributions of the EU to the practice of international law is that of 'forcing the international legal order to accept the EU as a new and relevant legal entity and to adapt its rules accordingly'.<sup>65</sup> The three books under review highlight different dimensions of this effort, on the part of the EU, to be accepted as a subject endowed with special features. Castellarin's book and the essays collected in *The EU and Dispute Settlement* focus on specific treaty regimes and analyse the

<sup>61</sup> Titi, 'Aspects of the EU's Responsibility in International Investment Disputes', in Cremona, Thies and Wessel, *European Union*, *supra* note 8, at 83.

<sup>62</sup> Delgado Casteleiro, *supra* note 13, at 232–235.

<sup>63</sup> Paasivirta, 'European Union and Dispute Settlement: Managing Proliferation and Fragmentation', in Cremona, Thies and Wessel, *European Union*, *supra* note 8, 31, at 44.

<sup>64</sup> See Paasivirta and Kuijper, *supra* note 45, at 211.

<sup>65</sup> Wessel, *supra* note 7, at 560.

adaptations introduced to them in order to allow the EU to participate in international dispute settlement or in international organizations. Delgado Casteleiro's book aims at determining whether customary international law accords a special treatment to the EU in regard to the attribution of conduct and the allocation of international responsibility. Each of these works provide a rich and careful examination of what the EU has been able to achieve. The picture is impressive. True, no customary international rules specifically addressing the position of the EU may have so far come into existence. Difficulties in reconciling the international ambition of the EU and the preservation of its special features are still present, particularly in regard to the participation in international dispute settlement. On the whole, however, the EU has been remarkably effective in developing international legal relations based on the recognition of its own special features.

The extent to which the international practice developed by the EU serves as a model for other international organizations remains to be seen. The impression is that the solutions devised in relation to the EU are not easily transposable to other organizations because, so far, there is no other international organization presenting special features comparable to those of the EU. A major obstacle lies in the fact that most of these solutions are designed to address, in a pragmatic way, problems that are specific to the EU, reflecting as they do the manner in which EU law, as interpreted by the CJEU, governs the competences of the EU as well as the relationship between the EU and its member states. In this respect, it is notable that the EU's 'specialness' appears to have the effect of limiting its capacity to contribute to international law-making more generally – that is, in relation to organizations other than the EU itself.<sup>66</sup> In particular, it calls for caution when assessing whether the international practice of the EU may be taken as a precedent for determining criteria and rules that are generally applicable to all international organizations.

### **Individual Contributions to *The European Union and International Dispute Settlement***

*Marise Cremona, Anne Thies and Ramses A. Wessel, Introduction;*

*Christophe Hillion and Ramses A. Wessel, The European Union and International Dispute Settlement: Mapping Principles and Conditions;*

*Esa Paasivirta, European Union and Dispute Settlement: Managing Proliferation and Fragmentation;*

*Danae Azaria, The European Union's Contribution to the Law on Standing and Jurisdiction in International Dispute Settlement;*

*Catharine Titi, Aspects of the EU's Responsibility in International Investment Disputes;*

*Niilo Jääskinen and Alicja Sikore, The Exclusive Jurisdiction of the Court of Justice of the European Union and the Unity of the EU Legal Order;*

*Tobias Lock, The Not So Free Choice of EU Member States in International Dispute Settlement;*

*Anne Thies, European Union Member States and State-State Arbitration: What's Left?;*

*Christina Eckes, International Rulings and the EU Legal Order: Autonomy as Legitimacy?;*

*Andrés Delgado Casteleiro, The Effects of International Dispute Settlement Decisions in EU Law;*

*Ernst-Ulrich Petersmann, The Position of European Citizens in International Dispute Settlement;*

*Gracia Marín Durán, The EU and Its Member States in WTO Dispute Settlement: A 'Competence Model' or a Case Apart for Managing International Responsibility?;*

*Aurora Plomer, The Unitary Patent and Unified Patent Court: Past, Present and Future.*

<sup>66</sup> This view is shared by Wessel. *Ibid.*, at 561.