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DISCUSSING THE NATURE OF THE EU: FROM THE INTER-STATE MODEL TO GLOBAL CONSTITUTIONALISM

A VUELTAS CON LA NATURALEZA DE LA UNIÓN EUROPEA: DE LA INTERESTATALIDAD AL CONSTITUCIONALISMO GLOBAL

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Abstract: Historically, the European Union has been characterized by different legal formulations. Positions are divided, broadly speaking, between those that understand this entity as an international organization in the classical sense, to those others which claim that its features are actually of a State-nature, and that the obvious model of evolution would be the Federal State. In the end, all this leads us, undoubtedly, to the European constitutional project. In this work we give a brief account of all these proposals, and then we try to adopt a different point of view: for us, the nature of the European Union should not be looked for in the legal configuration of the political project, but also in the silent evolution -and not so silent- of a legal order, the European legal order, that is increasingly systematic, and that must boast a key position on the evolution towards a higher level of legal organization, global constitutionalism. In the building up of this proposal, we will appeal to the concept of global ethics and to the recent example of the CETA case of TJUE, which opens the European Legal system to alien influences.

Key words: Legal nature of the european project, global constitutionalism, global ethics, international arbitration.

Resumen: Históricamente, se ha caracterizado la Unión Europea mediante diversas fórmulas jurídicas. Las posiciones se dividen, a grandes rasgos, entre aquellas que conciben esta entidad como una organización internacional en sentido clásico, hasta aquellas que propugnan que sus rasgos son los propios de un Estado, y que su modelo evidente de evolución sería el Estado Federal. En el fondo de la cuestión se encuentra, sin duda, el proyecto constitucional europeo. En el presente trabajo damos breve cuenta de estas propuestas, para después optar por un punto de vista distinto de ellas: para nosotros, la naturaleza de la Unión Europea no debe buscarse sólo en la configuración jurídica del proyecto político, sino también en la propia evolución silenciosa -o no tanto- de un ordenamiento, el de la Unión Europea, que va ganando forma sistemática, y que debe ostentar una posición clave en la evolución hacia un nivel de organización jurídica mayor, el constitucionalismo global. En la construcción de esta propuesta, recurriremos al concepto de ética mundial y al ejemplo reciente del caso CETA del TJUE, que abre el sistema jurídico europeo a influencias externas.

Palabras clave: Naturaleza jurídica del proyecto europeo; constitucionalismo global; ética global; arbitraje internacional.

1. INTRODUCTION. ON THE (ETERNAL) DEBATE ABOUT THE NATURE OF THE EU

Between many defiant debates that have been introduced by EU Law, the one about its own nature boasts a prominent position. As it is well known, it has been a classical object of debate among European Lawyers, given its crucial legal and political implications. Therefore, it is obvious that the aim of this project is not to propose a "definitive" solution to the question, which would possibly be futile, neither to compile all the existent lines of thinking in this matter[1]. The objective of this project will be to introduce a new line of analysis to the problem, with the hope that it might enrich the debate in a certain sense.

As a starting point, we will expose briefly the methodological and conceptual instruments which are essential to build the project up. This seems a necessary step in order to articulate our reasoning.

1.1. "Closed" system and "open" system

This conceptual couple is very well recognized within the Theory of Law, and in particular in its branch known as methodology of Law. In fact, this distinction was more than possibly imported from Philosophy (by the way, this vocabulary is also common in Physics), but despite its origins alien to the field of Law it results essential in a modern systematical construction of legal orders. To this effect, we assume a definition of the legal system as an order of connections between principles and legal rules, complying with the essential characteristics of unity and coherence and -more dubiously- exhaustivity.

Therefore, a closed system would be that systematic construction in which these three characteristics would reach its maximum degree, offering always mechanisms to solve any particular cases without any reference to any element external to the system itself. These closed systems, however, are mainly theoretical

[1] Vid., as a general approach, Von Bogdandy, A. (2016): European Law Beyond 'Ever Closer Union' Repositioning the Concept, its Thrust and the ECJ's Comparative Methodology, *European Law Journal* 22/4, 519-538, a key work that proposes a syncretic or "ecumenical" model to understand not only the EU, but the whole European constitutional and legal phenomenon. This is exactly pointing at the line of work that we would like to follow in the present project. It is also useful to see Díez-Picazo Giménez, L.M. (2008): "La naturaleza de la Unión Europea", *InDret*, 4/2008, which contains an extensive analysis on the tendencies of understanding the nature of the EU (if this word, "nature", is adequate at all, is something to be examined within the project itself).

elaborations (see, for example, the famous example of the jurisprudence of concepts) and it is difficult to find examples which are actually existent within the real world. On the other hand, some systems that might be called "closed" do not comply exactly with these three features, and so some problems of unity, coherence and exhaustivity might appear. However, in any case these "real" or semi-closed systems tend to solve those problems, always with mechanisms internal to the system itself, even if the result might reveal some kind of "imperfection". In our view, this is the case of classical State legal systems. This "imperfection" on how these systems are closed is at the same time a crucial element of their current tendency to openness: as soon as there is an imperfection within the system a breach is opened and this might allow external elements to enter. This semi-closed model is still useful, not only for States (for which it is the main applicable theory) but also for certain EU-powers still based upon territory.

On the other hand, we call "open system" to that which admits modifications and influences of any kind, including those original of alien systems and of different sciences, renouncing to an *a priori* solution for all the questions. This would be the case of the "internal" system, identified with the contemporary constitutional legal system, which is founded upon an array of non-rigid legal principles that are said to be "fragmentary"[2]. In our view, this openness might happen in two different directions: either "up" (this would mean that the system is part or has relationships with "bigger" or "superior" systems, with which it would share information) or "down" (which would mean that the system has relationships with "smaller" or more particular systems. In the case of the EU legal system, our aim in this project will be to show that is must constitute an open system of Law, which would have an influence *ad infra* or down (on the legal systems of the member States) and also an influence *ad supra* or up (on global constitutionalism).

1.2. Global Constitutionalism

The second key element of our proposal will be the comprehension of the EU system of Law within a broader line of research, Global Constitutionalism. So, the idea is not that both EU Law and the doctrine of Global Constitutionalism are completely different, but that, in some sense, the legal theory behind the EU-project might be at the same time a key element in building up a theory of Global Constitutionalism.

Global Constitutionalism is, of course, a polemic concept, which nature is by no means utterly clear[3]; that said, as a starting point it is necessary to establish a

[2] Vid. in general on all this reasoning Larenz, K. y Canaris, C.W. (1995): *Methodenlehre der Rechtswissenschaft*, 3ª ed. Springer, Lehrbuch. Berlin-Heidelberg, pág. 263 (on the concept of system and its importance for the Science of Law) y 314-15 (on the different kinds of system).

[3] On the *Global Constitutionalism* debate, vid. as reference works Ferrajoli, L. (1996): "Beyond Sovereignty and Citizenship: a Global Constitutionalism", Bellamy, R. (Ed.), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives*, Avebury. Aldershot. and Slaughter, A.M. and Burke-White, W.W., (2002): "An International Constitutional Moment", *Harvard*

certain definition or minimum content of this notion[4]. In our view, it would not be reasonable to demand to Global Constitutionalism that it was founded upon a constitutional or fundamental positive global legal rule. In a purely political sense, the aim of reaching a global political consensus on that rule, writing it down in a legal text and applying it, seems such a Utopia that no sensitive legal scholar would bet for such a solution. There might be attempts to make global constitutionalism's constructions upon the UN-Charter[5], but this can hardly be seen as a proper global positive constitutional charter. The crucial problem here is possible the lacking of a "Global People" or, even more fanciful, a "Global Nation"[6]. This lack of a Global People implies a lack of a Global Legitimacy, from a democratic point of view.

In our view, a different perspective would enrich more a theory of Global Constitutionalism. The idea would be to found this doctrine upon global principles of the rule of Law. This is, as we understand it, the line of thought of a majority of scholars involved in Global Law. If this is true, EU Law would fit into Global Constitutionalism in a tiple sense. Firstly, as a predecessor, as a necessary previous step. Secondly, as a model. And thirdly, as a structuring element of that concept. That said, the permanent problem will be, either the identification of such principles of the rule of Law which have reached a global status, or, on the other hand, their selection. Both methods are clearly different. In the first case, the conception which lies underneath is that of a iusnaturalistic or "immanent" set of principles. On the second case, this is an artificial operation, in which the principles are selected from the array of constitutional principles of Law of the Nation State, and that might be not be limited to those which are well know within western countries (both of Civil and Common Law traditions) but that can refer as well to constitutional principles developed in other philosophical or legal traditions, such as those of the eastern world or the so called "Global South". Which of these two points of view is to prevail is a question on to resolved by the project, so the only thing we can do now is to point it out.

International Law Journal, 43(1), 2-21, together with the most comprehensive work, Lang, A.F. y Wiener, A. *Handbook on Global Constitutionalism*, Cheltenham: Elgar.

[4] This would mean, amidst other consequences, that Global Constitutionalism and Global Law cannot be reduced to the category of "key concept", in the sense that these would just be expressions which enhance research in an avant-garde topic, but without any conceptual autonomy. In this sense vid. Darnaculleta Gardella, M.M. (2016): "El Derecho Administrativo Global. ¿Un nuevo concepto clave del Derecho Administrativo?", *Revista de Administración Pública*, 199, 11-49, págs. 47-48 and Díez Sastre, S. (2018): *La formación de conceptos en el Derecho Público*. Marcial Pons. Madrid, pág. 134. However, this conclusion seems inaccurate and insufficient to characterize the whole of the phenomenon. Some substantive definition for Global Law and Global Constitutionalism must be found.

[5] See, for example, Doyle, M.W. (2017): The UN-Charter and Global Constitutionalism?, Lang, A.F. y Wiener, A. *Handbook on Global Constitutionalism*, Cheltenham: Elgar, 338-354.

[6] However, a progressive line of thought of Global Constitutionalism, which seeks to found this doctrine upon the establishment of procedural and economical guarantees for world-citizens, criticizes this point of view. The reasons given are its apparently restrictive nature, and its theoretical roots, which link the need for a "Global People" to fund a proper Global Constitutionalism with the schmittian constitutional analysis and even a nationalistic or ethnic restriction for the Constitution. This is the position which can be found on Ferrajoli, L. (2018): *Constitucionalismo más allá del Estado*, Madrid: Trotta, 54-56.

In any case, what we want to establish now is that, in our conception, Global Constitutionalism must be build up as a constitutional system of Law, based on principles, open *ab* and ad *infra* (this means, it receives influences from "smaller" systems of Law and, at the same time, it influences them), and that would comprehend all these "smaller" systems of Law (such as EU-Law and other regional systems of proto-constitutionalism, together with national constitutional, State-based systems). This system is still in a starting point of construction, to which this projects aims to contribute. However, it is not still a positive system of Law which existence can be verified in the real world in a simple way, but a legal elaboration from an array of factual legal advances (the normative power of international organizations and globally powerful private subjects, the decisions of International Courts of Law, International Arbitration, the quasi-constitutional effect of certain International Treaties such as the UN-Charter or the Rome Convention of Human Rights, and the universalization of principles of the rule of Law, between many others).

1.3. The reach of common principles of rule of Law: Global Constitutionalism and World-Ethics?

In order to back the construction of a Global Constitutional set of principles, as we have explained, we will need to clarify, firstly, if those principles are global and, even more, universal "by nature", o if they are just artificial or cultural principles, selected to have an effect on the global space, where they are undoubtedly useful. And secondly, which will be the method we shall employ to discover or select those global principles of Law.

As we have already established, these questions must be solved in the development of the project, not now. However, we want to expose now another starting point which will make easier for us to get to this answer. If a global set of constitutional principles is to be established, it follows that a minimum ethical consensus will be necessary. Certainly, and regardless of the iusnaturalistic or contingent nature of those principles, it seems clear to us that all of them must be backed by a certain theory of morals, and therefore al of them will answer to a certain ethical conception[7]. This is of course also true for the so called "constitutional values", an expression we prefer to avoid (in this project we will better speak about principles).

However, is it actually a possibility to find several principles of Law that might be shared globally? To answer this question, a recourse to the theory of ethics will be more than useful. In effect, theory of ethics has already dealt with this

[7] For Bobbio, this is actually the essential assumption of iusnaturalism: not a particular morality, but a theory oof morals, which argues that there is an essential relationships between rules of Law and morality, vid. Bobbio, N. (2015): *Iusnaturalismo y positivismo jurídico*. Madrid. Trotta, 132. We can even argue that iusnaturalism is even a metha-theory of morals, in the sense that it is not either a particular theory, but a set of theories which have in common the necessary connection between morals (and, usually, political theology, in the donosian-schmittian sense) and Law.

question for a long time. And, within this doctrine, there have been several examples of intents to reach a theory of World-ethics. In the modern times, one notable example is that of H. Küng, who has argued for a World-range ethics for postmodernity, understanding it as the "sublation" of modernity in the hegelian sense. This would imply a separation from extreme pluralistic and relativistic models and an assumption of postmodernity not as incompatible with a democratic pluralism, but on the contrary, a necessary step for its conservation, through a global consensus on morals. So, modernity would transcend into a "pluralistic-holistic synthesis" which would be part of a "postmodern constellation" and that would materialize into a World Ethic[8].

Of course, this theory might be subject to its own critics. It is opposed to other widely influential points of view, including the comunitarism theory[9] and the Luhmann's theory of systems. Another contentious point is the central role that the author gives to the dialogue between religions, which for some might no be the crucial element of a global theory of ethics. However, in this point we are very near Küng: certainly, religion is still today the main support for moral systems, and a global ethics -and the same is true for a Global Constitutionalism- should start its construction from an inter-religious dialogue, an strategy that seems more effective than imposing western "values" globally. In any case, the crucial point here is that, with a theory of World or global ethics, we have a reference point to start discussing about a system of global constitutional principles. The method of abstraction of moral and legal principles is mimetic, and the aim of Global Constitutionalism as a political project is similar to global ethics: a consensus on the principles[10].

[8] Vid. Küng, H. (1999): *Projekt Weltethos*, Piper. Munich, 43-45.

[9] However, there are some comunitaristic theories which are curiously convergent with that of Küng. It it the case of Walzer, M. (1994): *Thick and Thin. Moral Argument at Home and Abroad*. Notre Dame. Notre Dame Press. In this work the author proposes a theory of ethics, which makes a proposal of a division between a "thick" and a "thin" morals, the first being a particular moral system developed in a wide extension and that might be found in a society in particular, and the second -thin- one would be the result of an agreement between members of different societies in certain matters, and that would be the only morals exigible to a foreigner. This thin minimum in morals would constitute a *core morality*, however always a socially elaborated one, never a "natural minimum". Nevertheless, regardless this theoretical "caveat" which preserves the author's coherence within comunitarism, this proposal resembles to that of Küng, and in fact it is to say that both have references to common legal texts, such as those of the Universal Declaration of Human Rights. Certainly, a common argument about the 1948 Declaration is that it is flexible enough in its content to be adopted universally, vid. Riedel, E.H. (2003): Universality of Human Rights and Cultural Pluralism, König, C. and Lorz, R.A., *Die Universalität der Menschenrechte. Philosophische Grundlagen, Nationale Gewährleistungen, Internationale Garantien*, Berlin, Duncker & Humboldt, 139-162, especially 162.

[10] This seems a common assumption for Global Constitutionalism. Vid. Garrido Gómez, M.I., (2018): "The decadence of Legislative Discourse", *Rechtstheorie*, 49(2), 155-174, pág. 169.

2. THE CLASSICAL ANALYSIS: THE EU THROUGH THE LENS OF THE NATION-STATE

We have established the methodological grounds of the project's proposal. However, the question about the nature of the EU has traditionally been approached from the point of view of International Law and State-constitutionalism. The context of this is, of course, the loss of power of the Nation-State, which of course has already been discussed for a very long time[11]. We shall now summarize very briefly these classical positions, in order to make contrast against our own proposal.

The three main ways of analysis on the question about the nature of the EU might be classified as follows: the International Organization, the Federal State and the Constitutional State. Very briefly, the basic elements of these three theories are the following:

2.1. The International Organization

The first line of research, the earlier one, puts the EU into the context of International Law. This seems obvious in the first place, being the EU structured on a series of International Treaties. It is certainly true that the EU is an International Organization, but this seems not enough to understand its whole nature. The point about this theory is precisely to reject any Federal or Constitutional construction: for supporters of the International Law perspective, the EU must not be recognized to go any further than the inter-State level, and so the entire sovereignty of the Nation-State is preserved within the Member States[12].

As some kind of "transition" proposal, it is increasingly common to refer to the EU as a "Supranational Organization". The exact meaning of this expression is actually unclear. It is assumed that this concept could preserve the International nature of the EU, at least in part, without reaching to affirm its State-nature, but recognizing some kind of advance from the model of International Organization. This would mean that certain State-powers remain within the Member-States, but are exercised by an independent organization. It could be, in some sense, an open way to an important evolution of the EU, both in the political and legal sense[13]. This has been put in connection with the normative autonomy boasted by some International Organizations, such as the WTO, FAO or OECD, and some

[11] Vid. for a classical example Galán Gutiérrez, E. (1959): "El porvenir del Estado en Europa", en AA.VV, *Homenaje a Nicolás Pérez Serrano*. Madrid. Reus. 352-399.

[12] For example, Vid. a clear expression between Spanish scholars in Mangas Martín, A. y Liñán Nogueras, D.J. (2016): *Instituciones y Derecho de la Unión Europea*. Madrid. Tecnos., pág. 47.

[13] In this sense, Sarmiento Ramírez-Escudero, D. (2018): *El Derecho de la Unión Europea*. Madrid. Marcial Pons., págs. 44-45.

recommendations in specific and technical economic sectors[14], all of which are actually important examples of Global Law themselves. This second line of thought is nearer to a contemporary comprehension of the EU phenomenon, but it is far from being the last word on the problem.

2.2. The Federal State

Possibly the proposal which rises the strongest debate -apart from the European Constitution, a connected question with which we will deal immediately- it tries, in very general terms, to take the Federal model from some Member States to the EU-level, being sometimes influenced by the USA model as well[15]. It works as some kind of antithesis of the International perspective, and therefore is always in conflict with it. Between both "extreme" proposals, our theoretical construction of an EU legal system within the dynamics of Global Constitutionalism seems as a "medium term". The project for a European Constitution itself has been conceived as a effort to build up a feasible Federal State within the EU, however admitting at the same time a strong critical approach coming from many Member States, even Federalist ones, because of the difficulties of adapting such a legal tradition to a supranational entity[16]. For the Federalist model, a very common legal method to apply is that of Comparative Law, precisely because of a constant try to adapt already existing federal models to the European context. For example, an economic analysis has been applied to compare both Canadian and EU common market systems. The result seems surprising, but possibly it is not so much the case: the EU Common Market is certainly more integrated and evolved[17]. Even the rejection of the European Constitution has been identified with an "evolutionary constitutionalism", a necessary step common to the creation of other federal States such as Canada or Switzerland[18].

[14] For example, the fishing industry, just to give one example given by the author, vid. Czuczai, J. (2012): "The autonomy of the EU legal order and the law-making activities of international organizations. Some examples regarding the Council most recent practice", *European Legal Studies*, Research Paper 3/2012.

[15] For a relatively early proposal vid. Everling, U. (1989): "Zur föderalen Struktur der Europäischen Gemeinschaft", en Hailbronner, K., Ress, G. y Stein, T. (eds.), *Staat un Völkerrechtsordnung*, Heidelberg: Springer, págs. 179-198, págs. 181 y ss.

[16] Zalany, N. P. (2003): "The European Union Constitution and its Effects on Federalism in the EU", *Ohio State Law Journal*, v. 66, 615-651, 624 (for an appraisal of the European Constitution of 2004) y 615 (para las críticas, citando una publicación periodística: Economist, (2003): "Tidying Up or Tyranny?", *Economist*, May 31, 2003, 51, disponible en: https://www.economist.com/europe/2003/05/29/tidying-up-or-tyranny.

[17] Vid. Hinarejos García, A. (2012): Free movement, federalism and institutional choice: a Canada-EU comparison, *Cambridge Law Journal*, 71(3), pp. 537-566, pág. 538.

[18] Martinico, G. (2011): "Constitutional Failure or Constitutional Odyssey? What Can We Learn From Comparative Law?", *Perspectives on Federalism*, 3 (1), pág. 53.

2.3. The Constitutional project

As it is well known, the EU Constitutional project of 2003, abandoned politically in 2005 after its democratic rejection in France and the Netherlands, has been the highest political bet within the EU-nature debate. It has been the case in which the EU has tried to go the furthest away from the International perspective, approaching Union towards the Nation-State. It had been said since the adoption of the Treaty of Niza that it was a matter of need for the EU to evolve from the Treaty system to a constitutional regimen, even in the normative sense[19]. However, an opposed line of thought doubted that the essential conditions for a Federal Constitutional State were given within the EU, lacking both a constituent *demos* and any previous kind of constitutional adoption process[20]. It was also argued that a future Constitutional Treaty should have (normative) appearance and functions of a Constitution, including a mechanism to resolve normative conflicts between EU Law and the legal systems of the Member States, establishing the principle of Primacy[21]. Finally, as it is well known, the political failure of the EU Constitution boosts a reaction that seeks to conserve a many advances as it was possible into the Treaty of Lisbon, however sacrificing the "name" itself[22]. The constitutional proposal is not itself our matter of discussion, but a precedent that justifies the subject matter of the proposed project: searching an alternative way to explain the nature of the EU, which might be better founded in the dogmatic sense, but that is -in principle- less polemical politically. Our aim is to look for this answer in a legal system construction of EU Law within the concept of Global Constitutionalism.

3. THE PROPOSAL OF THE PROJECT: EU LAW AS AN EXAMPLE OF GLOBAL CONSTITUTIONALISM

3.1. The European Legal Order as an open system

This latter claim does not mean that the project is naive about the political effects of this proposal. In fact, as long as any legal construction has a certain political background, it would be impossible to purely distinguish a "legal" from a "political" face of the Law. That said, our idea is to avoid the highly contentious

[19] De Witte, B. (2001): "The Nice Declaration: Time for a Constitutional Treaty of the European Union?", *The International Spectator*, no. 1.
[20] Weiler, J.H.H. (2003): Europe's Constitutional *Sonderweg*, Weiler, J.H.H. and Wind, W. (eds.), *European Constitutionalism beyond the State*, Cambridge. CUP, 7-23, 9.
[21] Cruz Villalón, P. (2004): "Nationale Verfassungsangleichung zur Stunde europäischer Verfassungsgebung", en Blankenagel, A., Pernice, I. y Schulze-Fielitz, H., *Verfassung im Diskurs der Welt. Liber amicorum für Peter Häberle*, 207-221, pág. 220.
[22] Reh, C. (2009): "The Lisbon Treaty: De-Constitutionalizing the European Union?", *Journal of Common Market Studies*, Volume 47. Number 3. pp. 625-650.

political questions which lie behind the International-Constitutional/Federal debate about the EU, and instead to focus on the legal dogmatic side of the problem.

To sum up, the project aims at building up at legal construction of a system of EU Law within an evolving system of Global Constitutionalism. EU Law would be a legal order within the global space, and it would have an autonomous nature, but without being actually "closed". On the contrary, it would be an "intermediate" system of Law. This means that it is an open system both "up" and "down". "Down", the EU legal order takes part into the internal legal orders of the Member States through their reception of the Treaties and the rest of European Legal rules. At the same time, EU Law is influenced by the Member States' Legal systems through various ways, and particularly via the national Judge, who as it is known acts as well as European Judge. Of singular importance for the project will be the question about European citizenship, in which -as a general rule- is the constitutional system of Member States the one which determines who is to be an European citizen, through their own nationality[23], establishing a dialogue between constitutional systems which is of the utmost importance for our proposal. An example for the dialogue between EU and Member State's legal systems in which the European level influences the national legal order would be the conforming interpretation of Member State's Law to EU Law[24]. Both directions of influence are necessary, and however not enough to fully understand the position of the EU constitutional system in the global space.

At the same time, "Up" the European Legal order is part of the continuous construction of a broader legal system, Global Constitutionalism. Or, expressed in other words, through the system-building of the EU, we will try to make a contribution to the system-building of Global Constitutionalism, as the first is conceived to be a necessary step for the second. This global constitutional system must therefore be integrated by principles of Law already recognized in European Law[25], such as the rule of law[26], of course in convergence with "other" concepts of rule of Law, such as the one elaborated in English Common Law or in the USA. To give another example of an European legal principle that might be found in Global Constitutionalism, we could mention proportionality. It has been said, with strong dogmatic grounds, that both in a substantive sense and as flexible formalism for a

[23] Vid. in this sense Von Bogdandy, A. and Arndt, F. (2011): European Citizenship, Wolfrum, R. (General Editor), Sólveigardóttir, M. (Managing Editor) et al., *Max Planck Encyclopedia of Public International Law*, OUP, available in https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e615?rskey=i44x9w&result=1&prd=EPIL (especially vid. point A.2.(a)2.).

[24] Vid. Rodríguez de Santiago, J.M. (2016): *Metodología del Derecho Administrativo. Reglas de racionalidad para la adopción y el control de la decisión administrativa*, Madrid. Marcial Pons, 82-88.

[25] As a referential work for this, vid. Von Bogdandy, A. (2010): Founding Principles. Von Bogdandy, A. y Bast, J. (eds.), *Principles of European Constitutional Law*, Oxford, München, Hart Publishing, Verlag C.H. Beck, 11-54.

[26] Pech, L. (2009): "The Rule of Law as a Constitutional Principle of the European Union", *Jean Monnet Working Paper Series* No. 4/2009.

pluralistic society, proportionality plays a role in the OMC system, which might be extended to other areas of Global Law[27].

3.2. One possible example to examine: *Achmea* and the change of direction in *CETA*.

Ton conclude the project proposal, we will try to show how, through the contraposition of two very recent (and controversial) cases, the "opening" of the EU legal system is actually a conclusion which can be reached from the evolution of EU Law itself. The two cases in question are *Achmea*[28] and *CETA*[29]. In the first case, the ECJ decided that an arbitration clause incorporated to a Bilateral Investment Treaty (BIT) signed between two Member States, as well as the following execution of the arbitral award within one of these States, were in violation of EU Law. In particular, the recourse to an international arbitration was in breach of both the principle of mutual trust between Member States (even if the Treaty was signed prior to the access of one of the Member States involved to the EU) and the principle of uniformity and autonomy of the EU legal order (58). It was a key issue in CJEU's judgment that the arbitral tribunal is not a judicial organ in terms of asking it for a preliminary ruling[30].

The second case answers an Opinion asked to the CJEU on the compatibility of another arbitral clause contained within an International Treaty, but this time is not a Treaty signed between two different Member States, but between the EU itself and a third State, Canada. It is, of course, the *Comprehensive Economic and Trade Agreement* (CETA), which intends to establish a free-trade and non-tariff area between both markets within certain conditions. As it is usual in this kind of Treaties, it includes an arbitration clause (in fact, a whole dispute resolution mechanism). Within the period of 13 months between both decisions, the possibility that the *Achmea* criterium was applied to the *CETA* case was always at stake. However, the CJEU distinguished both cases and departed from the doctrine of the immediate precedent, assuming it was actually no applicable to an EU Treaty with a non-Member State. Therefore, a less restrictive criterium was applied. It is true that, as a consequence of the application of such a mechanism, an arbitral tribunal might apply EU Law in the future. This, in principle, would be contrary to EU Law -following *Achmea*- if this institution is not allowed to ask the CJEU for a preliminary ruling. However, in this case, following the Opinion of the Advocate General[31], the CJEU finds that this mechanism is not, in principle, in breach of EU

[27] Vid. Peters, A. (2017): Proportionality as a global constitutional principle, en Lang, A.F. y Wiener, A. *Handbook on Global Constitutionalism*, Cheltenham: Elgar, 248-264, 257.
[28] Case C-284/16, 6 March 2018 (Slovak Republik v. Achmea BV).
[29] Opinion 1/17 CJEU 30 April 2019 (UE-Canada CETA Agreement).
[30] For an analysis of this case in depth, vid. Iglesias Sevillano, H. (2018): "El arbitraje internacional como camino hacia una justicia jurídico-pública global", *Revista de Administración Pública*, n. 206, 291-318, págs. 303-307.
[31] Opinion 1/2019, January the 29th, by Advocate General Bot.

Law, among other reasons, because it does not violate the principle of effectiveness of EU Law in competition matters[32].

In conclusion, and to focus on the point that is of interest for the purposes of this project, the CJEU assumes that an international arbitration mechanism is an acceptable method to resolve disputes under an international treaty, and might be also applicable to the EU, even if a consequence of this is that an arbitrator or arbitral tribunal finds itself applying EU Law. In the dogmatic sense, this has a crucial aftermath. With the reasons presented by the CJEU in *Achmea*, which interpreted the principles of coherence and autonomy of EU's legal order very strictly, the European legal system was built up as a closed system, and this meant that no supranational influence, either outwards or inwards, was allowed. Of course, *Achmea* was itself a too particular judgment to allow us to claim this plainly, but it seemed clear that this was the dogmatic idea which supported the decision. Thus, and perhaps surprisingly, the EU legal order, which is itself a supranational order and which owes its existence precisely to a weakening of the Nation-State in Europe and its closed constitutional-legal orders, tried to build itself up as a closed legal order, rejecting the influence of different institutions and powers existing in the global arena. With the *CETA* decision, this seems to change deeply, even if the judgement establishes certain limits to the arbitration clause. But in any case this second decision does not only admit that the arbitration clause within this particular Treaty is not in breach EU Law, but also that the European legal order is open to influence and receive influence from supranational or global institutions. This latter change is key to our proposal, for this is a necessary presupposition to affirm that EU's constitutional principles can actually both be influenced by the Member States constitutional orders and at the same time influence a growing Global Constitutionalism. And so, the EU can continue with its role of contributing -decisively- to the construction of a Global rule of Law.

4. CONCLUSION AND PROPOSAL

We shall conclude this project presentation with a very brief summary. We have assumed that the EU constitutes an open legal order, and that there is a supranacional set of constitutional principles in construction, which is most commonly known as Global Constitutionalism. The aim of this project is to demonstrate that both events are true, in the first place, and that both are connected between themselves, in the second place. So, the project will focus on how the EU legal order influences and is influenced by a Global Constitutionalism, in the construction of which the EU constitutional principles of Law inherited from its Member States, and essentially the rule of Law, must have a prevailing influence. To show this, we will try to find examples of mutual influence between EU Law

[32] In paragraph 188. Competition was a matter on which the consultation had already focused. The Opinion issued by the CJEU is complex and should be examined in depth by the project. By now, it should be enough to present this brief summary of the discussion.

and global institutions and rules, such as the example offered before with the *Achmea* and *CETA* cases of the CJEU.

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