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The Evolving Nature of EU External Relations Law

W. Th. Douma · C. Eckes · P. Van Elsuwege · E. Kassoti · A. Ott · R. A. Wessel *Editors*

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Editors
W. Th. Douma
EU Legal—Centre for European
and International Law
The Hague, The Netherlands

P. Van Elsuwege
Ghent European Law Institute (GELI)
Ghent University
Ghent, Belgium

A. Ott
Faculty of Law
Maastricht University
Maastricht, The Netherlands

C. Eckes
Amsterdam Centre for European Law
and Governance
University of Amsterdam
Amsterdam, The Netherlands

E. Kassoti
T.M.C. Asser Institute
The Hague, The Netherlands

R. A. Wessel
Faculty of Law
Groningen University
Groningen, The Netherlands

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Preface: The Evolving Nature of EU External Relations Law

The European Union has more and more far-reaching competences in external relations than ever before. It is legally committed to a long list of ambitious and comprehensive foreign policy objectives. Arguably, the Union's foreign policy objectives (Article 21 TEU) are more ambitious and comprehensive than the foreign policy objectives set out in the national constitutions of the Member States. At the same time, Member States have in recent years challenged Union external actions in an unprecedented number of cases, including in order to reign in Union action and constrain Union powers.

On the one hand, in an ever more globalised world it is rational for the EU Member States to confer powers to the Union in order to have jointly a greater say of how global challenges are tackled and what role the Union and its Member States are playing internationally. On the other hand, Member States are ever more heterogeneous in their interests and views of (how to tackle) these challenges. This edited collection unearths and reflects on some of these tensions, including in the areas of the environment, migration and Brexit.

The present volume also marks the 10th anniversary of the Centre for the Law of EU External Relations (CLEER) at the T.M.C. Asser Institute. Throughout the past decade, CLEER operated as a forum for scholarly debate and as a research interface between academia and practice dealing with the legal aspects of the role of the EU in the world. It is a platform for reflection about the evolving nature of EU external relations law and that is precisely the theme of this book.

The start of CLEER coincided with significant changes to the legal framework of the EU's external action. The entry into force of the Lisbon Treaty brought the dissolution of the old pillar structure, the introduction of a single legal personality, as well as the grouping of all external action objectives—including those relating to the Common Foreign and Security Policy (CFSP)—which, together with a number of institutional innovations, aimed to increase the coherence and consistency of the EU's external activities. At the same time, questions of competence delimitation continue to keep EU external relations lawyers busy and lead to an increasing number of relevant cases being brought before the Court of Justice of the EU (CJEU). In parallel, the EU faced unprecedented political challenges. From Trump

to Brexit, from the outbreak of violence at the southern and eastern borders, to economic, humanitarian and health crises, from the rise of populism to the public outcry regarding multilateral trade, all these events required a response from the EU and its Member States.

The conference "EU external relations: tackling global challenges?" organised at the T.M.C. Asser Institute from 6 to 7 December 2018 on the occasion of CLEER's 10th anniversary provided an opportunity to discuss the actions (and reactions) of the EU through external action instruments in a number of substantive areas such as migration, trade, neighbouring policies, and security and defence. It allowed to reflect on the appropriateness and effectiveness of the institutional structures underpinning the EU's external action in addressing these challenges and to suggest possible ways forward.

The present volume is the result of this exercise and aims to take stock of recent evolutions in the law and practice of the EU's external relations. In particular, it addresses the question *how the evolving legal and political framework affects the nature of EU external relations law*.

The first part of this volume tackles the EU's role as an exporter of values, rules and standards. This ambition is enshrined in Articles 3(5) and 21 TEU and constitutes the bedrock of the EU's external action. As observed by Cannizzaro, the generally formulated objectives, principles and values cut across the EU's system of competences. Hence, the question arises whether the external action objectives are only rhetorical devices or effective interpretive tools influencing the case law of the CJEU. As Cannizzaro argues, it appears that the increased focus on values and objectives since the Treaty of Lisbon does have a normative effect on the EU's external action and on the position of the CFSP in the EU legal order. Subsequent chapters critically analyse the EU's evolving practice in promoting the export of its own rules and values. The chapters by Theisinger and Douma address the limits of the EU's approach towards the promotion of sustainable development goals through Trade and Sustainable Development chapters that lack legal enforcement possibilities in recent trade agreements, whereas the chapter by Dero-Bugny and Motte-Baumvol looks into the enforcement challenges of the EU's secondary legislation with extraterritorial consequences.

The second part of this volume covers recent developments in the EU's treaty-making practice and foreign policy. Eva Kassoti focuses on the interface between EU law and international law in the case law of the CJEU. In particular, she looks at the CJEU's reliance on the international law principle of systemic integration for the interpretation of international agreements with third countries. Focusing on the Western Sahara case law, she criticises the CJEU's selective reading and instrumental use of the international rule of law and its consequences for the EU's identity as a global actor. A similar critique can be found in the contribution by Merijn Chamon, who looks at the EU's use of the mechanism of provisional application of treaties as foreseen in Article 25 of the Vienna Convention on the Law of Treaties (VCLT). In applying this mechanism within the framework of mixed agreements, the EU pragmatically operates at the international stage together with its Member States. Whereas this practice facilitates the EU's

external action, it also has significant drawbacks as has been illustrated with the problematic signature and ratification process of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. The challenge of reconciling individual Member State interests with the ambitions of the EU as a global actor is also addressed in the chapters by Steven Blockmans and Ramses Wessel. The establishment of Permanent Structured Cooperation (PESCO) as "a microcosm" of differentiated integration is certainly one of the most significant developments in this respect. Differentiation is also increasingly visible in the broader framework of the CFSP, which not only implies the selective participation of EU Member States but also the participation of non-EU Member States. Accordingly, as concluded by Wessel, the CFSP is increasingly characterised by "a patchwork of diverging and overlapping members and non-members that—sometimes institutionalised, sometimes ad hoc—contribute to assisting the EU in achieving its objectives as a global actor."

The increasing integration with non-EU Member States is particularly visible in the EU's direct neighbourhood, as is further explained in the third part of this volume. Andrea Ott analyses the various types of international agreements and legal tools used to establish a so-called "European legal space". Adam Lazowski focuses more specifically on the EU's eastern neighbourhood and the development of relations with the associated Eastern Partnership countries (Ukraine, Moldova and Georgia). Finally, the chapters by Gatti and Larik deal with the challenge of Brexit. Since the entry into force of the Withdrawal Agreement, the UK is formally speaking a third country. In anticipation of a new legal framework for future EU-UK relations, Gatti observed that "[the UK's] legal position remains complex: as it was the least integrated member of the Union, it is now a very integrated third state". Larik further explores what is called "the Great British trade-off", i.e. the UK's regained power to negotiate its own trade agreements with third countries (also known under the narrative of "Global Britain") versus the loss of EU market power.

Finally, the last part of this volume is devoted to the substantive area of the EU's migration policies. This is certainly one of the most contentious fields of EU external relations law in the past decade. Against the background of an unfolding migration crisis, the EU's approach to migration management has become a heavily debated and politically sensitive issue in several Member States. In this context, the legal framework of the EU's role in shaping the Global Compact for Migration raises important questions. As discussed in the chapter by Pauline Melin, this inter alia includes the EU's involvement in the procedure for the negotiation of international soft law instruments and the external representation of the EU at the international stage. Apart from the challenges related to the use of soft law instruments, the EU and its Member States also increasingly transfer responsibilities to third countries. Juan Santos Vara and Laura Pascual Matellán critically analyse the implications of this practice and discuss the attribution of responsibility for breaches of human rights that might take place on the territory of third countries. Alfredo dos Santos Soares and Sophia Beck-Mannagetta focus more specifically on the EU's cooperation with Libya and question the compliance of the EU's approach

with the values and principles of EU law. Narine Ghazaryan, finally, looks into the EU's policy towards combatting trafficking in human beings in its relations with the Eastern neighbourhood.

Taken together, all contributions reveal the evolving nature of EU external relations law. Whereas traditional questions of competence delimitation still largely determine the legal debate, the post-Lisbon constitutional structure requires a more holistic approach. In the light of the broadly defined objectives of the EU's external action, a neat distinction between traditional areas such as common commercial policy, development cooperation or CFSP becomes increasingly artificial. Trade agreements not only serve the economic interests of the EU but are intended to serve a broader agenda based on the export of the EU's values and norms. The CFSP is no longer a separate, intergovernmental pillar but part and parcel of the EU's constitutional structure. Differentiation, integration without membership and the creation of a "level playing field" with third countries are high on the external relations agenda, with Brexit as its most eminent example. The EU also faces new challenges and tensions. The ambition to become a global norm-setter while safeguarding its own autonomy is not always an easy exercise. The promotion of the EU's norms and values abroad may conflict with economic and security interests, as the debates in relation to the EU's trade, sustainable development and migration policies clearly illustrate. Hence, EU external relations law is in constant flux. This volume aims to shed light on the most significant developments of the past decade and provides food for thought for further research. This is precisely the ambition of CLEER for the years to come.

A 10-year anniversary is not complete without looking back at the origin of this successful endeavour. CLEER originated in Steven Blockmans' initiative in 2008 to bring a group of younger scholars together working in the field of EU external relations law. Starting off with meetings between Steven Blockmans, Wybe Th. Douma (both at the time at the T.M.C. Asser Institute), Fabian Amtenbrink (University of Rotterdam), Christophe Hillion (Leiden University), Andrea Ott (Maastricht University) and Ramses Wessel (at the time affiliated to the University of Twente), an idea developed quickly into setting up CLEER as an intra-faculty initiative with the T.M.C. Asser Institute as its base, solely devoted to the research and teaching of EU external relations law. The coordinator role at the beginning fell to Steven Blockmans but with the quick extension of tasks and his departure to the University of Amsterdam and CEPS, a number of CLEER coordinators took over the tasks to manage the manifold CLEER activities. We are very grateful to the following CLEER coordinators over the years: Tamara Takács, Aaron Matta, Luca Pantaleo, Enrico Partiti and Eva Kassoti. They have actively contributed to CLEER's success over the last ten years by managing the CLEER activities at the T.M.C. Asser Institute and elsewhere and acting together with the governing board in the management of financial applications, the editing of CLEER papers, book volumes, keeping the CLEER website up to date, editing the CLEER News Service, supervising CLEER fellowships, the organisation of workshops, training courses, CLEER summer schools and guest lectures. We are also grateful to the many trainees that helped CLEER through these years. Finally, CLEER was conceived as

a hub for EU external relations law and thrives on its extensive network in and outside the Netherlands with many scholars and practitioners devoted to EU external relations law and policy. The governing board of CLEER would like to thank its advisory board and CLEER network members for their support and active engagement in the past and looks forward to a fruitful future cooperation in this dynamic and important EU policy field.

The Hague, The Netherlands	W. Th. Douma
Amsterdam, The Netherlands	C. Eckes
Ghent, Belgium	P. Van Elsuwege
The Hague, The Netherlands	E. Kassoti
Maastricht, The Netherlands	A. Ott
Groningen, The Netherlands	R. A. Wessel
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A. dos Santos Soares and S. Beck-Mannagetta

Contributors

S. Beck-Mannagetta Munich, Germany

S. Blockmans CEPS, Brussels, Belgium;
University of Amsterdam, Amsterdam, The Netherlands

E. Cannizzaro University of Rome "La Sapienza", Rome, Italy

M. Chamon Maastricht University, Maastricht, The Netherlands

D. Dero-Bugny Université de Paris, Malakoff, France

A. dos Santos Soares Universidad Pontificia Comillas, Madrid, Spain

W. Th. Douma EU Legal—Centre for European and International Law, The Hague, The Netherlands;
European Environmental Law Consultancy, The Hague, The Netherlands;
Ghent University, Ghent, Belgium;
Dutch Ministry of Social Affairs and Employment, The Hague, The Netherlands

M. Gatti University of Bologna, Bologna, Italy

N. Ghazaryan University of Nottingham, Nottingham, UK

E. Kassoti T.M.C. Asser Institute, The Hague, The Netherlands

J. Larik Leiden University, The Hague, The Netherlands

A. Łazowski University of Westminster, London, UK

P. Melin Maastricht University, Maastricht, The Netherlands

J. Motte-Baumvol Université de Paris, Malakoff, France

A. Ott Maastricht University, Maastricht, The Netherlands

L. Pascual Matellán University of Salamanca, Salamanca, Spain

J. Santos Vara University of Salamanca, Salamanca, Spain

M. Theisinger Erasmus University Rotterdam, Rotterdam, The Netherlands

R. A. Wessel University of Groningen, Groningen, The Netherlands

Part I
The EU as Exporter of Rules and Standards

Chapter 1
The Value of the EU International Values

E. Cannizzaro

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Abstract This chapter focuses on the nature and effect of the values and principles enshrined in Articles 3(5) and 21 TEU, which set out the objectives and limits of the EU's external action. It begins with some introductory remarks highlighting the constitutional significance of international values aimed at giving guidance to the conduct of the EU foreign relations power. The second part explores the tendency of the CJEU to use these values and principles as a means of enlarging the functional scope of the EU competences. The problematic issues flowing from this approach, in particular the relation between general objectives of the EU's external action and particular objectives assigned to single areas, are discussed in the third part. The chapter concludes with a brief enquiry on the impact of general values and objectives on the principle of conferral.

Keywords objectives and values · external action · EU system of competences · principle of conferral · CFSP · holistic approach

E. Cannizzaro (✉)
University of Rome "La Sapienza", Rome, Italy
e-mail: enzo.cannizzaro@uniroma1.it

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1.1 Introductory Remarks: Values, Principles, Objectives or Interests?

The Treaty on the European Union introduced provisions that were directly or indirectly borrowed from the Constitutional Treaty; a project which had never attained, as is well known, normative character. Two of them, in particular, Articles 3(5) and 21, express the international dimension of Europe's Constitutional setting. They are aimed at determining the model of relations the Union wishes to entertain with the "wider world" and to give guidance to the Union's Institutions accordingly. They set out a comprehensive and sophisticated frame of reference for the new external action of the Union, namely for the external aspects of all the policies and actions of the Union.[1]

A very superficial analysis of these provisions reveals the existence of two broad categories of directives. On the one hand, those aiming to ensure compliance with international law; namely respecting international law as it presently is. On the other hand, those that—albeit with changing tones and a varying phraseology—call upon the EU Institutions to contribute to the development of international law towards a model consistent with these fundamental values and principles of the EU.

The symbolic impact of these provisions can be hardly overstated. Articles 3(5) and 21 express the sentiment of the founding treaties towards the "wider world". Not only do they conceive international law as the indispensable tool for realizing the external dimension of the European integration, they also express a new ethical vision of international law and put the formidable power of the EU at the service of such a model: A new international Constitutionalism which takes shape through the EU's founding Treaties.[2]

Beyond their theoretical significance, however, the technical analysis of the two provisions is fraught with problematic issues. Articles 3(5) and 21 TEU do not clarify the nature and effect of the normative notions they lay down. Nor do they clarify the impact of these notions on the EU's competence system and, in particular, on the new external action of the Union. How do they relate to the principle of conferral? Do they blur the line between the diverse areas of the EU's external action? Or are they simply guidelines deprived of any normative effect?

These questions cannot be easily answered by referring to the mere terms of Articles 3(5) and 21. Quite the contrary, it is difficult to determine a coherent normative framework integrating these two provisions in the complex system of the EU's external action. The following sections will attempt to demonstrate how thorny it may be to reconcile the existence of general rules laying down objectives, principles and values, with a system of competences based on the principle of conferral. In doing so, this chapter aims to set the stage for the following chapters, most of which are—either explicitly or implicitly—based on the central notions in Articles 3(5) and 21 TEU.

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[1] See Consolidated Version of the Treaty on the European Union, 2012, OJ C326 (TEU), Article 21(3).

[2] See Neframi 2013; Cremona 2016; Larik 2016.

1.2 Some Thoughts on the Nature and Effect of the EU International Values

The analysis starts from a terminological issue. The legal notions formulated by Articles 3(5) and 21 seem to sprout from a common root; the desire to construe an ethical framework able to give guidance to the exercise of the EU's foreign power.[3] However, the terminology used in the Treaty is highly heterogeneous. Article 3(5) talks about "values and interests"; Article 21 uses the term "objectives". Other Treaty provisions refer to the notions as "objectives and principles".[4] This uncertain terminology should warn against any attempt to draw conclusions on their definite legal nature.

The effect of these legal notions appears even more indeterminate. It is not clear whether they constitute mere guidelines for the exercise of the EU's external policies and actions or, rather, whether they have a normative effect, in general terms and, in particular, on the system of EU competence attribution.

Having identified the main controversial questions which surround the interpretation of these two provisions, one must admit that the Treaties do not provide many elements to answer them. An extensive reading is suggested by Article 21(3): "The Union shall respect the principles and pursue the objectives set out in paras 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies". This statement is twofold. First, it suggests that the normative notions formulated under the previous paragraphs contribute *qua* principles to the standard of review for acts adopted under the EU's external action. Second, it entails that Articles 21 (1) and 21(2) provide general objectives, which add up to the specific objectives assigned to the single areas which compose the EU's external action. Article 21(3) seems thus to uphold the idea that the general objectives enshrined in Articles 21(1) and 21(2) integrate the set of objectives specifically assigned to the single policies which together form the external action, even though it remains unclear what happens in case of inconsistency between general and specific objectives.[5]

Article 3(6) strikes a different tone. It states that the objectives of the Union—which arguably include also the normative notions listed under Article 3(5), although labelled as values—must be pursued by appropriate means commensurate with the competences which are conferred upon it in the Treaties. Here the problem is the interpretation of the term "commensurate". This term implies some type of correspondence between the competences and the means to be employed to implement them; a correspondence in size, importance or quality. The most logical deduction is that Article 3(5), in conjunction with Article 3(6), does not extend the scope of the EU's competences but simply lays down general principles which must be pursued

[3] See de Witte 2008, pp. 3–15; Leino 2016, pp. 259–289.

[4] See Consolidated Version of the Treaty on the Functioning of the European Union, 2012, OJ C 326 (TFEU), Articles 2017(1), 208(1), 212(1), 214(1).

[5] Kube 2016.

through the use of the competences of the Union. These, in turn, must conform to the objectives specifically assigned to them.

A third option is provided by the specific provisions included in each single area of the EU's external action,[6] which directs these policies to be exercised in the context of or in the framework of the principles and objectives of Article 21.[7] The interpretation of notions such as "context" and "framework" appears to be particularly controversial. On the basis of a textual interpretation, reference to the context and framework entails that these principles and objectives should restrict, rather than enlarge, the scope of the policies and actions included in the EU's external action. This means that each single measure must be specifically grounded on the legal basis provided by one of these policies or action, and at the same time, respect the principles and objectives of Article 21. In other words, the principles and objectives of Article 21 cannot be invoked with a view to circumventing the objectives of the individual policy or action under which a measure is enacted.

We are therefore confronted with various interpretive options, each implying a different effect of the function of Articles 3(5) and 21: extending the scope of the policies which come within the external action, leaving it untouched, or restricting it. Behind this confusion, a major dilemma looms for the European order. Whereas an overtly restrictive interpretation can undermine the integration approach that is mirrored in the current Treaties, an expansive interpretation—providing for new and autonomous objectives for measures having external effect—may disrupt the basic foundations of the principle of conferral.

These three are not the only available interpretive options. In a more radical view, one could be tempted to accept that the establishment of an integrated external action has definitively merged together the general principles, values and objective enshrined in Articles 3(5) and 21, with the more specific objectives assigned to each single policy or action and thus instituted a holistic regime in which all these normative entities can be used interchangeably as a legal basis for measures implementing them.

In addition, all these options must be tested in the light of the legal conundrum represented by Article 40 TEU. Although this provision concerns the different issue of the choice of the legal basis for measures which, in the terminology predating the Lisbon Treaty, would have been defined as cross-pillar, it constituted a demanding test for every attempt to determine the functional scope of the various areas of the external action. The bi-lateralisation of the barrier separating the CFSP—a purely functional competence—from the TFEU policies—generally defined by reference to their substance matter—makes it equally hard for either one to expand its scope to the detriment of the scope of the other.[8]

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[6] With the exception of Article 215 TFEU, concerning the restrictive measures, which, however, proceeds on the basis of a CFSP decision, subject, under Article 23 TEU, to the respect of the principles and objectives of the External Action; see TFEU, above n. 4.

[7] See, again, TFEU, above n. 4, Articles 207(1), 208(1), 212(1) and 214(1).

[8] Articles 40 also prevents a coordinated exercise of powers of actions respectively conferred upon each of these two dimensions of the European integration, either based on a combination of their

On the basis of these remarks, I will now proceed to see how Articles 3(5) and 21 have been treated in the case law of the CJEU. It is submitted that these have been treated in different ways: as a key to open up the principle of conferral, albeit in the limited field of external relations; as a mere rhetorical tool, to reinforce the persuasiveness of the decision; or, finally, as something intermediate between these two. This analysis may be useful for research projects aimed to determine the nature of effect of these quite mysterious provisions; a task, however, which largely remains outside the scope of the present chapter.

1.3 Rhetorical Device or Interpretive Effect?

Articles 3(5) and 21 have often been used in case law in their less engaging dimension, as a rhetorical tool, to confirm solutions based on different arguments or to reinforce the persuasiveness of an argument. Most commonly, by referring to these two provisions, the Court of Justice simply used them as an abbreviated way to refer to the obligation to respect international law. From the start of the process of integration, this obligation flows from Article 216(2) TFEU, under which international agreements that are binding on the EU must be complied with by the EU's Institutions. Moreover, according to settled case law, every international law rule binding on the EU is an integral part of the European legal order and constitutes a standard of review for EU domestic legislation.

Interestingly, the conception of Articles 3(5) and 21 as an abbreviated reference to the obligations imposed on the EU Institutions to comply with international law is adopted also by the referring judges. In *Western Sahara Campaign UK*,[9] for example, the referring Court submitted the following question:

> Is the Fisheries Partnership Agreement valid, having regard to the requirement under Article 3(5) TEU to contribute to the observance of any relevant principle of international law and respect for the principles of the Charter of the United Nations and the extent to which the Fisheries Agreement was concluded for the benefit of the Saharawi people, on their behalf, in accordance with their wishes, and/or in consultation with their recognised representatives?

Obviously, the validity of the Fisheries Partnership Agreement could have been more directly challenged against a standard of review composed by the rules and principles of international law that were allegedly breached, namely the principle of self-determination and the rule prohibiting to enter into agreements with a State administering non self-governing territories unless the agreement was concluded for

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respective legal basis or on a sequence of measures, each grounded on its own legal basis. A sequential exercise of CFSP acts and of EU substantive policies acts is, notoriously, established only by Article 315 TFEU in the area of restrictive measures and, consequently, appears as a *lex specialis*, unlikely to be replicated in situations which fall outside its scope. For a more in-depth analysis of the exceptional status of Article 315, I refer to Cannizzaro 2017, pp. 531–546.

[9]Court of Justice, *Western Sahara Campaign UK,* Judgment of the Court (Grand Chamber), 27 February 2018, Case C-266/16, ECLI:EU:C:2018:118.

the benefit of the non-self-governing people, on its behalf and in accordance with its wishes. The same rationale applies to the obligation to respect the Charter of the United Nations,[10] which is arguably binding on the Union, although the Union is not among it signatories.[11]

In *Rosneft*[12] the Court used Article 21 to interpret an international agreement in light of the mandatory principles of the Charter of the United Nations. Asked to determine whether restrictive measures taken against that company were compatible with some provisions of the EU-Russia Partnership agreement, the Court observed that the conflict between the restrictive measures adopted by the EU and the EU-Russia agreement was only apparent, as that agreement contained a standard exception clause. Under this clause, each party was entitled to adopt "measures that it considers necessary for the protection of its essential security interests, particularly in time of war or serious international tension constituting a threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security". Reference to this classic self-judging clause would have been sufficient to reject the claim. However, the Court went on to interpret that clause to the effect that it by no means requires the 'war' or the 'serious international tension constituting a threat of war' to take place in the territory of the invoking party.[13] In the light of this quite obvious remark, the Court felt safe to say that the contested measures had been enacted for the purpose of maintaining international peace and security and that purpose was "in accordance with the specified objective, under the first subparagraph of Articles 21(1) and 21(2)(c) TEU, of the Union's external action, with due regard to the principles and purposes of the Charter of the United Nations". In this way, the Court established a link between the two first paragraphs of Article 21 and the principles of the Charter, which were used to interpret extensively the EU-Russia agreement and, in particular, to bring within its scope a threat to international peace and security which did not concern *stricto sensu*, the relations between the two parties. Thus, reference to Articles 3(5) and 21 helped deal with complex situations where the scope of international values and principles of the EU overlapped with that of the Charter of Fundamental Rights: a rare but not impossible situation.

In Opinion 1/17,[14] concerning the consistency of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and

[10] See Hilpold 2009, pp. 141–182.

[11] Kokott and Sobotta 2012, pp. 1015–1024. This impression emerges from Court of Justice, *Kadi and Al Barakaat International Foundation v Council and Commission,* Judgment, 03 September 2008, Joined Cases C-402/05 and C-415/05, ECLI:EU:C:2008:461, paras 290–292, which, however, does not unveil the argument leading to this solution. A perspective based on the idea that the EU succeeded to the MS in the rights and duties flowing from the Charter, which fall within its competences, was set out by the GC (CFI) in Court of Justice, *Kadi v Council and Commission,* Judgment, 21 September 2005, Case T-315/01, ECLI:EU:T:2005:332, paras 193–195.

[12] Court of Justice, *Rosneft,* Judgment, 28 March 2017, Case C-72/15, ECLI:EU:C:2017:236.

[13] Ibid., para 111ff.

[14] Court of Justice, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)*, Opinion of the Court, 30 April 2019, Opinion 1/17, ECLI:EU:C:2019:341.

its Member States, of the other part (CETA) with the EU Treaties, the Court was asked to determine whether the considerable financial risk which claimants had to bear to bring a claim to the CETA Tribunal was consistent with Article 47 of the Charter. Among the arguments which led to a positive answer, the Court recalled that the right of access to justice is inherent in the principle of free and fair trade, enshrined in Article 3(5).[15] Paradoxically, in Opinion 1/17 the Court abstained from using Articles 3(5) and 21 for what may have appeared their most logical and natural use, namely imposing a limit to the principle of autonomy of the European legal order. In this perspective, Articles 3(5), or 21 could have been used to compose the standard of review of EU acts, including acts concluding or implementing international agreements, alleged to be invalid in light of superior EU rules or principles, among which, the principle of autonomy holds a prominent place.[16]

There are elements in Opinion 1/17 which seem to demonstrate that the Court considered this line of reason, without expressly accepting it. This impression emerges from the passage where the Court, after referring to its settled case law on the compatibility with the founding Treaties of provisions of international agreements which establish judicial organs to settle disputes under that agreement, added:

> It is, moreover, precisely because of the reciprocal nature of international agreements and the need to maintain the powers of the Union in international relations that it is open to the Union … to enter into an agreement that confers on an international court or tribunal the jurisdiction to interpret that agreement without that court or tribunal being subject to the interpretations of that agreement given by the courts or tribunal of the Parties.[17]

Coherently unfolded, this line of reasoning could have led the CJEU to the conclusion that autonomy is not the (only) overarching principle governing the conduct of the EU external relations, but that it must be balanced against other Constitutional values and principles, among which those laid down by Articles 3(5) and 21 TEU, which, moreover, relate specifically to the EU's foreign affairs power.

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[15] Ibid., para 200.

[16] This use of the general values and principles of Articles 3(5) and 21 emerges from the Opinion of AG Bot; see Court of Justice, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)*, Opinion of AG Bot of 29 January 2019, Opinion 1/17, ECLI:EU:C:2019:72, paras 73–78: "It is my view that examination of the compatibility of Section F of Chapter 8 of the CETA with the principle of the autonomy of EU law must be carried out taking due account of the need to preserve the European Union's capacity to contribute to achieving the principles and the objectives of its external action. … the Court should interpret the principle of the autonomy of EU law not only in such a way as to maintain the specific characteristics of EU law but also to ensure the European Union's involvement in the development of international law and of a rules-based international legal order."

[17] Opinion 1/17 (*CETA*), above n. 14, para 117.

1.4 The Impact of International Principles and Values on the System of Competences

1.4.1 The No-Effect Approach

The rhetoric use of Articles 3(5) and 21 TEU leaves unaltered the impact of these provisions on the system of the EU's competences. In this regard, the most conservative view was expressed by Sharpston AG. In her opinion pertaining to the Opinion procedure 2/15,[18] the Advocate General held, in quite clear-cut terms, that these provisions do not affect, even minimally, the system of competences. This view was expressed in response to the exclusivity claim advanced by the Commission and the Parliament. The Commission and the Parliament argued that Chapter 13 of the EU-Singapore FTA, although having as its main purpose to promote labour and environmental protection, nonetheless fell within the scope of the Common Commercial Policy by virtue of its effect of regulation of trade.

In response to these arguments, the AG followed the classic line of argumentation based on the directness and immediacy of the link between the measures of the agreements and their effect on trade. The enquiry gave negative results and the AG drew the conclusion that, on the basis of the classic criteria, Chapter 13 did not fall within the scope of the CCP.[19] To test the robustness of this analysis, the AG went on to examine whether this result could change in light of the objectives relating to sustainable development and labour protection in the EU external action, enshrined in Articles 3(5) and 21. In other words, the AG raised the issue of whether international obligations which do not pursue the objectives specifically assigned to the CCP, could nonetheless come within the exclusive purview of the EU as they pursue general objectives of external action. The answer was emphatically in the negative:

> In my opinion, Articles 3(5) and 21 TEU and Articles 9 and 11 TFEU, to which the Commission refers, are not relevant to resolving the issue of competence. The purpose of those provisions is to require the European Union to contribute to certain objectives in its policies and activities. They cannot affect the scope of the common commercial policy laid down in Article 207 TFEU.[20]

The idea that Articles 3(5) and 21 are irrelevant in the context of determining the scope of the EU's competence does not appear persuasive. Under Article 5 TEU, a competence has two components: the powers of action conferred by the Treaties and the objective which must be attained thereby. If Articles 3(5) and 32 set out the general objectives of the EU's external action, they can well provide the functional part of the single policies which compose it.

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[18] Court of Justice, *Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion of AG Sharpston, 21 December 2016, Opinion 2/15, ECLI:EU:C:2016:992.

[19] Ibid., paras 489–494.

[20] Ibid., para 495.

As said above, the text of these provisions does not help determine whether they intend to set out objectives or values, interests or principles. However, Article 207 TFEU, as well as its twin provisions concerning the other policies included in the external action, expressly use the term "objectives", thus making it clear that there are general objectives laid down by Articles 3(5) and 21, which can be attained through the means of action conferred to the EU by these provisions.

Even from a more general perspective, the sweeping assertion of the AG appears to be dismissive. Under the doctrine of competence, rules, principles and other undetermined legal notions can interfere in a variety of manners with a competence assigned to the EU. Under Article 6, for example, principles protecting fundamental rights do not extend the competence of the EU. However, this does not entail that they do not produce effect on the competence of the EU. They interfere with the issue of competence in many ways, the most obvious being that they restrict the scope of the competences of the Union. Thus, even if the notions enshrined Articles 3(5) and 21 TEU are not full-fledged objectives for the purposes of Article 5 TEU, this would not rule out the possibility that they are, nonetheless, relevant to determining the scope of the EU's competence.

1.4.2 The Holistic Approach

In Opinion 2/15 of 16 May 2017,[21] the Court of Justice did not follow the no-effect doctrine embraced by AG Sharpston and, rather, adopted a doctrine which may appear as its logical opposite. In particular, in the section concerning the consistence of the commitments on sustainable development formulated by Chapter 13 of the Agreement, the Court departed from the conclusions suggested by the Advocate General and relied on a different approach. According to the Court, Article 207 TFEU modifies the functional scope of the CCP by integrating the general objectives and principles of the EU's external action in the conduct of that policy.

> The obligation on the European Union to integrate those objectives and principles into the conduct of its common commercial policy is apparent from the second sentence of Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU. Indeed, as provided in Article 21(3) TEU, the European Union is to 'pursue the objectives set out in paras 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the [FEU Treaty] …'. Part Five of the FEU Treaty includes, inter alia, the common commercial policy.[22]

The Court went on to draw the inevitable conclusion that, although the Union has no exclusive competence to conclude an international agreement aimed to regulate the levels of social and environmental protection in the respective territories of its parties, it has the competence to regulate trade between the European Union and a

[21] Court of Justice, *Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion of the Court, 16 May 2017, Opinion 2/15, ECLI:EU:C:2017:376.

[22] Ibid., paras 143–144.

third State by making this regulation conditional upon the compliance of international obligations concerning labour and environment protection.[23]

Although the Court did not unveil all the details of its reasoning, one could hardly doubt that, under that case law, Articles 3(5) and 21 are part of the system of the EU's competence. If the objectives and values set out by these provisions are incorporated in the set of objectives assigned to the common commercial policy, the most logical inference is that they can be attained by using the means of action conferred by the treaty under this policy. Since the process of incorporation is common for all the other policies of the Union, the same conclusion must be drawn for them all.

By no way does this finding exhaust all the problematic issues about the role of Articles 3(5) and 21. The first and most obvious is to determine the meaning of the term "integrate". Opinion 2/15 seems to conceive the process of integration as a sort of addition of a common set of objectives to those specifically assigned to each area of external relations. Should one then conclude that acts implementing the single areas of the external action could pursue the general objectives set out by Articles 3(5) and 21 insofar as they are not inconsistent with the specific objectives of each single policy or action? If this were the case, rather than enlarging the scope of the Union's competence, the process of integration restricts it.

This counterintuitive conclusion requires an explanation. The Court did not say that the means of action of the CCP policy can be used to attain the common objectives laid down by Articles 3(5) and 21. For example, the EU is not allowed to use the common commercial policy to attain the objective of social or environmental protection. This would have been a real extension of the functional scope of that policy. Rather, the Court held that the use of the classical instruments of the commercial policy, consistent with both the substantive and the functional scope of that policy, can be made conditional upon certain standards of social or environmental protection. In this context, the word "integration" is interpreted in the sense that Articles 3(5) and 21 TEU simply add certain objectives to the existing functional standard against which the lawfulness of a measure adopted under the CCP must be assessed.

For these reasons, the claim made in Opinion 1/15 is less revolutionary than it may appear. The Court did not restrict the CCP, as well as the other areas of the external policy, from pursuing the specific objectives assigned to it. Nor did it not uphold a one-size-fits-all effect. It simply found that the notions enshrined in Articles 3(5) and 21 extend the set of objectives assigned to each of these areas without get rid of the more specific objectives assigned to the single areas by the founding Treaties. One may be tempted to say that, in Opinion 1/15, the Court upheld a holistic effect. This approach would then require to determine the functional link between a measure and the competence to which it pertains on the basis of all the objectives: the general objectives of the external action and the more specific objectives assigned to its single areas.[24]

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[23] Ibid., para 166.

[24] This conclusion was suggested by AG Bot in the *Mauritius*, who proclaimed his intention "to define the boundaries between the CFSP and the Union's other policies" and concluded that "(i)n so far as Article 21(2) TEU sets out the common objectives of the Union's external action, that

The relevance of Opinion 2/15, therefore, lies in the finding that the general objectives of the external action matter when determining whether a certain measure falls within the functional scope of the competence on the basis of which it was adopted. However, it did not clarify the relations between the general and the specific objectives. In particular, in case of a conflict between these two sub-set of objectives, a further clarification would be needed.

1.5 The Role of Article 40 TEU

The difficulty to determine the effect of the values and principles of Articles 3(5) and 21 increases if one adds to the picture one of the most mysterious and less explored provisions of the Treaties, namely Article 40 TEU. This provision contains in its two paragraphs, two symmetrical non-affectation clauses. The first aims to protect the procedure of the EU policies in the TFEU from CFSP measures having a substantive content. The second, conversely, aims to protect the procedure of the CFSP from politically motivated measures taken under one of the substantive TFEU policies of the EU.

This provision probably constitutes the most rigorous application of the principle of conferral and establishes a regime of separation, or even segregation, between the CFSP on the one and, the other substantive policies and action of the EU on the other. At its core, it prevents the CFSP to enter into matters entrusted to the substantive policies of the EU and, *vice versa*, these policies from intruding into the realm of the CFSP.

This model of relation between CFSP and TFEU EU policies is, under many respects, antithetical to the intent underlying the EU's external action. Whereas the latter integrates, the former segregates. More particularly, whereas the latter tends to consider the various areas of the external action of the Union as a harmonious set of legal bases for measures aimed to attain common objectives, the former tends to conceive them as monads, self-contained and devoid of any interaction, with the only exception provided for by Article 315 TFEU on restrictive measures.

The impact of Article 40 TEU on the integration of the EU's external action is far from clear. If taken at face value, this provision would, indeed, prevent any attempt to harmoniously use the various policies of the external action as a unitary tool designed to promote the common values and to attain the common objectives laid down by Articles 3(5) and 21. Yet, as seen above, this is not what emerges from the recent case law, which seems to have attenuated the strict regime of separation between the CFSP and the policies in the TFEU. The idea underlying this case law is that Articles 3(5) and 21 carve out an exception to the prohibition to pursue objectives,

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provision should be read in conjunction with the more specific provisions applicable to each policy in order to determine the Union policy to which a certain objective is more specifically related"; see Court of Justice, *Parliament v Council (Mauritius)*, Opinion of AG Bot, 30 January 2014, Case C-658/11, ECLI:EU:C:2014:41, paras 87–88.

which were formerly assigned to the CFSP only, through measures taken under other EU substantive policies. However, this new judicial doctrine must still reckon with Article 40 and with its articulations described above.

Some of these issues have been considered in case C-244/17, concerning the procedure to be followed by the Council in determining the position of the EU with regard to decisions establishing the procedural rules of the cooperation council, a body set up by the Partnership and Cooperation Agreement between the EU and its MS with the Republic of Kazakhstan. It is worthwhile noticing that this agreement was concluded in mixed form and grounded, for what concerns the competence of the EU, on a combination of legal bases including the CFSP. The Council thus took the view that the position of the EU ought to be based on Article 218(9) TFEU, in conjunction with Article 31(1) TEU and, therefore, it needed to be adopted by a unanimous vote. This view was opposed by the Commission, which argued that the agreement mainly pertained to the non-CFSP areas of the external action and, therefore, the procedure had to be only determined by Article 218(9).

The AG and the Court agreed that the issue, by virtue of its instrumental character, needed to be decided on the basis of the contents and objectives of the Partnership agreement. They further agreed that the agreement contained obligations falling within the CFSP and obligations falling within the non-CFSP areas of the EU external action. Lastly, they agreed on the insufficiency of this link for the purpose of including the CFSP among the legal basis for such a decision.

This conclusion was based by the Court on the incidentality doctrine.[25] Although converging on this conclusion, the AG offered a more articulated reasoning, which also took into account Article 40 TEU. After recalling that "to comply with the spirit of Article 40 TEU, the unanimity principle of the CFSP must not be allowed to be undermined by the procedural rules of the communitised policies, nor must this unanimity principle of the CFSP be permitted to 'infect' the communitised policies", the AG turned her attention to the centre of gravity doctrine and concluded, as the Court did, that the references to the CFSP in the Partnership agreement ought to be considered as incidental vis-à-vis the provisions falling within the substantive competences of the EU. At the end of this reasoning, the AG felt the need to assess the soundness of the conclusions based on incidentality against the normative background of Article 40:

> A waiver of the reference to legal bases resulting from the area of the CFSP moreover does not lead to any weakening of the foreign and security policy component of the Partnership Agreement. This is because the aims and content of the Partnership Agreement with references to the foreign and security policy, as identified above, may not only be implemented by the conventional means of the CFSP. Rather, the commitment to democracy and the rule of law, respect for human rights, peaceful settlement of disputes and observance of international law belong to the fundamental values of the European Union, guiding it in all of its action on the international scene in accordance with the cross-cutting clause of Article 21(1)

[25] Ibid., para 46: The provisions falling within the scope of the CFSP "are not therefore of a scope enabling them to be regarded as a distinct component of that agreement. On the contrary, they are incidental to that agreement's two components constituted by the common commercial policy and development cooperation".

> TEU, that is to say not only in the context of the CFSP, but also for example in the context of the common commercial policy (Article 207 TFEU) and development cooperation (Article 208(1) and Article 209(2) TFEU).[26]

Although formulated in the specific context of the incidentality effect, this passage may have a broader scope and unveil some still hidden aspects of this troubled relation. One obvious inference is that measures taken under a TFEU competence in pursuing the objectives laid down in Articles 3(5) and 21 TEU, are perfectly consistent with Article 40, and not only incidentally.

This holding has far-reaching implications. First, it seems to entail that the Partnership agreement could, and perhaps should, have been concluded on a legal basis which excluded the CFSP. Second, and more important for our purposes, it seems to sensibly weaken the first sentence of Article 40 and to definitively pave the way for a system where the substantive policies of the Union under the TFEU can also autonomously operate to protect the values and attain the objectives of Articles 3(5) and 21 TEU. In such a system, these substantive EU policies become instrumental to the implementation of the internal values and principles of Articles 3(5) and 21, without the need of the intermediation of acts of foreign policy.

1.6 Conclusions: Beyond the Holistic Approach

Recent case law seems to establish a legal regime of EU external action dominated by the holistic approach, albeit in the restricted sense shaped in the previous section of this chapter. According to this case law, the effect of Articles 3(5) and 21 is tangible albeit limited. Far from constituting mere political or ethical directives, these provisions do have normative effect and, in particular, they enlarge the functional scope of the substantive competences of the EU's external action. The substantive policies of the EU—those expressly included in the external action and the external aspects of all the other EU policies—are now enabled to pursue the objectives laid down by these provisions. Moreover, the values, principles and objectives flowing from these provisions enter into a dynamic interrelation with the various doctrines of competences developed by the case law. The most blatant example is the incidentality doctrine, which presumably will be massively applied throughout the full spectrum of the relations between CFSP and other EU policies,[27] and may further integrate the various external policies.

It is noteworthy that this impact is not bidirectional. Articles 3(5) and 21 only extended the functional scope of the external aspects of the EU substantive competences, thus prompting a process of erosion of the monopoly of the CFSP. They do not correspondingly enlarge the substantive scope of the CFSP, which remains,

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[26] Ibid., para 77.

[27] See Court of Justice, *Commission v Council,* Judgment of the Court, 20 May 2008, Case C-91/05, ECLI:EU:C:2008:288; see Hillion and Wessel 2009, pp. 551–86.

at least theoretically, a purely functional, de-materialised competence. Presumably, this asymmetrical upheaval of the system of compartimentalisation between TEU and TFEU competence of the EU foreign power will intensify the role of the CFSP as an instrument giving guidance to the exercise of the TFEU substantive policies.[28]

Not all the issues arising as a consequence of this abrupt change in the traditional system of the EU competences are automatically solved. In particular, the simple addition of new general objectives to the specific objectives of the substantive EU competences raises the problem to determine, in case of inconsistency, the relations among heterogeneous objectives pertaining to the same competence.

On the basis of logical considerations, a number of options are available, none of them, however, clearly superior to the others. A hierarchical order giving priority to the general objectives over those specifically assigned to the single EU's substantive policies could match the fundamental character of the general principles and values of the European legal order. The problem with this view is that it may incentivise the development of independent lines of foreign policy through the procedures pertaining to the substantive competences of the EU. One may wonder how far the relative autonomy acquired by the EU substantive policies can go in view of the recent case law without altering the institutional and normative balance reflected in the Treaties and, in particular, in Article 40 TEU.

A second option advocates the prevalence of the more specific objectives assigned to the single EU substantive policies in the TFEU. Arguably, this option is less disruptive of the classic principle of conferral, which still remains the philosophical corner stone of the process of integration. By confining the pursuance of the values and objectives of Articles 3(5) and 21 to the substantive scope of each single competence, this solution may be politically acceptable as it would maintain a role of supervision for the CFSP and avoid the development of independent lines of foreign policy through the different methods of EU decision-making.

A third, and perhaps more audacious, option is to apply the crucible approach used by international law to determine the relations between the diverse methods of interpretation of international treaties. The popularity of this approach in international law is basically due to its indeterminacy. It consists in putting together a number of methods of treaty interpretation, potentially conflicting with each other, and leaving to the interpreter the task of choosing the proper method, or a combination among some or all methods, on the basis of the contingencies of each particular case.

If applied to the objectives of the Unions' action, this option would appear to be highly innovative. The political Institutions would have great discretion to choose the objectives more appropriate for each specific measure falling within the scope of the external action. The various objectives—those generally assigned to the external action and those specifically assigned to the single policy—could be used interchangeably. However, the cost to be paid would be significantly high. The principle of conferral, and more generally the entire system of the EU's competences, would be fatally disrupted. If this system applied to the external aspects of the all the EU's policies, the magnitude of this upheaval would correspondingly increase.

[28] On that role, in the light of the pre-Lisbon institutional practice, see Cannizzaro 2007, pp. 193–234.

The quite disappointing conclusion is that the recent case law is still incapable to choose among the many ways following from the decision by the Treaty drafters to include general objectives, principles and values in the EU's external action. In turn, this inability seems to depend from the still controversial relationship between the political aspiration of the EU as a global actor, capable to use all the means at its disposal to pursue these objectives, principles, and values, and the restraints flowing from the principle of conferral. It is this untied knot which stays as an insurmountable obstacle in the way of every attempt to compose in a clear and coherent frame the diverse components of the EU foreign relations power.[29]

References

Cannizzaro E (2007) Unity and Fragmentation in the EU's Foreign relations Power. In: Barnard C (ed) The Fundamental of EU Law Revisited. Oxford University Press, Oxford, pp 193–234

Cannizzaro E (2017) The EU Antiterrorist Sanctions. In: Eeckhout P, Lopez-Escudero M (eds) The European Union's External Action in Times of Crisis. Hart Publishing, Oxford, pp 531–546

Cremona M (2016) Values in EU Foreign Policy. In: Sciso E, Baratta R, Morviducci C (eds) I valori dell'Unione europea e l'azione esterna. Giappichelli, Turin

de Witte B (2008) Too Much Constitutional Law in the European Union's Foreign Relations? In: Cremona M, de Witte B (eds) EU Foreign Relations Law—Constitutional Fundamentals. Hart Publishing, Oxford, pp 3–15

Hillion C, Wessel RA (2009) Competence distribution in EU external relations after ECOWAS: Clarification or continued fuzziness? CMLRev 46:551–86

Hilpold P (2009) EU Law and UN Law in Conflict: The Kadi Case. Max Planck Yearbook of United Nations Law 13:141–182

Kokott J, Sobotta C (2012) The Kadi Case—Constitutional Core Values and International Law—Finding the Balance? European Journal of International Law 23:1015–1024

Kube V (2016) The European Union's External Human Rights Commitment: What is the Legal Value of Article 21 TEU? EUI Department of Law Research Paper No. 2016/10

Larik J (2013) Entrenching Global Governance: The EU's Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality. In: Van Vooren B, Blockmans S, Wouters J (eds) The EU's Role in Global Governance: The Legal Dimension. Oxford University Press, Oxford, pp 7–22

Larik J E (2016) Foreign Policy Objectives in European Constitutional Law. Oxford University Press, Oxford

Leino P (2016) The Journey Towards All that is Good and Beautiful: Human Rights and Common Values as Guiding Principles of EU Foreign Relations Law. In: Cremona M, de Witte B (eds) EU Foreign Relations Law—Constitutional Fundamentals. Hart Publishing, Oxford, pp 259–289

Lonardo L (2018) Common Foreign and Security Policy and the External Action Objectives: An Analysis of Article 21 of the Treaty on the European Union. European Constitutional Law Review 14:584–608

Neframi E (2013) Les Rapports entre Objectifs et Compétences: de la Restructuration et de l'Identité de l'Union Européenne [The Relationship between Objectives and Competences: on the Restructuring and Identity of the European Union]. In: Neframi E (ed) Objectifs et compétences dans l'Union européenne [Objectives and Competences in the EU]. Bruylant, Brussels

[29] See Wessel 2020; Lonardo 2018, pp. 584–608; Larik 2013, pp. 7–22.

Wessel R A (2020) Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis. In: Kilpatrick C, Scott J (eds) Contemporary Challenges to EU Legality: Collected Courses of the Academy of European Law. Oxford University Press (forthcoming)

E. Cannizzaro is Professor of International Law and EU Law at the University of Rome "La Sapienza" in Italy.