Introduction

Eleftheria Neframi and Mauro Gatti

The legal regime for the external relations of the European Union (EU) is commonly acknowledged, in EU law literature, to be highly specific. External relations are studied as a distinct field of action, in which the fundamental principles structuring the EU legal order find particular expression.[1] Moreover, external relations and action have their own place in the Treaties: the Treaty on European Union (TEU), for example, defines the status of the Common Foreign and Security Policy (CFSP)[2] and establishes external action as a proper mission of the Union,[3] with external action objectives subject to a global approach,[4] while the Treaty on the Functioning of the European Union (TFEU) devotes an entire part to external action covering external policies.[5] Furthermore, according to the case law of the Court of Justice of the European Union (CJEU), specific requirements in the field of the Union's external action give a specific content to fundamental EU law principles, such as the principle of loyal cooperation.[6]

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1 In addition to the abundant literature devoted to EU external relations, important writings deal with the application of EU law principles in the field of the external action of the Union. See, for example: M. Cremona (ed), *Structural Principles in EU External Relations Law* (Oxford: Hart Publishing, 2018); R. Schütze, T. Tridimas (eds), *Oxford Principles of European Union Law* (Oxford: Oxford University Press, 2018).

2 Title V of the TEU.

3 Article 3, paragraph 5, TEU.

4 Article 21 TEU.

5 Part Five of the TFEU concerns "the Union's External Action".

6 Unity in external representation, especially in the context of mixed agreements, requires a reinforced duty of loyal cooperation between the Union and its Member States. According to the Court of Justice, "it is essential to ensure close cooperation between the Member States and the (Union) institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the (Union)". Ruling of 14 November 1978, 1/78, *Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports*, EU:C:1978:202, paras 34-38; Opinion of 19 March 1993, 2/91, Convention no. 170 of the International Labour Orga-

The Union's ability to undertake external action is part of its identity. "In its relations with the wider world", the Union pursues an objective of being a global actor[7] beyond the specific policy objectives.[8] Nevertheless, at the same time, "the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement".[9] Besides, the Union "shall ensure consistency between the different areas of its external action and between these and its other policies".[10]

It follows that, in addition to the demand for substantive consistency, which is an expression of the unity of the EU legal order in both its internal and external dimensions, the specific status of the external relations of the Union must accommodate and be aligned with the fundamental principles of the EU legal order. Significant literature has already been dedicated to the balance between the specific features of the Union's external action and the need to respect the constitutional and institutional framework

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nization concerning safety in the use of chemicals at work, EU:C:1993:106, para 36; Opinion of 15 November 1994, 1/94, *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property*, EU:C:1994:384, para 108.

7 M. Cremona, "The Union as Global Actor: Roles, Models and Identity", *Common Market Law Review* 41, n°2 (2004), 553; R. Holdgaard, *External Relations Law of the European Community : Legal Reasoning and Legal Discources* (Alphen aan den Rijn: Kluwer Law International, 2008), 377. D. Kochenov, F. Amtenbrick, "Introduction: The Active Paradigm of the Study of the EU's Place in the World", in D. Kochenov, F. Amtenbrick (eds), *The European Union's Shaping of the International Legal Order* (Cambridge: Cambridge University Press, 2013), 1; J. Larik, "Shaping the International Legal Order as an EU Objective, in D. Kochenov, F. Amtenbrick (eds), *supra*, 62.

8 According to Article 3, paragraph 5, TEU, "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter".

9 Article 21, paragraph 1, TEU.

10 Article 21, paragraph 3, 2nd sub-paragraph, TEU.

of the EU legal order.[11] It is indeed on that basis that the CJEU established the autonomy of the EU legal order with regard to international law.[12]

The present book invites the reader to rethink some questions raised in EU external relations law in the light of recent developments in the case law of the Court of Justice, from the perspective of the constitutional foundations of the Union. It does not, however, aim to exhaustively address the Lisbon Treaty's important contributions to EU external relations and all of the recent developments in EU external relations law. Rather, the various chapters invite the reader to take a second look at the balance between the specific legal regime for EU external action and the constitutional fundamentals of the EU legal order, such as: the principles of conferral, loyalty, institutional balance, as well as the rule of law, democracy, and fundamental rights protection. The accommodation between specificity and fundamental principles is, thus, a transversal constitutional issue.

It should be noted that the specific place of EU external action in the EU legal order has been established progressively. Although policies with external dimension (such as the common commercial policy) fell under the European Community's competences, it was only in the *ERTA* judgment that the Court acknowledged the international personality of the European Community and the importance of external action tools to the attainment of its internal objectives.[13] Moreover, the Member States progressively entrusted the European Union with foreign affairs competence – the CFSP, constituting as such a specific feature –, and with a common approach to external action policies and objectives. External action has progressively become more than a tool to attain policy objectives (internal- or even external-oriented); it is the expression of the proper identity

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11 *Supra* note 1. See also : M. Cremona, A. Thies (eds), *The European Court of Justice and External Relations : Constitutional Challenges* (Oxford : Hart Publishing, 2016); G. De Baere, *Constitutional Principles of EU External Relations* (Oxford : Oxford University Press, 2008).

12 C. Eckes, "International Rulings and the EU Legal Order: Autonomy as Legitimacy?", in M. Cremona, A. Thies (eds), *The European Union and International Dispute Settlement* (Oxford: Hart Publishing, 2017), 161.

13 The Court of Justice held that the former Article 201 CE, concerning legal personnality of the former European Community, « means that in its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in part one of the treaty". Judgment of 31 March 1971, *Commission* v *Council (European Agreement on Road Transport–ERTA)*, 22/70, EU:C:1971:32, para 14.

of the Union. This move, however, is situated in the legal order of the European Union: it stems from the Treaties, it is aligned to the overall integration objective and, thus, must accommodate the fundamentals of EU law. The move from policy-oriented external action objectives to a general objective of being an actor in the international scene is indeed enshrined in the EU constitutional order as part of the identification of the Union. The identity that the Member States want the Union to affirm in the international scene is a projection of its internal evolution in terms of values and principles.

The chapters of the book provide different perspectives on classic EU constitutional issues, having regard for the external relations' specific features. They encourage reconsideration of the inherent specificity of the Union's external action in its unique constitutional framework and in the light of recent developments, which express both a reinforcement of the external action potentialities and the external projection of its internal evolution. The underlying assumption is the endogenous specifity stemming from the assigned objectives, which impacts the scope and role of fundamental principles operating in the EU constitutional framework. It implies, in turn, a unique scope and functioning of the principle of conferral itself, as well as an accommodation of the need to preserve and promote the EU identity with the demand for efficiency, the latter opening the Union's balancing between external objectives and internal limits to exogenous influence.

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Defining EU External Action Objectives and Competences

The first part of the book discusses the endogenous specificity of EU external action, stemming from the particular relationship between competences and objectives. Following the principle of conferral,[14] the exercise of a competence depends on the determination of the legal basis related to the corresponding objective. The relationship between competences and objectives is expressed in two different respects. On the one hand, this re-

14 Article 5, paragraph 2, TEU: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

lationship determines the choice of legal basis for the Union's action: what competence pursues a specific objective? And, in view of the conclusion of an international agreement, what competence corresponds to the objective pursued by the external measure? On the other hand, this relationship affects the nature of the competence on which depends the kind of the action to be conducted: may the Union act alone or must it act alongside its Member States?

Concerning the choice of legal basis, the specificity of the relationship between competences and objectives lies in a less-strict correspondence in comparison with the internal field of action. To be sure, each external competence has its specific policy objectives. However, contrary to the internal field, external action is characterised by the global approach of objectives, under the general objective of being an international actor.[15] The coexistence of specific policy objectives and the global approach means that, to determine the proper legal basis of an external action, a link between competence and objective is to be established, but, at the same time, the scope of an external competence may be broadly conceived. Moreover, an external competence does not necessarily pursue an external policy objective, but external action of the Union may serve internal objectives. Finally, the objective guiding the choice of legal basis is not necessarily that which is determined by the intention of the parties in the conclusion of the agreement, but may be mostly determined by the fragmented perspective of EU law.

These issues are elucidated by *Cremona,* who studies the scope and the boundaries of the express external competences. She underscores that the approach of the Court of Justice is based on the overall framework of action for EU foreign affairs: Article 21 TEU allows a legal basis to cover objectives corresponding to different competences and, therefore, invites a rethinking of the absorption doctrine,[16] as well as the distinction between essential and ancillary elements of external action. *Cremona* illustrates the

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15 Article 21, paragraph 2, TEU states especially in a) and h): "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (…) (h) promote an international system based on stronger multilateral cooperation and good global governance". *Supra* note 7.

16 "According to settled case-law, the choice of the legal basis for a European Union measure, including the measure adopted for the purpose of concluding an international agreement, must rest on objective factors amenable to judicial review, which

global assessment of an international agreement, taking as a starting point the Union's objective in the field of the common commercial policy (CCP). *Neframi* highlights the Union's perspective and the influence of the general objective of being an international actor with regard to the scope of the CCP, which goes beyond an instrumental approach and covers provisions that, seen individually, may be linked to other fields of competence. Moreover, *Neframi* focuses on the broad concept of the CCP with regard to sustainable development objectives resulting from Opinion 2/15,[17] which gives an EU-perspective of the absorption doctrine. As she points out, it is the broadly defined scope of an EU competence and of the corresponding objective that allows the absorption of provisions of an international agreement, which could give rise to the centre of gravity test.

The global approach to external action objectives raises further difficulties, as far as a specific competence is conferred to the Union without specific objectives corresponding to the policy field. *Cremona* analyses the integration of the CFSP in the general framework of the Union's external action and its relationship to the other competences. She argues that, in practice, express external competences, such as the CFSP, tend to prevail over implied external competences, which pursue an internal objective. The broad scope of external policies is the expression of the prevalence of the finalist approach over the instrumental approach. Even if the objective of an external action measure is an internal one that could allow the exercise of an implied external competence, and even if, in the implementation of the international agreement, an internal policy instrument is needed, the broad scope of the external action objectives in their global approach allows the Court of Justice to favour the express legal basis beyond a strict correspondence between objectives and competences. The exercise of an

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include the aim and content of that measure. If examination of a European Union measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component". Judgment of the Court of 11 June 2014, *Commission* v *Council*, C-377/12, EU:C:2014:1903, para 34. See S. Adam, "The Legal Basis of International Agreements of the European Union in the Post-Lisbon Era", in I. Govaere and others (eds), *The European Union in the World; Essays in Honor of Marc Maresceau* (Leiden: Martinus Nijhoff, 2014), 78.

17 Opinion of 16 May 2017, 2/15, *EU Singapore Free Trade Agreement*, EU:C:2017:376.

express external competence, instead of an implied one, presents an interest where the express external competence is exclusive (as is the CCP), but also as a confirmation of the importance of external action objectives, which allows the Union to use, as *Cremona* points out, a wide variety of instruments (even borrowed from internal policy fields) and explains the adaptation of constitutional principles to the requirement of efficiency, as is seen in the second part of the book.

The acceptance of a broad scope for the CFSP, however, is not necessarily without shortcomings. By adopting the perspective of the transversal objective of security, *Gatti* suggests that the Court of Justice has privileged the preservation of a space of action for the CFSP, thereby restraining the scope of the Area of Freedom, Security and Justice (AFSJ). There might be, therefore, the risk that a broad interpretation of the CFSP's scope might entail the absorption of acts from AFSJ and other policies, notably development cooperation, thereby expanding the latitude of the intergovernmental method in external relations.

Concerning the nature of the external competence on which depends the form of the Union's action – whether the Union concludes an EU-only or a mixed agreement – it is certainly closely related to the identified objective of the action. Although this is also the case in the internal field, as the principle of subsidiarity governs the use of EU competences with regard to the necessity to attain the corresponding objective, some specific issues are raised in the external relations field.[18]

Bosse Platière studies the functioning of the subsidiarity principle in the external action of the Union. While there is no formal opposition to the use of the principle directly in the external action field, she notes that subsidiarity operates mainly in the exercise of the internal competences, which leads to the exclusive nature of the implied external competence through the criterion of affecting the common rules or altering their scope, known as *ERTA* effect,[19] codified in Article 3, paragraph 2, TFEU.[20] How-

18 F. Castillo de la Torre, "The Court of Justice and External Competences After Lisbon: Some Reflections on the Latest Case Law", in P. Eeckhout, M. Lopez Escudero (eds), *The European Union's External Action in Times of Crisis* (Oxford, Hart Publishing, 2016), 129.

19 *Supra* note 13.

20 "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope".

ever, in such a case, implied external competence is exclusive, not because of the need to realise the corresponding internal objective, but because of the loyalty obligation to preserve the common rules, as underlined by *Delgado Casteleiro.*

The question is whether the principle of subsidiarity can operate directly in the external field. *Bosse Platière* does not exclude the exercise of external competence according to that principle. However, a distinction should still be made between express and implied external competences. In the case of express external competences of shared nature (as the environmental competence), the use of the subsidiarity criterion should not be excluded. However, Article 216, paragraph 1, TFEU provides that the Union may conclude an international agreement where the Treaties so provide. The question, thus, is whether subsidiarity operates with regard to the specific objective or whether the assignment of an external action objective implies that the Union may act regardless of a necessity test. *Neframi* notes that the subsidiarity test in the internal field has an impact on the nature of the implied external competence and, thus, does not need to be done in view of the conclusion of an international agreement, as it determines the scope of the *ERTA* effect. Indeed, in the field of harmonisation, common rules do not completely coincide with the provisions of an international agreement if a margin of discretion is left to the Member States. Nevertheless, the exercise of internal competence through the adoption of common rules may lead to a broader preemption in the external field, to the extent international provisions are deemed to fall under a field that is largely covered by common rules and where the subsidiarity test is already completed.

Despite the broad scope of the *ERTA* effect, it does not always confer exclusivity on the external competence. In such a case, the action of the Union in the external field depends on the necessity to achieve the corresponding objective or even the objective linked to an international agreement, when globally assessed.

Chamon revisits the conditions of the exercise of shared implied external competence and sheds light on the question of facultative or compulsory mixity from the perspective of Article 216, paragraph 1, TFEU, which provides that the Union may conclude an international agreement where it "is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties". Following the pos-

ition of the Court of Justice in its *Germany* v *Council* ruling,[21] the lack of *ERTA* exclusivity does not necessarily lead to the conclusion of a mixed agreement. Compulsory mixity is limited to the absence of EU external competence for part of an international agreement while the lack of exclusivity gives rise to facultative mixity. That means that an implied shared external competence can be directly exercised in the external field if it is considered necessary with regard to the attainment of the corresponding objective. The difference with regard to the necessity criterion for the principle of subsidiarity seems to be that necessity is assessed, not with regard to qualitative or quantitative criteria in reference to the Member States action, but with regard to the opportunity to act in the external field. It is, thus, more a question of political will than the consequence of a loyalty obligation with regard to the attainement of the relevant objective.

Such an evolution allows the Union to overcome the limits of the *ERTA* effect that were clarified in Opinion 2/15. *Pigeon* analyses the basis and limits of the *ERTA* effect with regard to the potential to affect the Treaties. Because portfolio investments do not fall under the scope of the CCP, the question has been whether the implied external competence of the Union could be considered exclusive on the basis of the affectation of Article 63 TFEU related to the freedom of movement of capital. His chapter explains the reasons for the Court of Justice's negative response thereto and clarifies the scope of the *ERTA* doctrine. Even if the *ERTA* effect implies a limitation on Member States' action through the establishment of exclusivity, the limitation of its scope is balanced through the recognition of the ability to exercise shared implied external competence.

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Balancing EU Values with External Action Objectives

The Union's overarching objective of being an effective international actor impacts not only the relationship between objectives and competences and, thus, the principle of conferral, but also other principles and values of the Union. To be truly effective on the international scene, the Union must

21 Judgment of 5 December 2017, *Germany* v *Council*, *(Amendment of the Convention concerning International Carriage by Rail – COTIF)*, C-600/14, EU:C:2017:935.

adapt its action to the specificities of the international environment. Democratic values, fundamental rights, and the rule of law – the values on which the Union is founded and is supposed to promote in its relations with the rest of the world – may have to be subtly adjusted to accommodate the objective of being an effective international actor.

In the first place, although the conduct of the international relations should not affect the Union's commitment to representative democracy (at least in principle), the Union may have to restrain parliamentary prerogatives in order to effectively conduct external action. As noted by *Flavier*, the full involvement of parliaments in foreign affairs could jeopardise the secrecy of international negotiations. Accordingly, the Treaties restrain the European Parliament's powers in external relations. While the European Parliament generally plays the role of co-legislator, it merely holds the power to approve most international agreements and is simply consulted in respect of some treaties, notably those regarding the CFSP. *Kuijper* argues, however, that the restrictions on the European Parliament's powers may be less prominent than they appear at first sight. Recent judgments leave to the European Parliament powers of general scrutiny of CFSP treaty-making, through a forceful recognition of its right to be fully informed by the Council at all stages of the treaty-making process.[22] Such a right of the Parliament is, indeed, quintessential to the EU's institutional balance.

Secondly, like representative democracy, transparency must also sometimes be sacrificed for the sake of effectiveness in foreign policy. Access to information is an essential condition for the realisation of democracy, but, according to *Flavier*, this should not lead one to overlook the need for effective external action. If the Union's foreign policy were entirely transparent, its negotiating strategy would become known to its counterparties, thereby hindering the attainment of the Union's objectives. Cognizant of this difficulty, the European Union courts often balance the concern for transparency against that for the effectiveness of the EU's external action,

22 Judgment of 14 June 2016, *Parliament* v *Council (Tanzania)*, C-263/14, EU:C:2016:435, para 43; Opinion of 6 December 2001, 2/00, *Cartagena Protocol*, EU:C:2001:664; Judgment of 24 June 2014, *Parliament* v *Council (Mauritius)*, C-658/11, EU:C:2014:2025.

notably by denying members of the European Parliament generalised access to directives regarding negotiation.[23]

Third, the Court of Justice itself takes the concern for effectiveness into account. It is true that the Treaties generally give broad powers to the Court in the field of external relations, broader, in fact, than the powers exercised by most of the highest courts in sovereign States, as noted by *Kuijper*. It is also true that the Court of Justice has often exercised its jurisdiction on foreign policy and declared several acts incompatible with fundamental rights. The *Kadi* saga is a case in point.[24] However, as the courts of sovereign States routinely balance judicial control and foreign policy effectiveness,[25] judicial restraint is also embraced by the Court of Justice, in order to enable better conduct of external relations.

For instance, judicial protection of rights conferred directly through international agreements is very limited. Although the Treaties expressly stipulate that international agreements are binding on both the Union and its Members States[26] – which may seem to imply that the Union and third States can agree upon rules that directly bind individuals in the Union – individuals cannot always invoke rights provided by international agreements. As shown by *Prek* and *Lefèvre*, a "subjective" element is indispensable to the direct application of an agreement: the parties must have intended to confer rights to individuals. If, on the other hand, the parties intended the agreement to be applied on the condition of reciprocity, direct application is impossible. The Union's negotiation of reciprocal benefits would indeed be ineffective if the rights conferred by international agreements were justiciable in the Union, but not in the legal orders of the other parties. Interestingly, the "subjective" element necessary for judicial protection was found to be absent from many agreements concluded by the Union. Further, the case law of the Court of Justice suggests that, frequently, rights conferred by multilateral agreements, such as those of the

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23 Judgement of 4 May 2012, *Sophie In't Veld*, T-529/09, EU:T:2012:215, para. 24; Judgement of 3 July 2014, *Sophie In't Veld*, C-350/12 P, EU:C:2014:2039; Judgement of 19 March 2013, *Sophie In't Veld*, T-301/10, EU:T:2013:135.

24 Judgment of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P & C-415/05 P EU:C:2008:461.

25 Domestic courts have indeed acknowledged that they should not make fundamental decisions of foreign policy, see e.g. US Supreme Court, *Goldwater* v *Carter*, 444 U.S. 996 (1979).

26 See Articles 3, paragraph 5, 21, paragraph 1, TEU and 216, paragraph 2, TFEU.

World Trade Organisation (WTO), cannot be invoked by individuals. Bilateral treaties have, in the past, been given direct effect, but recent bilateral agreements might constitute exceptions. The trend, therefore, seems to go more in the direction of the effectiveness of EU external relations and, perhaps, less in the direction of increased judicial protection in foreign affairs.

Beyond the question of direct effect of international agreements, the Court of Justice's concern for effectiveness is expressed in its limited review of restrictive measures in the field of the CFSP. As noted by *Poli*, restrictive measures that adversely affect individuals, but are not addressed to them, may escape the Court's review. More generally, the Court seems to exercise some restraint in the CFSP area. As *Fines* demonstrates, the Court leaves ample political discretion to the Council: its case law justifies the adoption of sanctions against subjects that are somehow linked to foreign governments, even if they are not involved in illegal activities or crises. Furthermore, the Court of Justice has also accepted limited transparency in this area. *Flavier* notes that the strictness of the obligation to justify denial of access to documents is variable: transparency may be limited when overriding considerations relating to the Union's security come into play, since they may preclude the communication of certain elements to otherwise interested parties.

Nevertheless, it should be noted that the exercise of the Court's jurisdiction over restrictive measures, even though limited, might demonstrate less a differentiation of, and more a unified approach to, the scope of fundamental principles in the internal and external field.

Despite the specific regime of the CFSP and its acknowledgment that judicial activism might be dangerous for the effectiveness of the Union's action, the Court of Justice restrictively interpreted the restraint on its jurisdiction. On the one hand, the Court found that it does have jurisdiction on budget and staff management acts in the area of the CFSP: in these cases, as *Kuijper* argues, the administrative character of the acts prevails over their foreign policy nature.[27] On the other hand, the Court held that it can reply to preliminary questions concerning restrictive measures targeting

27 Judgment of 12 December 2015, *Elitaliana* v *Eulex Kosovo*, C-439/13 P, EU:C:2015:753; Judgment of 19 July 2016, *H.* v *Council of the European Union*, C-455/14 P, EU:C:2016:569.

individuals, thus filling a lacuna in primary law, as noted by *Fines*.[28] Therefore, the restriction of the Court's jurisdiction does not extend to the CFSP as such, but only to the adoption of "political" foreign policy acts and, then, only insofar as those acts do not directly target an individual.

Moreover, the Court of Justice has exercised its jurisdiction on the CFSP in practice and found that the Council cannot adopt restrictive measures at will; rather, it must justify them. The Council must provide the Court, in particular, with a set of indicia sufficiently specific, precise, and consistent to establish that there is a link between the target individual and the regime being questioned, as shown by *Poli*. To strike a better balance between policy effectiveness and judicial protection, the General Court and the Court of Justice, in 2014, prepared new procedural rules, the adoption and content of which are analysed by *Rosas*. These new procedures apply to actions for annulment, where a main party wishes to base his claims on information the communication of which to the other main party would harm the security of the Union. The judges must then balance the concerns for security against the rights of the defence and specify the procedures to be adopted, such as the production of a non-confidential version or a non-confidential summary of the information or material. The hope is that this new system will contribute to an appropriate balance between legitimate security concerns and the requirements of the rule of law.

The balancing of policy effectiveness and the rule of law may, in some cases, be linked to another problem specific to external relations: the preservation of the autonomy of the EU system. Through the conduct of external relations, the Union enters into contact with the international legal order and the legal systems of third countries. This relationship is problematic, insofar as it may threaten the separation of the EU from other legal orders, a *fil rouge* that links numerous decisions of the Court since *Van Gend en Loos*.[29]

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28 Judgment of 28 March 2017, *The Queen (PJSC Rosneft Oil Company)*, C-72/15, ECLI:EU:C:2017:236.

29 According to the Court of Justice (Judgment of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v *Netherlands Inland Revenue Administration*, 26/62, EU:C:1963:1), the EU legal order constitutes a new legal order of international law. However, international agreements concluded by the Union should not impact the autonomy of the EU legal order. The Court of Justice highlighted this requirement namely in Opinions 1/91, 1/09 and 2/13. See, Opinion of 14 December 1991, 1/91, *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the*

The autonomy of EU law has proved problematic, in particular, in the area of data protection. The Union's institutions have entered into arrangements on data exchange with several countries over the last decades. Though the exchange of personal data, according to EU institutions, is indispensable to fight against criminals and terrorists, the Court of Justice has repeatedly held that the right to data protection cannot be sacrificed. *Potvin-Solis* shows that the Court ensures strict control over the protection of the right to data protection, by repeatedly holding that EU authorities must make sure that, whenever personal data are transferred outside the European Union, they are subject to "adequate" protection. Interestingly, the Court seems to interpret the concepts of "adequacy" extensively, by aligning the "adequate" protection provided abroad with the protection ensured within the EU. In other words, the Union must make sure that its internal – autonomous – data protection rules are applied abroad; foreign standards, though loosely equivalent, are not acceptable. If cooperation cannot ensure an "adequate" level of protection, it must be avoided, no matter the practical consequences in terms of policy effectiveness.

The autonomy claim is, therefore, an important element in the balancing exercise between effective international action and constitutional EU law principles. As noted by *Delgado Casteleiro,* autonomy is inextricably linked to the principle of loyalty. These principles inspire the fundamental rules of EU external relations, such as the consistent interpretation with regard to international law. To be loyal to the Union and to preserve the autonomy of its legal order, the Member States must interpret provisions binding both themselves and the Union in accordance with the case law of the Court of Justice. By ensuring consistency in the interpretation of international law, the principle of loyalty thus preserves both the autonomy of the Union's legal order and its unity on the international scene, and thereby fosters the Union's effectiveness.

The relationship between autonomy and effectiveness is more problematic when it comes to the conclusion of agreements that contain dispute settlement mechanisms. Such agreements might enable international bodies to rule upon the interpretation of EU law and, particularly, on the scope

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other, relating to the creation of the European Economic Area, EU:C:1991:490; Opinion of 8 March 2011, 1/09, *Creation of a unified patent litigation system*, EU:C:2011:123; Opinion of 18 December 2014, 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454.

of EU competences, thereby impinging on the exclusive jurisdiction of the Court of Justice and the EU's autonomy. The case law of the Court suggests that even indirect threats to the Union's autonomous interpretation of its competences must be prevented. An international tribunal's decision on the allocation of international responsibility between the Union and its Member States – such as, potentially, a judgment of the European Court of Human Rights – might be especially problematic.[30] This explains, in part, why the Court of Justice ruled in Opinion 2/13 that the agreement on the EU's accession to the European Convention on Human Rights is incompatible with EU law.

Contartese and *Pantaleo* suggest solutions to resolve problems relating to the allocation of international responsibility between and among the Union and its Members States. They argue that, in light of the Court of Justice's case law, the allocation of such responsibility should never be performed by international bodies. The Union and its Member States, rather, should have the ability to internally identify the respondent party. The Union's accession agreement to the European Convention on Human Rights fell short of this requirement. The investment agreements recently concluded by the Union might be more likely to pass the autonomy test, although such an outcome cannot be taken for granted.[31]

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The analysis of the relationship between the EU's autonomy and its objective to be effective on the international scene does not permit, *per se*, one to reach definitive conclusions as to the "special" character of EU external relations. While many elements point towards the constitutional "specialty" of external action (e.g., external competences or the special institutional balance of EU external relations), others suggest a certain degree of "normalcy" (for instance, the application of "normal" data protection standards or the expansive scope of the Court's jurisdiction). The contributions

30 P. Eeckhout, "Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?", *Fordham International Law Journal* 38 (2015), 955, at 982.

31 Possible issues may be raised in the context of the request for an Opinion submitted by the Kingdom of Belgium on 13 October 2017 regarding the Canada-EU Comprehensive Economic and Trade Agreement (CETA), Opinion proceeding 1/17, OJ 2017 C 369/2.

contained in this book nonetheless permit one to formulate two considerations.

On the one hand, it seems clear that, if there is a "specialty" of EU external relations law, it belongs to external action, broadly intended, and not specifically to the CFSP. It is true that the CFSP constitutes the core of the EU's foreign policy, which is often associated with the peculiar features of this area (e.g., judicial restraint). It is also true, however, that the CFSP is not the only part of EU external action that is affected by endogenous and exogenous peculiarities: trade policy, or treaty-making at large, are also "special" in many respects. It is also increasingly arguable whether, and to what extent, the CFSP should be seen as categorically separate from the rest of external action. While it is true that the CFSP is characterised by special actors and procedures, it seems increasingly close to other EU policies, at least in terms of judicial supervision and parliamentary control. One should also acknowledge that, in the area of foreign policy *stricto sensu,* judicial supervision and parliamentary control can hardly be complete, even at the Member State level.

On the other hand, one may note that the Union operates in the same international environment as any other international actor and is adapting in a similar manner. Like (democratic) states, the Union seeks to strike a balance between its values and the effectiveness of its external action. To be sure, the EU is perhaps more keen on protecting transparency than third states: while the EU publishes part of its negotiating documents, its partners tend to adhere to traditional diplomatic secrecy.[32] When hard interests are at stake, at any rate, the EU is capable, like any other international subject, of striking "creative" constitutional balances, as evidenced by the Court's restraint on the need to justify restrictive measures or its reluctance to give direct application to international agreements founded on reciprocity. The case might be that, while EU external relations law becomes increasingly "exceptional" in order to ensure the Union's effectiveness, it might evolve into something rather "normal", when compared to the foreign policy law of traditional international actors (i.e., the States).

32 For instance, it would seem that the EU has published many more documents than the US government during the negotiation of the Transatlantic Trade and Investment Partnership, cf. the website of the European Commission: http://ec.europa.eu/trade/policy/in-focus/ttip/index_en.htm, and the website of the US government: https://ustr.gov/ttip.