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### Preface

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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

# The Evolving Nature of EU External Relations Law



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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 combating 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.

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R. A. Wessel

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