

MARISE CREMONA AND ANNE THIES (EDS.), *THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELATIONS LAW: CONSTITUTIONAL CHALLENGES* (OXFORD: HART PUBLISHING 2014) ISBN: 978-1-84946-504-5. 298PP. £50.00 (HARDBACK).

Graham Butler\*

Without outlining the challenges and the balancing act that the Court of Justice must always strive to achieve, and the potential pitfalls that ensue, this book is a worthy read for those perplexed about the foreign relations issues of the Union, and those interested in how the primary judicial actor of the Union interacts with law surrounding it, given the constitutional parameters. Over the length of this book review, it will be explained why this publication is a valuable contribution to the understanding of the Court of Justice as a judicial actor in the field of EU foreign policy and external relations.

One of the most characteristic paradoxes and contradictions in European Union law is that EU *external* relations law is in fact inherently *internal* in its dynamics from a legal perspective. Whereas the Union actively attempts to fit into the global order, both legally and politically, the undercurrents of it mean that internal strife must first be settled on a sound and firm setting in order for its international ability to be able to deliver 'foreign policy' results. It is impossible to argue that the Court of Justice has *not* shaped the external dimension of the Union's policies, particularly so once it is understood what the Court of Justice has done to shape its character. The Court's mandate being imposed by the Treaties, and furthered through self-anointment actions, as covered at length in this book's contributions, has gently crafted the manner in which the EU's international relations are conducted. Whether it is international agreements that form a key part of the external space in which the Union operates, or otherwise, the Court has found itself as a key interlocutor within the governing processes as *the* judicial adjudicator. This has all been spurred on by the often ill-defined Treaties that are at best, mildly coherent, and at worst, blatantly contradictory. The Treaty

---

\* Centre for Comparative and European Constitutional Studies, Faculty of Law, University of Copenhagen, Denmark. graham.butler@jur.ku.dk.

of Lisbon, as alluded to in the introduction of the book, was an attempt by the intergovernmental conference to 'clean up' the existing legal instruments that were scattered throughout different provisions. Convened after the ill-fated Constitution for Europe, the intergovernmental conference, amongst other things, sought to amalgamate and categorise as much external relations law within the primary law, the Treaties, as was practically possible. Despite this honourable attempt, the provisions still lack as much clarity as they might otherwise could have.

The law of EU external relations can be broadly separated into two distinct entities for the purposes of practice and analysis, with firstly, the Common Foreign and Security Policy,<sup>1</sup> and secondly, the other regular external relations of the Union, that of *non*-CFSP. Some progress was made in this regard at making the Treaties more coherent, for example in CFSP where Decisions are now the predominant tool, and with its 'specific rules and procedures' that still govern their nature as if a standalone pillar still existed, with its shadow still very clearly visible.

This book takes aim at just one angle, albeit an important one, and that is the approach of the Court of Justice of the European Union within the field of EU external relations law. In attempting to cover many aspects of the Court's approach to external relations, including answering intricate questions of EU external representations as an international actor, to matters of constitutional importance for the Union, the book captures as much as it could be reasonably expected, given its broad nature. Matching such scholarly ambition with qualitative results, to meet legitimate expectations, is not an easy feat.

Scholarship on the legal dimension of EU external relations has been broached for some time, albeit by a limited number of specialised scholars. The edited collection contains three contributions in each of the four neatly allocated sections. Commencing in Part I with a discussion on the Court of Justice's role in the development of the external relations law, a thematic approach is evident. With corresponding questioning titles, touching upon

---

<sup>1</sup> Somewhat (dis-)affectionately known as CFSP.

the institutional nature of the Court of Justice, *Cremona*, *de Witte*, and *Hillion*, each ponder three flammable questions – whether it is reticent, selfish, or indeed powerless. In the first substantive contribution to the collection, *Cremona* introduces the question whether the Court is non-interventionist or not. By linking what would generally be considered 'policy objectives' with the Court's own role in the institutional framework of the Union, a picture is painted of the Court's approach to questions before it, and its attitude towards such. As *de Witte* alludes to, the Court of Justice's 'relationship' with other international judicial bodies has been strained at best. By delving into the case law of the Court, largely focused on major Opinions and judgments, he details the history of the Court's attitude to other entities, ranging from the *Opinion 1/91* on the establishment of an EEA Court, which it prevented; as well as *Opinion 2/94*, declaring that the EU had no competence to accede to the European Convention on Human Rights (ECHR). By addressing the *Mox Plant* case on jurisdiction and Treaty obligations vis-à-vis the International Tribunal for the Law of the Sea (ITLOS) under the UN Convention on the Law of the Sea (UNCLOS), as well as the complex issue of the European and Community Patents Court through *Opinion 1/09*, it is clear that the Court finds that international agreements that open a potential jurisdictional clash with the Court of Justice find themselves coming in for sharp critique. In concluding the theme of provocative questions, *Hillion* asks whether the Court is powerless in the context of the CFSP. Of all external relations policies, CFSP is the most peculiar, with its 'specific rules and procedures' determined by its own Title within the TEU. The post-Lisbon provisions of the Treaties on CFSP have led to a series of inter-institutional disputes opening up the Court to adjudicating on differing interpretations of how far CFSP can be stretched, given the boundary-policing role in which the Court has been placed. Furthermore, it is considered how the new Article 218 TFEU is interpreted on the opening, negotiating, and conclusion of international agreements. The importance in which the institutions, particularly the Parliament, have attached to such litigation is noteworthy given that the Court's judgments have a lasting impact on the practice of CFSP and other external relations provisions of the Treaties.

Part II threads a little further by appraising the jurisprudential construct of the Court of Justice, and the distribution of external competence. In dealing with the division of competences in a vertical sense, *Neframi* discusses the

principle of conferral in the multilevel architectural framework. The division of competence between Member States and the Union is not categorised in any explicit manner, yet the Treaty of Lisbon merged specific CFSP objectives with overall external relations objectives. The chapter concludes that the constitutionalising process of external relations competences will entail the Court continuing to play an important role. Next, *Kuijper* tackles the pertinent question of whether EU foreign policy and external relations is still retained at executive level. Traditionally in the nation state concept, it has been executive actors who have amassed and retained control of sensitive areas of policy, such as foreign, security, and defence matters. The lack of plurality in the decision-making regime meant the domain was preserved for governments, as opposed to parliaments and judiciaries. The separation of powers and institutional balance in an EU context, however, poses a different set of questions, given the evolutionary nature of the Treaties, which set down the rules for each institutions' and actors' respective positions. Finally in Part II, *Van Elsuwege* contextualises the inter-institutional relations and the battle-ground clashes that have opened up as a result of the Treaty of Lisbon coming into effect in 2009. The Court of Justice is finding itself as a marshal given the CFSP and non-CFSP distinction when it comes to choice of legal basis for external measures, with the 'centre of gravity' test making up for the indistinguishable border between the areas. This results in the role of the Court of Justice being propelled further than it may have itself wanted. Given the potential conflicts, *Van Elsuwege* questions what the role of the Court of Justice should be in external relations as a judicial adjudicator, noting the ever-present and continued friction between CFSP and non-CFSP legal bases.

In the penultimate Part III, *Thies* deals with the 'general principles' in the development of EU external relations law. Progress in this field generally derives from judgments of the Court of Justice, and such principles of Union law are just as important in external relations as any other. *Thies* demonstrates that the international dimension of external action by the EU is multidimensional, given the action of Member States on the same international playing field. Similarly, the flexibility that is needed for external action, playing in tandem with the strict ramification of Union law that the Court has to uphold, can generate debate on the role of the Court itself.

Following this, *Azoulai* questions the legal reasoning surrounding the Court in external relations matters. Through his assertions, it is pointed out that the legal cognition of the Court has been subject of much interest in recent years. Given the *ERTA* doctrine that was created in 1971 and has developed since, it is argued that its significance should never be understated. Differentiated integration has developed across the Union, either through derogation, practice, or political understanding, resulting in the uniformity of Union law coming under fire in a number of different ways. Finally in Part III, *Eckes* examines the ramifications that judicial discourse has had on the Court, and how its interaction with other judicial and quasi-judicial bodies in multi-layered systems of governance has contributed to its pivotal position.

In a two-to-one practitioner / academic divide, Part IV commences with *Kokott* and *Sobotta* on the Union law versus international law balance. Whilst there is an abundance of literature on the *Kadi* saga already in circulation, the contribution seeks to add further remarks on effective judicial protection within the Union in light of the special circumstances of such delicate cases on individuals through restrictive measures. The back and forth between the General Court (the Court of First Instance for *Kadi I*) and the Court of Justice is by no means a settled area of law on striking the balance between the two fields. Next, *Heliskoski* examines the Draft Accession Agreement of the Union to the ECHR, analysing the relationship between the Court of Justice, and the European Court of Human Rights (ECtHR). The prior involvement issue that is delved into was one picked up by the Court of Justice in Opinion 2/13<sup>2</sup> (delivered after the publication of this book), which has effectively slowed the accession process down to a halt. Although only dealing with a minor issue from the accession difficulties, it can be taken from the focused contribution that the two legal orders – that of the Union and that of the Strasbourg system – are intrinsically difficult to meaningfully intertwine. The final contribution to the volume by *Wouters*, *Odermatt* and *Ramopoulos* picks apart institutional approaches to international law – that of the judiciary, and the legislature. It is undeniable that the Treaties continued resilient silence has been the direct result of a lack of unanimity amongst decision-makers as to how to balance the interests of the various actors. The

---

<sup>2</sup> Opinion 2/13, ECLI:EU:C:2014:2454.

post-Lisbon framework in which the Union's institutions act is obliged to take international law into greater account, which the authors justify as means for making the comparison between European Union law and international law. From a rigid approach, to a more encapsulating methodology, the Court has clearly had issues with accepting international law on its face value within the Union legal order that it itself has proudly constructed. Despite the inconsistencies in which the actors adopt their methodological approach to international law, it is unlikely that coherence will come to the fore, with the increasingly 'unfriendly' approach that the Court is opting for.

Scholarship on the law of the EU's external relations was very much late to the game. It is contributions to the literature such as this that help to bind it all together, and ensure that the sub-discipline is more wholesome and accessible to those who have yet to grasp the intricate knowledge of the ins and outs of external relations – from the legal basis, to external representation discussions, debates, litigation, and institutional balance. It is often the case that edited volumes fail to have a common thread that would allow for a publication to excel, and become essential reading. This collection however, has no such issue. With a detailed set of objectives put forth at the introductory stages of the book, the book manages to hit the mark in capturing many of the purposes which it attempts to achieve. As the external relations of the Union continue to develop in the way that it has, so will the issues that arise as the pressure of the unitary legal order comes under continued attack. At least one chapter has already been cited in a recent Advocate-General Opinion,<sup>3</sup> showing the high esteem the book already holds in the eyes of practitioners.

Since the book's publication, the Court of Justice through Opinion 2/13 has found the Draft Accession Agreement of the Union to the ECHR to be incompatible with the Treaties. How such a landmark Opinion of the Court would feed into the narrative of the authors if such knowledge was on hand at the time is a question of pertinence. Opinion 2/13 has been such a controversial ruling from the Court of Justice that in due course, will

---

<sup>3</sup> See Opinion of Advocate General Wahl in Case C-455/14 P, *H v. Council and Commission* ECLI:EU:C:2016:212, paragraph 39, footnote 17.

necessitate some of the contributors to this book to revisit many of the pressing questions on the Court's role in the EU external relations. Having said that, this book is just one angle on EU external relations law – that of the Court of Justice. Other important institutions in EU external relations law are the Commission (in trade), the Council (by far in CFSP), and the Parliament, which finds itself with a strained, but increasing role as practical developments get locked into subsequent legal revisions.

Notwithstanding the role of other institutions in external relations law, the Court is still a prime actor, and will continue to possess strong constitutional status. The post-Lisbon environment and the prolonged use of the existing Treaties may mean that the development of external relations from a legal perspective may have to be governed by judgments and Opinions of the Court of Justice. If so, then its prominence is only going to increase further, on top of its already cemented place as the ultimate arbiter of Union law. There is further research to be done on the EU judiciary and its place within EU external relations law, with the political question doctrine potentially being the starting point for a new research agenda. In the meantime, this book is essential reading for advanced researchers in EU external relations law that reaps fascinating insights from an academically diverse range of authors, collectively striving to further understand and explain the Court's true impact.