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SYMPOSIUM ON COMPARATIVE FOREIGN RELATIONS LAW

EU FOREIGN RELATIONS LAW AS A FIELD OF SCHOLARSHIP

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EU external relations law is a doubly peculiar field of scholarship that has attracted significant scholarly attention over the last several decades. It is both part of EU law—considered a "new legal order"[1] distinct from international law—and it is concerned with the European Union as a global actor, a "strange animal"[2] in that the EU is neither a state nor a classical international organization.

This essay argues that in the emerging field of comparative foreign relations law, the law of EU external relations will be both a supporting pillar and important driver: A pillar, because, next to U.S. foreign relations law, it is one of the most vibrant scholarly discourses on the subject; and a driver, because it continues to be a fascinating comparator for national—especially federal—systems of foreign relations law that questions many of the assumptions underlying nation-based concepts and blurs the lines between national and international law.

The essay first outlines the historical development of EU external relations law as a field of scholarship. It then offers three explanations for why it is likely to join the emerging field of comparative foreign relations law in the vanguard alongside U.S. foreign relations law. Two important disclaimers should be added at the outset: The publications referred to here are by no means exhaustive, but rather are merely representative of larger bodies of research. Moreover, just as with EU law in general, EU external relations law scholarship is a multilingual enterprise. While English is the predominant language, other large linguistic communities such as those speaking German or French continue to produce comparably high-quality publications in this area.[3] Furthermore, courts of the EU member states, which occasionally make important rulings with an EU external relations dimension, do not always provide English translations.[4] Hence, a deep understanding of the European constitutional space and the way it interacts with the outside world continues to benefit from looking beyond the "Anglosphere" of judgments and publications.

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[1] Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen para. 10, ECLI:EU:C:1963:1.

[2] Fraser Cameron, An Introduction to European Foreign Policy 24 (2007).

[3] *See, e.g.*, Eleftheria Neframi, L'action extérieure de l'Union européenne: Fondements, moyens, principes (2010); Europäische Außenbeziehungen (Andreas von Arnault ed., 2014).

[4] Examples include the judgments of the French *Conseil constitutionnel* (Constitutional Council) and the German *Bundesverfassungsgericht* (Federal Constitutional Court), both of which pronounced themselves on the constitutionality of the Comprehensive Economic and Trade Agreement between the EU and its Member States and Canada, having to show great sensitivity on questions of EU law and the prerogatives of the European Court of Justice.

The Four Eras of EU External Relations Scholarship

The scholarship of EU external relations can be roughly divided into four periods, with scholarship usually lagging a few years behind judicial or political milestones that mark their respective beginning: Emergence, growth, consolidation, and a future of seminormalization.

First, the period of "emergence" commenced when it became clear that the European Union—or rather its predecessor organization, the European Economic Community—would have important external powers. The milestones here are two European Court of Justice (ECJ) decisions from the 1970s. The *ERTA* judgment of 1971 established that the Community, whenever it adopted common rules internally, impliedly acquired the power to act internationally in those areas as well, thus preempting the Member States' ability to undermine these rules through their international interactions.[5] In *Opinion 1/75* four years later, the ECJ ruled that some of the Community's external powers could also be a priori exclusive, i.e., without the need to adopt internal rules first, such as in the Common Commercial Policy (CCP; meaning trade policy).[6] It is from this point onwards that legal scholars started to focus on the legal aspects of the Community's emerging international action and the internal rules and procedures that framed it.[7]

A topic that galvanized scholarly enquiry from these early days onwards is that of mixed agreements.[8] A hallmark of EU external relations, these are international treaties that need to be concluded by both the Union and the Member States with third parties, since neither of them has the power to do so on their own given the degree of sovereignty that has been pooled. Prominent examples include the World Trade Organization agreements, the United Nations Convention on the Law of the Sea, and the EU's newer generation of trade agreements.[9]

Second, the period of "growth" was heralded by the Maastricht Treaty of 1993, which founded the European Union as an umbrella that contained the Community and two more "pillars," the second of which was the Common Foreign and Security Policy (CFSP). Maastricht was followed by the Amsterdam and Nice Treaties, each of which provided legal scholars with ample materials to scrutinize and let the field thrive.[10] Here, two strands of scholarship can be distinguished. The first continued to focus on the external relations of the European Community,[11] in which the CCP continued to take pride of place. Closely linked to the development of the internal market, it has been the EU's most well-studied area of external relations. Hence, when the first extensive treatises on EU external relations law appeared, it is hardly surprising that they started out with analyses of the CCP, before turning to other policy areas.[12] The other strand of scholarship was the study of the European Union, in particular

[5] ERTA stands for the European Road Transport Agreement, which was at issue in the case, Case 22/70, Commission of the European Communities v. Council of the European Communities (European Agreement on Road Transport), ECLI:EU:C:1971:32.

[6] Opinion 1/75 (Local Cost Standard), ECLI:EU:C:1975:145.

[7] K. R. Simmonds, *The Evolution of the External Relations Law of the European Economic Community*, 28 Int'l & Comp. L.Q. 644 (1979); Eric Stein, *Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution*, *in* 1(3) Integration Through Law: Europe and the American Federal Experience 3 (Mauro Cappelletti et al. eds., 1986).

[8] Mixed Agreements (David O'Keeffe & Henry G. Schermers eds., 1983); Mixed Agreements Revisited: The EU and its Member States in the World (Christophe Hillion & Panos Koutrakos eds., 2010).

[9] As confirmed by the ECJ in Opinion 1/94 (WTO), ECLI:EU:C:1994:384 and Opinion 2/15 (EU-Singapore FTA), ECLI:EU:C:2017:376.

[10] Christoph Herrmann, *Common Commercial Policy After Nice: Sisyphus Would Have Done a Better Job*, 39 Common Mkt. L. Rev. 7 (2002).

[11] The External Relations of the European Communities: A Manual of Law and Practice (Iain MacLeod et al. eds., 1996); The General Law of E.C. External Relations (Alan Dashwood & Christophe Hillion eds., 2000).

[12] Piet Eeckhout, EU External Relations Law 11–69 (2d ed. 2011), of which the first edition was published in 2005; Panos Koutrakos, EU International Relations Law 17–72 (2d ed. 2015), of which the first edition was published in 2006.

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its status as a legal person and its relation to the Community,[13] as well as the intergovernmental nature of the CFSP.[14]

Third, the current period of "consolidation" was launched by the 2008 *Kadi* judgment and the Lisbon Treaty, which entered into force in 2009. In the former, the ECJ pronounced itself on the primacy (which Americans might call "supremacy") of the EU Treaties over the UN Charter.[15] The latter led to the absorption of the Community and the other pillars into the single legal personality of the post-Lisbon European Union. Even though the Lisbon Treaty was a compromise following the failed Treaty Establishing a Constitution for Europe of the early 2000s, both it and the *Kadi* judgment contributed to viewing EU external relational law increasingly through the lens of a unified "constitutionalized" framework.[16]

The increased importance and maturity of the subject are illustrated, for example, by the establishment of the specialized Centre for the Law of EU External Relations at the T.M.C. Asser Institute in The Hague in 2010. In the sphere of law reviews, while articles on EU external relations have long been published regularly in journals on EU law in general,[17] since 1996 the *European Foreign Affairs Review* became a forum specifically on EU external relations, featuring articles from both law and international relations. Moreover, in 2017, the journal *Europe and the World: A Law Review* was launched by UCL Press.[18] Another indicator of consolidation is that EU external relations law has become a staple of many university curricula, for which student-oriented textbooks on "texts, cases and materials" started to appear in 2014.[19]

However, consolidation of this subject is not to be confused with reduced need for academic scruntiny. In addition to common foreign relations law topics such as the domestic effects of international law,[20] the "specific rules and procedures"[21] of the intergovernmental CFSP continue to raise many additional legal questions.[22] These include the delimitation of its scope vis-à-vis other areas of EU policy,[23] the legal nature of the "nonlegislative"

[13] Jan Klabbers, *Presumptive Personality: The European Union in International Law*, *in* INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 231 (Martti Koskenniemi ed., 1998).

[14] For an overview, see Jan Wouters & Hanne Cuyckens, *Festina Lente: CFSP from Maastricht to Lisbon and Beyond*, *in* THE TREATY ON EUROPEAN UNION 1993–2013: REFLECTIONS FROM MAASTRICHT 223 (Maartje De Visser & Anne Pieter Van Der Mei eds., 2013).

[15] Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, ECLI:EU:C:2008:461; see for an argument likening the ECJ approach in *Kadi* to the U.S. Supreme Court's in *Medellín*, Gráinne de Búrca, *The European Court of Justice and the International Legal Order After* Kadi, 51 HARV. INT'L L.J. 1 (2010).

[16] EU FOREIGN RELATIONS LAW: CONSTITUTIONAL FUNDAMENTALS (Marise Cremona & Bruno de Witte eds., 2008); GEERT DE BAERE, CONSTITUTIONAL PRINCIPLES OF EU EXTERNAL RELATIONS (2008).

[17] E.g., the *Common Market Law Review, European Law Review,* or *Columbia Journal of European Law.*

[18] See for the inaugural issue Christina Eckes et al., *Editorial*, 1 EUROPE & WORLD: L. REV. 1 (2017).

[19] BART VAN VOOREN & RAMSES WESSEL, EU EXTERNAL RELATIONS LAW: TEXT, CASES AND MATERIALS (2014); and PIETER JAN KUIJPER ET AL., THE LAW OF EU EXTERNAL RELATIONS: CASES, MATERIALS, AND COMMENTARY ON THE EU AS AN INTERNATIONAL LEGAL ACTOR (2d ed. 2015).

[20] INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION (Enzo Cannizzaro eds., 2012).

[21] Consolidated Version of the Treaty on European Union art. 24(1)(1), 2012 O.J.(C 326) 13 [hereinafter TEU].

[22] Peter van Elsuwege, *EU External Action After the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency*, 47 COMMON MKT. L. REV. 987 (2010).

[23] Geert De Baere & Tina Van den Sanden, *Interinstitutional Gravity and Pirates of the Parliament on Stranger Tides: The Continued Constitutional Significance of the Choice of Legal Basis in Post-Lisbon External Action*, 12 EUR. CONST. L. REV. 85 (2016).

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acts that govern it,[24] and the overall "coherence" of EU foreign policy despite a plurality of procedures and actors.[25] If anything, this tension between intergovernmental and supranational modes of operation kindles—and indeed requires—more legal scholarship.

Fourth, a new era of "seminormalization" may be dawning on EU external relations law scholarship as part of the emergence of the field of comparative foreign relations law. While the European Union is not turning into a federal "Superstate" anytime soon, it is likely to remain the most advanced model of regional integration and the most globally active regional organization. Consequently, the law of its external relations will start to appear less exotic, both because of similarities it shares with national foreign relations law in (federal) countries around the world, and, further down the line, because of the increased presence of regional organizations as global actors with their own set of external relations laws.[26]

The "Fermi Paradox" of Foreign Relations Scholarship: Where Is Everybody Else?

There are a bit less than two hundred sovereign states in the world, each with their own domestic law that "governs how that nation interacts with the rest of the world."[27] Nonetheless, EU external relations law appears to be the only vibrant field of the study of this particular area of law besides the well-established U.S. foreign relations law. One could call this the "Fermi Paradox" of foreign relations scholarship,[28] which essentially asks: Why only America and the European Union? Where are all the other fields of foreign relations scholarship? This may be explained by a combination of three factors that arguably have existed together only in the United States and the European Union in the recent past: federalism, normative zeal, and superpower capabilities.

First, both U.S. and EU foreign relations scholarship has proliferated due to the added legal complexities of reconciling quasi-federal governance with external relations unity.[29] For the European Union, this is compounded by the fact that the Member States are prominent actors in parallel to the Union on the world stage. By contrast, there is considerably less to write about in nonfederal (and nondevolved) polities about external relations, which can be folded into scholarship on public law rather than developing into a field of its own.

Second, what makes American and EU foreign relations interesting to both international relations scholars and lawyers is their "normative zeal," exhibiting—at some times more strongly than at others—policies to actively export their own values and models of governance to other parts of the world.[30] International relations scholars have long been fascinated with "American exceptionalism"[31] and Europe as a "normative power,"[32] respectively. In the case of the European Union, there is a particularly pronounced legal dimension to this, given that the EU

[24] Ramses Wessel, *Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?*, 20 Eur. Foreign Aff. Rev. 12 (2015).

[25] S. Dennis Engbrink, *The European Union's External Action: Coherence in European Union Foreign Policy Despite Separate Legal Orders?*, 44 Legal Issues Econ. Integration 5 (2017).

[26] Marise Cremona et al., ASEAN's External Agreements: Law, Practice and the Quest for Collective Action (2015).

[27] To use the definition from the essay by Curtis A. Bradley, *Foreign Relations as a Field of Study*, 111 AJIL Unbound 344 (2017).

[28] The original Fermi Paradox refers to the tension, conceptualized by physicist Enrico Fermi in 1950, between the size and age of the observable universe, on the one hand, and the lack of any evidence for extraterrestrial life beyond Earth, on the other. *See* Santhosh Mathew, Essays on the Frontiers of Modern Astrophysics and Cosmology 163 (2015).

[29] Robert Schütze, Foreign Affairs and the EU Constitution: Selected Essays 175–208 (2014).

[30] For the EU, see Marise Cremona, *The Union as a Global Actor: Roles, Models and Identity*, 41 Common Mkt. L. Rev. 553 (2004).

[31] Not to be confused with "foreign relations exceptionalism," i.e., the idea that constitutional principles operate differently in the sphere of foreign policy. *See* Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from "Exceptionalism"*, 128 Harv. L. Rev. F. 294 (2015).

[32] Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 J. Common Mkt. Stud. 235 (2002).

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Treaties constitutionally commit the Union to conduct its external relations based on "the principles which have inspired its own creation, development and enlargement."[33]

Third, there is the matter of capabilities. While any country can make grandiose statements about its foreign policy ambitions, the subject becomes all the more salient when the country has the means to actually achieve some of them on a global scale. This, in turn, makes an understanding of the legal framework all the more relevant. Here, the European Union stands out next to the United States, above all due to its considerable economic weight. But also in the military domain, though left far behind by the U.S., the combined (and increasingly coordinated) defense budgets of its Member States easily surpass those of all other countries with the exception of China.[34] Also important here is the factor of "soft power," including and especially as applied to the legal domain. Next to the U.S. Supreme Court, the ECJ and certain Member State courts such as the *Bundesverfassungsgericht* have arguably the largest clout in the world. Both the United States and the European Union have large numbers of excellent law schools, research institutes, and funding-schemes, in sharp contrast to countries from the Global South. In short, both the United States and the European Union have the global capabilities to affect change through their foreign policies, and they also have the academic infrastructure to have people write and publish about it.

Conclusion: Foreign Relations Law in an Era of Upheavals

As outlined in this essay, EU external relations law has rapidly developed into a vibrant field of scholarship over the past decades. Even though it can rely on a period that is only a fraction of the more than two centuries of U.S. foreign relations law practice, in the emerging field of comparative foreign relations law it will be one of the supporting pillars and drivers. This is due to a rare combination of factors it shares with the United States. Nonetheless, even though comparability entails a degree of normalization, the future of EU external relations law and foreign relations law more generally will be anything but dull. From Brexit to the Trump Administration, to rising powers of the Global South, to cyber governance and climate change, the rules that govern how major players interact with the outside world will continue to capture the interest of legal scholars for decades to come.

[33] TEU art. 21(1)(1). While particularly pronounced in the European Union, many national constitutions today contain global mission statements. *See* JORIS LARIK, FOREIGN POLICY OBJECTIVES IN EUROPEAN CONSTITUTIONAL LAW (2016).

[34] Andrew Moravcsik, *Europe Is Still a Superpower*, FOREIGN POL'Y (Apr. 13, 2017).

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