



# City Research Online

## City, University of London Institutional Repository

---

**Citation:** Fahey, E. (2016). The European Court of Justice and External Relations Law: Constitutional Challenges. *European Law Review*, 41(5), pp. 769-772.

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

---

**Permanent repository link:** <http://openaccess.city.ac.uk/16385/>

**Link to published version:**

**Copyright and reuse:** City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

---

City Research Online:

<http://openaccess.city.ac.uk/>

[publications@city.ac.uk](mailto:publications@city.ac.uk)

---

*The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford: Hart, 2014) 298pp. inc. index, hardback, ISBN: 9781849465045) (edited by Marise Cremona and Anne Thies) is a recent edited volume featuring 13 essays by leading external relations scholars. It is a rich and deserving read. I cannot say that I would state that the book is 'timely' as the book itself grapples with the question of how powerful the Court is and should be- an eternal research question of EU law. I say this also because since its publication or thereabouts, the Court has held a birthday party to celebrate its most activist decision and has struck down an international agreement that it itself negotiated even though mandated by the treaties. So my own sense of irony is not unfiltered here as to what the Court is and does.

The editors pose the curiosity of the subject- and their contribution in a subject described in its jacket-cover as 'highly legalised,' but also 'highly political'. It is a juxtaposition of a topic that reflects the strange fence on which the subject sits, now a hyper-legalised but still highly regularised and ordinary yet also extra-ordinary field of EU law. One significant feature of EU international relations or foreign affairs law- to give the subject its contemporary post-Lisbon name- is that it is still a *hugely* court-centric one. This is not even for good reason. There are in reality a handful of truly 'constitutional' moments in external relations and mostly at a time predating broader constitutional moments in other fields of EU law. Court-centric analyses nevertheless still lead the research agenda and methodology in this field and the book develops some interesting directions here.

The book is divided into four equal parts, comprising three chapters per section: (I) The CJEU's role in the development of external relations law, (II) jurisprudence and the allocation of external competition, (III) external relations, the Court and the Union legal order and (IV) the Court and the international legal system. Part 1 features three wonderfully-entitled pieces on the Court as a 'reticent court,' 'a selfish court' and 'a powerless court' by Cremona, De Witte and Hillion respectively. Their thought-provoking titles as devices leave the reader aware of the 'actorness' that the Court is perceived to possess.

Cremona in Ch. 1, 'A Reticent Court? Policy Objectives and the Court of Justice', focussing upon the internal constitutional landscape makes a particularly significant point that the EU's external objectives lack a telos or end point in which to move the Union. She writes that although the Union had no single set of objectives for the Union's external policy prior to the Treaty of Lisbon, contemporary external policy objectives are 'non-teleological, non-prioritised, open-ended ended and concerned more with policy orientation than goal setting' (at p. 31). She argues that the contribution of the Court in theory has been considerably constrained in contrast with its function in the internal market. It's extraordinary Opinion 2/13 ([2014] ECR-000; ECLI:EU:C:2014:2454), in defiance of the spirit of the treaties, may cause one to reflect on what is meant by external objectives post-Lisbon.

De Witte's chapter 'A selfish court? *The Court of Justice and the design of international dispute settlement beyond the European Union*,' largely concerns the conundrum of how the Court deals with what he terms as 'rival' dispute mechanisms and how the Court has reacted to initiatives taken by the EU to engage with new or existing international dispute settlement mechanisms. Looking at Opinion 1/76, Opinion 1/91, Opinion 2/94 and Opinion 1/09 (references omitted), he concludes that the outcome of the Court's rulings is not always consistent. This jurisprudence casts a shadow upon the international initiatives of the EU and its Member States, because of occasionally a little selfishness on the part of the court, caring more about its own role. He states somewhat laconically that 'nobody can criticise the Court....' for doing as much (at p. 46). One suspects that his chapter might read differently post-Opinion 2/13.

Hillion's chapter, *'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy (CFSP)'* Ch. 4, argues that the exceptions to the Court's jurisdiction in the area of CFSP do not render it as 'powerless' as one might think. He argues that their commonly asserted distinctiveness needs to be nuanced, because there has been an inversion of pre-Lisbon policy and so now the Court of Justice has *more* jurisdiction unless explicitly excluded. Hillion points to the important broader changes to the context within which the Court operates- e.g. with constitutional norms as to democracy, the rule of law and fundamental rights- as a 'louder' background landscape. He draws from literal, systemic and principled arguments to support the view that more control and provisions which are not as restricted as they may look. He further argues that the Court's patrolling function as to Article 40 TEU could bolster its interpretative power in relation to the CFSP so that the Court is not so 'powerless' in this field. What powerless really means in EU law is another story. Rather, the entire history of demarcations and red-lines in the treaties- and the Court's response to them- readily supports such a thesis.

In Part II, Neframi's chapter *'Vertical Division of Competences and the Objectives of the European Unions' External Action'* in Ch. 5 asks the question as to whether the Court will adopt a global view of external action competence and objectives beyond specific fields? She reviews the caselaw on vertical allocation of competences, exploring the boundaries of external action competences, the doctrine of exclusivity and the vertical allocation of competences when parallelism between competences and objectives has to be defined. Neframi argues that it is important the Court remains exclusively competence to define the allocation of powers in the implementation of mixed agreements. For her, in the collective exercise of external competences through cooperation, the Court acts as a constitutional adjudicator of competences in the 'constitutionalisation' process.

Kuijper in Ch. 6 *'The Caselaw of the Court of Justice of the EU and the Allocation of External Relations powers,'* looks at the distance between the legislature and judiciary and the allocation of powers between major institutions as a question of balance of powers. It is a most interesting 'take' on a vast range of questions that are neatly distilled within the theme where he looks a range of stages in the negotiation of international agreements- a topic of considerable salience at the time of writing in jurisprudential terms. He concludes that there is no indication that the Court has been particularly favouring the European Parliament in order to ensure democratic legitimation of EU external action. Instead, he concludes that the Court has been sensitive to the question of balance between the institutions, done with moderation and good judgment- except where its own powers are concerned, a conclusion that sits on all fours with the findings of De Witte.

Van Elsuwege in his piece, *'The potential for inter-institutional conflicts before the Court of Justice: Impact of the Lisbon Treaty,'* reflects on the topic of inter-institutional conflicts in the field of external relations. What precisely he hones in on may be said to be two fold- the actual problem and its prevention. Perhaps both of these themes are most laudable research questions of themselves. His account examines the borderline between CFSP and non-CFSP action as a major source of inter-institutional tension and the inter-institutional litigation on the horizontal division of non-CFSP competences, as to the very topical issue of the procedure for the conclusion of international agreements- the subject of much recent analysis. The former overlaps substantively with Hillion's piece but adopts an entirely different method to the question, taking a different form of actor as the focus. He depicts the Court as 'an honest broker' playing a 'key role', in a field where all institutional actors jealously defend their newly acquired powers.

In Part III, Thies' chapter, *'General Principles in the development of EU external relations law'* distinguishes her contribution as a view of the *legal* principles in the context of foreign affairs- and

not the ECJ's approach to the accommodation of EU institutions' *political* agenda and scope for manoeuvre in external relations. It is a difficult distinction to maintain perhaps generally- against whom or what one could readily ask? Are such issues not pertinent to the Court's construction of such principles? Nonetheless, the chapter is a rich read and is expressed to distinguish between interpretive, benchmark and organisational principles governing the development of EU external relations law by her, which are outlined exhaustively. She labels as a series of challenges here, *inter alia*, the international legal context of EU foreign affairs such as the place of non-state actors not willing to accept EU organisational principles, the Court's limited jurisdiction as to the CFSP and the lack of judicial dialogue in external relations with Member State courts who mostly do not review such caselaw- the latter being a most interesting issue that the chapter develops well.

In Ch. 9 '*The many Visions of Europe: Insights from the Reasoning of the European Court of Justice in External Relations law*', Azoulai in a superb piece which differs substantially from the rest of the format of the book in method and approach, as a scholar of a different genre, takes a step back to reflect on the banality of EU external relations law reasoning. As he states, *Costa v. ENEL* is more than well known for all of its contents and consequences, whereas in *AETR*, the Court established a new form of European power that is not always so understood or embraced as constitutionally foundational. He reflects on the forms of institutionalism that the Court there expounded- not based on primacy but rather on either what he terms as an integrative version of institutionalism or associative institutionalism. The Court struggles with now, he states, whether to re-elaborate the institutionalist perspective or shifting the foundations of EU external power.

Eckes in Ch. 10 '*The Court of Justice's Participation in Judicial Discourse: Theory and Practice*' considers the nature of judicial reasoning and considers internal discourse as the practice of judicial interaction between the CJEU and the courts of the Member States (under the preliminary reference procedure and outside it without a formal mechanism) and then external discourse as the practice of judicial interaction between the CJEU and international judicial bodies (ECtHR, EFTA and WTO Dispute Mechanism). She argues that the CJEU has succeeded in translating national constitutional rights into the EU context. Internal EU discourse can only contribute to reflections on the external discourse at an abstract level.

In Part II on the Court and the International Legal System, the section begins with a contribution by (Advocate General) Kokott and Sobotta, '*The Kadi Case- Constitutional Core Values and International Law- Finding the Balance.*' In fact, it is an evaluation of the *aftermath* of the infamous *Kadi* saga and presents a very interesting temporal twist on the overall book schema. They explore the creation of the office of the United Nations Ombudsman in 2009 and the development of her powers and argue that the system arising thereafter is a huge improvement on the initial mechanism and consider her track record. The chapter concludes that 'the developments following the *Kadi* case demonstrate the intention of the relevant actors to find a workable balance we are optimistic that the balance will be found' (at p. 221). Perhaps, however, despite their positivity, it might be said that a final verdict on the outcome of *Kadi* I and II is not yet truly ripe given the information deficit surrounding the procedure that concerns many in broader debates and literature.

The chapter by Heliskoski on the prior involvement mechanism in the draft ECHR Accession Agreement, '*The Arrangement Governing the Relationship between the ECtHR and the CJEU in the Draft Treaty on the Accession of the EU to the ECHR,*' makes for an interesting read after the delivery of the Opinion 2/13 so-called 'Christmas bombshell'. It transpires that he argued correctly that the mechanism for prior involvement appeared to create as many legal problems as it solved. He queried who would determine whether the CJEU had assessed compatibility with EU law and

whether the decision if taken by the ECtHR could be in conformity with EU law. The mechanism operated to privilege the EU Member States unlike the courts of other contracting parties to the ECHR- and under no other EU agreement could such a mechanism be found. As is well known, the CJEU in Opinion 2/13 found that it was not able to provide for a definitive interpretation of secondary law and that the procedure had been wrongfully confined to a situation adversely affected EU competences and refused to countenance any threat to the autonomy of EU law or rather its own prerogatives. It seems perhaps easy to remedy the Court's critique in a future draft, but as Heliskoski rightly states, it is an entirely esoteric arrangement in EU international agreements.

Ch. 13 features an excellent contribution by Wouters, Odermatt and Ramopolopus, '*Worlds Apart? Comparing the Approaches of the European Court of Justice and the EU Legislature to International Law*,' comparing the approaches of the Court and EU legislature to international law. They conclude that the Court and legislature take remarkably different attitudes to international law and that there is considerable inconsistency between them. The authors advocate *inter alia* a more practical approach on the part of the Court to the functional succession doctrine or to change its approach to direct effect- perhaps warranting some further revision as a suggestion in light of changes to direct effect in the EU's new Free Trade Agreements. The chapter adopts a very useful and also very clear methodology overall and this writer certainly advocates this particular 'take' on the subject as a worthy future research agenda.

The edited volume reveals well the salience of a court-centric agenda as a recurring and recursive constitutional theme. However, one cannot help wondering how to look at the Court in another way than as proverbial 'the small tail wagging the big dog' in methodological terms. Some of the authors in this collection develop important new directions which provide interesting food for thought and are usefully to be read as a result.