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Special issue: *The European Union's External Action: Views from the Outside*

Research article

The European Union's external action: views from the outside

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Abstract

While most studies in EU external relations law take an inside-out perspective, the question of how the EU and its external action is viewed from the 'outside' is hardly ever raised in EU legal scholarship. Yet studies from the outside can help us to understand how third States and international institutions perceive the (normative) role the EU aims to play. As the EU's external action develops, the law governing the EU's external action has indeed received greater attention from the 'outside'. The articles published in this special issue were presented at a workshop on 'The European Union's External Action and International Law: A View From the Outside' organised by the International Law and Affairs Group (ILAG) of the City Law School and the European Society of International Law (ESIL) Interest Group on the EU as a Global Actor. This introductory article sets the scene for a special issue drawing together various outside perspectives, examining the views from selected international institutions, cooperation frameworks, and non-EU States.

Keywords EU external relations; EU law; international law; EU exceptionalism; multilateralism

1. Theme

In these difficult and insecure times, the world is again looking at the European Union (EU) to see to what extent it is able and willing to live up to its brief to be a leading global actor. With the EU's international ambitions clearly spelled out in the current treaty provisions (such as Articles 3(5) and 21 Treaty on European Union (TEU)), it has become increasingly important to assess to what extent the Union's internal development facilitates or perhaps hampers the attainment of its external objectives. The external promotion of EU values, including democracy and respect for human rights, is again high on the agenda¹ and the current war on the European continent triggers the question of how exactly the EU is to 'preserve peace, prevent conflicts and strengthen international security' (Article 21(3) TEU).

While most studies in EU external relations law take an inside-out perspective, the question of how the EU and its external action is viewed from the 'outside' is hardly ever raised in EU legal scholarship.² Yet, as the EU's external action continues to expand and evolve, ever more questions about how such practice fits within the State-centric system of international law emerge. Some practices in the EU's external action have been criticised as examples of 'European exceptionalism', in which the EU receives various exceptions from its international partners.³ The use of disconnection clauses in international agreements; the EU's insistence that the autonomy of the EU legal order be preserved in dispute settlement bodies; and the practice of concluding mixed agreements and other complex 'joint' forms of cooperation⁴ among others, have raised concerns for the EU's external partners. The EU's external relations have also been criticised in terms of failing to live up to the values the EU seeks to promote externally, such as the EU's record in the field of human rights or migration policy. Furthermore, the EU's external action has attracted certain criticism from international lawyers who have pointed to fields of EU action which may violate international law.⁵

Indeed, much of the debate about the EU's external action has come from the 'inside', that is, from experts who have backgrounds in EU law and European studies. This special issue explores the EU's external action from the 'outside', including a range of perspectives that are often not included in the study of EU external relations. The term 'outside' applies to a range of viewpoints. It includes a geographical element – perspectives of non-EU States and entities that have engaged with the EU, both in its neighbourhood (such as Switzerland) and further abroad (such as Mercosur). In addition to third countries and cooperation frameworks, other international organisations, again either nearby (such as the Council of Europe) or at some distance (such as the United Nations), have been dealing extensively with the EU and have been struggling with its exceptional position. Finally, also in the development and functioning of international law, the EU's position remains something to be aware of. Thus, the International Law Commission has been confronted with questions on how a non-State actor like the EU could contribute to the further development of international law (something that is part of the EU's own objectives), while the EU's position in the enforcement of international law has also raised new questions (inter alia on its participation in compliance mechanisms or arbitral tribunals).

One of the aims of this special issue is thus to bring together different parts of the study of EU external relations. EU external relations is often discussed in terms of a particular policy field, such as

¹ E Fahey and I Mancini (eds), *Understanding the EU as a Good Global Actor: Ambitions, Directions and Values* (Routledge 2022).

² But see the discussion of 'EU foreign relations law' in the field of comparative foreign relations law, in the Symposium on Comparative Foreign Relations Law, e.g. CA Bradley, 'Foreign Relations Law as a Field of Study' (2017) 111 *AJIL Unbound*. In EU studies and political science, the theme has been addressed more prominently. See, also for references, N Chaban and J Hedley (eds), *Perceptions, Narratives and Attitudes: New Perspectives and Geographies in the Study of External Perceptions of the EU*, Special Section Part I and II in (2021) 3 and (2022) 1 *European Foreign Affairs Review*.

³ M Ličková, 'European Exceptionalism in International Law' (2008) 19 *European Journal of International Law* 463; G Nolte and H Aust, 'European Exceptionalism?' (2013) 2 *Global Constitutionalism* 407.

⁴ N Levrat, Y Kaspirovich, C Kaddous and RA Wessel (eds), *The EU and Its Member States' Joint Participation in International Agreements* (Hart Publishing 2022).

⁵ See J Odermatt, *International Law and the European Union* (Cambridge University Press 2021).

trade, investment, security, human rights or climate change. This special issue seeks to bring together some of these disparate elements, overcoming this compartmentalised approach. The issues dealt with are brought together by a similar methodological approach, one that aims to take into account issues and challenges that may be overlooked. By bringing together studies from various parts of EU external action, the special issue helps reveal patterns that may not be revealed through a sectoral approach.

Another aim is to broaden the range of issues and concerns that are debated. A textbook on EU external relations law may give the impression that issues such as the balance of competences or the appropriate legal basis for decisions are the most important legal issues in this field. While this may be the case from the 'internal' perspective of EU law, these issues may be less important for those studying EU external action, or engaging with the EU, from an outside perspective. 'Foreign relations law' is understood as 'the domestic law of each nation that governs how that nation interacts with the rest of the world'.⁶ This can include legal questions such as the authority of actors to engage in foreign policy, or the role of the courts in reviewing foreign policy decisions. It is understandable, then, that the study of the EU's external relations law would similarly focus on the internal issues, such as the allocation of responsibilities between the EU institutions or the powers of the EU and the Member States. Yet these internal issues for the EU and Member States can have important effects that are relevant for 'outside' actors and the international system in which the EU operates. As Bradley explains, there is a link between a State's foreign relations law on the content and operation of international law.⁷ As an illustration, to understand US foreign relations law by focusing on its internal practice, without also understanding how this policy is understood and received outside, would only present part of the picture. Indeed, the US is often criticised for exceptionalism in international law. However, it has been pointed out that the US is not alone in this regard, and the Union is increasingly discussed in such isolationist terms.⁸

Studies on EU external relations law also tend to be written by experts in EU law, and primarily for a European audience. Again, this is understandable, especially given that EU external relations law can be a complex and evolving field of law, which may be of little interest to scholars from outside that discipline. Studies on the EU's external relations also tend to present the EU as having a positive role in the world, emphasising, for example, its role in promoting multilateralism or 'global values'. Criticism of the EU's external action tends to be about making the EU more *effective*. Studies from an outside perspective can help to address this by including a broader range of perspectives and viewpoints. Some scholars have noted this emphasis on internal issues.⁹ The study of EU external relations, moreover, is no longer a niche discipline, of interest to a limited number of legal scholars in the EU. As the EU's external action develops, the law governing the EU's external action has received greater attention from the 'outside'. This special issue aims to address these issues by examining the outside perspective from both selected international institutions and cooperation frameworks, and non-EU States.

2. The contributions

The contributions to this special issue all examine the EU's external relations from a different 'outside' perspective.¹⁰

A first set of papers take the perspective from different branches of international law. In her contribution, Teresa Cabrita first of all revisits the classic question of to what extent the EU can

⁶ CA Bradley, 'What Is Foreign Relations Law?' in CA Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019).

⁷ *ibid.* 'Foreign relations law can influence how nations form treaties and what they agree to in treaties, and it can also affect the State practice that forms the foundation for rules of customary international law.'

⁸ S Safrien, 'The Un-Exceptionalism of U.S. Exceptionalism' (2008) 41(5) *Vanderbilt Journal of Transnational Law* 1307; J Odermatt, 'Convergence through EU Unilateralism' in E Fahey (ed), *Framing Convergence with the Global Legal Order: The EU and the World* (Hart Publishing 2020).

⁹ 'The existing EU literature is mostly devoted to the study of the EU's internal legal framework. As a result, analysis of the EU's place in the international legal arena tends more often than not to be limited to the rules governing the EU's external relations.' Book Review, 'Kronenberger, Vincent (ed), *The European Union and the International Legal Order: Discord or Harmony?* The Hague: T.M.C. Asser Press. 2001' (2003) 14 *European Journal of International Law* 1051.

¹⁰ First drafts of these contributions were presented and discussed at the online workshop organised by The City Law School, London, in cooperation with the Interest Group *The EU as a Global Actor* of the European Society of International Law in June 2020. A summary of that discussion can be found in AM Pelliconi, J Odermatt and RA Wessel, 'The European Union's External Action and International Law: A View From the Outside', City Law School Research Paper 2020/02, 2020 <<https://openaccess.city.ac.uk/id/eprint/24541/>> last accessed 13 June 2022.

contribute to the development of international law, by adopting the perspective of the International Law Commission. She notes that while EU practice has at times served as evidence for the codification of 'IO-specific' rules of general international law, it has largely been deemed too 'exceptional' for generalisation. EU exceptionalism also returns in the contribution by Birgit Hollaus when she looks at the EU from the vantage point of compliance mechanisms in international environmental law. She finds that in those mechanisms, EU claims for special treatment are often met with strong opposition as EU special treatment is not perceived as a legal necessity (as it is present from an EU law point of view) but rather as a political desire. EU claims for special treatment may even harm its position as a 'green leader' in multinational frameworks. Similar conflicts between EU 'autonomy' and its participation in the international legal system also appear in the context of international arbitral tribunals. As Katariina Särkännä shows, it is difficult to reconcile the 'intra-EU' and international perspectives in the context of investment treaties, and new international law instruments are needed to overcome this.

A second set of contributions deals with perspectives from different international organisations. Taking the vantage point of the UN Security Council, Cornelia Klocker examines EU military operations in the context of the international collective security system. She particularly focuses on the difference between operations with and without a UN Security Council authorisation and reveals the complexities of certain autonomous EU operations. The EU is not always easy to deal with, even for another European organisation such as the Council of Europe, as Jörg Polakiewicz finds in his contribution from the perspective of the Council of Europe. He argues that the Council of Europe and the EU have a shared responsibility for upholding the effectiveness of their respective frameworks and ensuring that any overlapping competences do not create conflict. He analyses concrete proposals with a view to further strengthening the existing cooperation between the two organisations.

Partly from the perspective of another international organisation, but primarily perhaps of another global region, Jamile Bergamaschine Mata Diz views the operations of the EU in the ongoing negotiations with Mercosur. As she argues, due to diverging political preferences, also within Mercosur, negotiations with the EU remain difficult, in particular as regards meeting the 'non-trade' demands (for instance, in relation to sustainable development) that have been put on the table by the EU. And, using a Swiss perspective, Yuliya Kaspiarovich informs us how it is to be in Europe but not in the EU. By comparing the Swiss and the British situations, she identifies a systemic approach regarding institutional designs that the EU is offering to its neighbours via comprehensive but also very different international agreements. While, from an EU perspective, there may be a certain logic in the way the role of Court of Justice of the European Union and/or of an arbitration tribunal operates, this is not the case for third States, which increasingly wonder why the 'domestic' law of one party should prevail.

All in all, these contributions reflect a certain unease with how the EU operates externally and how it continues to underline its 'exceptionalism' and expects third States and other international organisations to simply accept that. The (normative) power of the EU, and its Court,¹¹ should indeed not be underestimated, but this special issue also teaches us that there is perhaps a limit to what can be asked of external partners. As a global actor, the EU has to follow the rules of the game if it wishes to play along in the international (legal) system. The contributions seem to call for a somewhat more modest attitude of the EU in its dealings with international partners. While this may underline the need for the EU to live up to its brief to observe and develop international law (Article 3(5) TEU) and accept that for non-EU Member States EU law is not at the top of the hierarchy of norms, time will tell whether the current insecure situation on the European continent will change the perception of third States on the normative role of the Union.

Declarations and conflicts of interest

Research ethics statement

Not applicable to this article.

¹¹ A Reich and H-W Micklitz (eds), *The Impact of the European Court of Justice on Neighbouring Countries* (Oxford University Press 2020).

Consent for publication statement

Not applicable to this article.

Conflicts of interest statement

The authors are Guest Editors of the journal's special issue *The European Union's External Action: Views from the Outside* this article is included in. All efforts to sufficiently anonymise the authors during peer review of this article have been made. The authors declare no further conflicts with this article.