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978-1-107-03333-7 - The European Union's Shaping of the International Legal Order

Edited by Dimitry Kochenov and Fabian Amtenbrink

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Introduction: the active paradigm of the study of the EU's place in the world

DIMITRY KOCHENOV AND FABIAN AMTENBRINK

1 The active paradigm to study the EU's engagement with the world

This book zooms in on the EU's active engagement with the international legal order. It aims at analysing how the EU shapes its environment and creates rules and practices for the world, reshaping – or at least attempting to reshape – international law. The book does more than simply visiting a range of essential fields of the EU's engagement. It offers an ethical perspective on the Union's actions, shedding light on some underlying motivations, which are at times more complex than the official documents would suggest.

This collection advocates what we refer to as an 'active paradigm' of the study of the EU in the international legal context, approaching the Union as an active co-creator of the international legal order,¹ as opposed to emphasizing the perspective of the reception of international law in the EU,² the latter's legal interconnectedness with the rest of the world,³ its role in emergencies⁴ or the soft

¹ See J. Frowein, 'The Contribution of the European Union to Public International Law', in A. von Bogdandy, P. Mavroides and Y. Mény (eds.), *European Integration and International Coordination: Studies in Honour of Claus-Dieter Ehlermann* (The Hague: Kluwer Law International, 2002), p. 171; B. de Witte, 'The Emergence of a European System of Public International Law', in J. Wouters, A. Nollkaemper and E. de Wet (eds.), *The Europeanisation of International Law* (The Hague: TMC Asser Press, 2008).

² For a classical authoritative account of EU external relations law, see P. Eeckhout, *EU External Relations Law*, 2nd edn (Oxford University Press, 2012). Specifically on the role of international law within the EU legal order, see E. Cannizzaro, P. Palchetti and R. Wessel (eds.), *International Law as Law of the European Union* (Leiden: Martinus Nijhoff, 2011).

³ M. Evans and P. Koutrakos (eds.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart Publishing, 2011).

⁴ A. Antoniadis, R. Schütze and E. Spaventa (eds.), *The European Union and Global Emergencies: Law and Policy Aspects* (Oxford: Hart Publishing, 2011).

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‘governance’ approaches to EU’s global influence, prevalent in the literature.⁵

The analysis reveals that embracing the ‘active paradigm’, while at times overambitious, overall is well justified in a wide array of areas. Indeed, the EU’s global legal influence is not only rooted in its very *raison d’être*⁶ – it is much more significant and consequential than many would expect. In fact what is presently suggested is that the standard approach of locating the EU *within* the international legal order should coexist with a different one: the shaping of the international legal order *by* the EU. It is this unorthodox approach, which lies at the core of the active paradigm of approaching the study of the EU in the international legal context, that takes centre stage in this edited volume. Crucially, it opens the way to assess the Union’s future role in the world re-imagined under its influence.

The EU plays an important role in the formation of international law. This takes place through a number of avenues ranging from the consequences of the mere existence of this supranational legal order within the sphere of international law⁷ – providing a model way of thinking about an alternative approach to the prevalent practice of framing international relations, thus inciting actions of others and providing a point of inspiration⁸ – to the attempts by the Union to engage in a proactive co-shaping of the international legal order alongside other actors. Such co-shaping, too, takes a wide array of forms, ranging from simply

⁵ See e.g. G. de Búrca, ‘EU External Relations: The Governance Mode of Foreign Policy’, in B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The EU’s Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013).

⁶ See the chapter by Gráinne de Búrca in this volume as well as the concluding chapter by the editors.

⁷ See e.g. R. Petrov and P. Van Elsuwege (eds.), *The Application of EU Law in the Eastern Neighbourhood of the European Union* (London: Routledge, 2013); Evans and Koutrakos, *Beyond the Established Legal Orders*.

⁸ This is an important consideration to take into account, which underlies the successes of the export of the EU’s *acquis* to third countries, as well as the attractiveness of the block explaining the successes of its steady growth through history. On the latter, see C. Hillion (ed.), *EU Enlargement: A Legal Approach* (Oxford: Hart Publishing, 2004); M. Cremona (ed.), *The Enlargement of the European Union* (Oxford University Press, 2003); A. Ott and K. Inglis, *Handbook on EU Enlargement: A Commentary on the Enlargement Process* (The Hague: TMC Asser Press, 2002). On the former, see I. Govaere, et al. (eds.), *The European Union in the World: Essays in Honour of Marc Maresceau* (Leiden: Brill, 2014); L. Delcour and E. Toulmets (eds.), *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood* (Baden-Baden: Nomos, 2008); A. Magen, ‘The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?’ (2006) 12 *Columbia Journal of European Law* 384; M. Maresceau and E. Lannon (eds.), *The EU’s Enlargement and Mediterranean Strategies: A Comparative Analysis* (Basingstoke: Palgrave, 2001).

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pursuing internal EU objectives with clear implications for the neighbourhood and trading partners,⁹ to the active involvement in international organizations,¹⁰ coupled with exporting its own approaches to the functioning of international law,¹¹ as well as international agenda-setting¹² and the solving of specific problems in the spirit of the values enshrined in the Treaties.¹³ Add to this the promotion of particular principles in its external relations¹⁴ and the involvement in the formulation of the essential rules at the international plane, including those governing the creation and recognition of states¹⁵ and those ensuring international financial stability¹⁶ – and a picture of EU's shaping of the international legal order emerges in all its complexity.

The EU's engagement with the international legal order has been most intimate from the Union's very inception and, especially, from the Court of Justice's (ECJ) clarification that EU law is, as such, not international law.¹⁷ Not a simple international organization,¹⁸ the EU ensured that its law 'is dressed in the constitutional gowns of supremacy and direct

⁹ As it happens in the area of migration, for instance, as described by Laure Delcour in this volume.

¹⁰ S. Blavoukos and D. Bourantonis (eds.), *The EU Presence in International Organisations* (London: Routledge, 2010); M. Rasch, *The European Union at the United Nations* (Leiden: Martinus Nijhoff, 2008).

¹¹ As explained by Tilman Krüger in relation to WTO law later in this volume.

¹² As with the global financial transactions tax, analysed by Bart Van Vooren in his contribution to this collection.

¹³ M. Cremona, 'Values in EU Foreign Policy', in M. Evans and P. Koutrakos (eds.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart Publishing, 2011), p. 275; S. Lucarelli, 'Values, Principles, Identity and European Union Foreign Policy', in S. Lucarelli and I. Mannes (eds.), *Values and Principles in European Union Foreign Policy* (London: Routledge, 2006). See also the chapter by Ester Herlin-Karnell in this volume.

¹⁴ As explained by Laurent Pech in this volume, using rule of law as an example. Classical case studies usually focus on the promotion of democracy and human rights worldwide, e.g. L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press, 2005). See also L. Ogerschnig, 'EU Democracy Assistance: An Analysis of Theory and Practice 1991–2011', PhD thesis, European University Institute, Florence, 2013.

¹⁵ As analysed by Steven Blockmans in this volume.

¹⁶ As analysed by Christoph Ohler in this volume.

¹⁷ Case 26/62 *Van Gend en Loos* 64/64 *Flaminio Costa v. ENEL* [1964] ECR 585. See on the nature of EU law: R. Schütze, *From Dual to Cooperative Federalism* (Oxford University Press, 2009); K. Lenaerts and K. Gutman, "'Federal Common Law" in the European Union: A Comparative Perspective from the United States' (2006) 54 *American Journal of Comparative Law* 1.

¹⁸ A. Somek, 'On Supranationality' (2001) 5 *European Integration Online Papers*, available at <http://eiop.or.at/eiop/pdf/2001-003.pdf>.

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effect'.¹⁹ The distinction between EU law and international law is of essential importance for the functioning of the former in the Member States, but it also has broader implications. In fact, one of the main achievements of the Union to date remains the substitution of what Philip Allott characterized as 'diplomacy' in the relations between the Member States of the Union with 'democracy':²⁰ the very logic of interstate relations within the Union has thereby been transformed entirely.²¹ Instead of acting in the interests of 'own peoples'²² no matter what, the Member States are ready to take the interests of others (both states and, necessarily, peoples of other states) into account, when decisions are taken. The key implication of this transformation is the demonstration that an *ethos* of interstate relations different from the familiar de Vattelien dogma, which has been holding our minds hostage for centuries, is feasible.²³ Put differently, by distancing itself from the reigning paradigm of international relations internally, the EU has undergone a remarkable transformation, becoming a success story in the eyes of its neighbours.

The idea of distancing the EU legal space from classical international relations also helps in explaining the successes of the EU's enlargements, widely regarded as the main foreign policy achievements of the EU to date. By socializing new Member States into the constitutionalized space of the Union where Allott's 'diplomacy' is not the main *modus operandi*, any enlargement²⁴ – from the EU's internal perspective at least – is a move from 'diplomacy' to 'democracy'.

Yet, the impact of such constitutionalization on the *ethos* of the Union's external action has been minimal, as Andrew Williams's scholarship

¹⁹ P. Eeckhout, 'A Panorama of Two Decades of EU External Relations Law', in A. Arnulf, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford: Hart Publishing, 2008), p. 329. For a magisterial analysis of EU constitutionalism, see J. H. H. Weiler, *The Constitution for Europe* (Cambridge University Press, 1999).

²⁰ P. Allott, 'The European Community Is Not the True European Community' (1991) 100 *Yale Law Journal* 2485.

²¹ E. Basheska, 'The Principle of Good Neighbourly Relations in European Union Law', PhD thesis, University of Groningen, 2013.

²² On the 'container theory of society', see U. Beck, *What Is Globalisation?* (Cambridge: Polity Press, 2000), p. 23.

²³ For a powerful plea to move away from the de Vattelien reality of international relations, see P. Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge University Press, 2002). See also I. Scobbie, 'Slouching towards the Holy City: Some Weeds for Philip Allott' (2005) 16 *European Journal of International Law* 299.

²⁴ On the connection between EU enlargements and the development of European constitutionalism, see W. Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press, 2012).

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demonstrates with remarkable clarity. Having ensured peace internally, the EU is not a peacemaker externally²⁵ – and understanding its engagement with human rights in the wider world has rightly been called a ‘study in irony’.²⁶ EU’s dealing with the conflict in the former Yugoslavia provides but one vivid example of the remarkable inability to deal with outstanding problems even in the closest proximity to the Union. Regrettably, to agree with an authoritative study by Urfan Khaliq, as far as the actual promotion of values and principles by the EU is concerned, it is rooted in policies which are ‘neither consistent nor coherent, but need to be’.²⁷ Even the pre-accession value-promotion context leading to the EU’s enlargements allows coming to the same conclusion.²⁸

The internal success story of the EU is essentially different from the external disappointments and is rarely questioned.²⁹ It provides a vivid example of how much can be achieved by departing from the classical dogmatics of international relations and mainstream international law in interstate relations in a given region. In Europe *le droit de l’intégration* has been born,³⁰ potentially providing a way out from the shadow of at least the most disappointing side-effects of de Vattelism through the constitutionalization of interstate relations and thereby – essentially – the departure from international law as we know it outside the Union.

Quite naturally, the constitutionalization of EU law led to the emergence of the questions concerning international law’s functioning within the supranational EU legal order.³¹ Although openness to international law is the prevalent vision,³² whether international law should function in the EU internally depends on the blessing of the Union, which can also be withheld, should it contradict the EU’s policy, objectives, rationale or principles. Numerous examples of such situations can be given, from the

²⁵ A. Williams, *The Ethos of Europe* (Cambridge University Press, 2010), pp. 22–69.

²⁶ A. Williams, *EU Human Rights Policies: A Study in Irony* (Oxford University Press, 2004).

²⁷ U. Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union* (Cambridge University Press, 2008), p. 447.

²⁸ D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Areas of Democracy and the Rule of Law* (The Hague: Kluwer Law International, 2008).

²⁹ For exceptions, see I. Ward, *The Margins of European Law* (Basingstoke: Macmillan, 1996); G. de Búrca, D. Kochenov and A. Williams (eds.), *Europe’s Justice Deficit?* (Oxford: Hart Publishing, 2014 (forthcoming)).

³⁰ P. Pescatore, *Le droit de l’intégration* (Leyden: A. W. Sijthoff, 1972).

³¹ E.g. C. W. A. Timmermans, ‘The EU and Public International Law’ (1999) 4 *European Foreign Affairs Review* 181.

³² For the basic principle, see Case 104/81 *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641. But see Joined Cases 21–24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.

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enforceability of WTO law³³ in the EU to *Micheletti*,³⁴ and, more recently, *Kadi*,³⁵ to mention just a few. The EU undoubtedly does not regard itself as an emanation of ordinary international law at work and is ready to defend itself – also against international law, if needed.³⁶ Just as the strategies deployed by the Member States in the context of the establishment of supranational legal principles internally,³⁷ such defence can take at least two forms. The first consists in tweaking international law internally in the context of (dis-)applying it within the Union legal order (*Kadi* provides a valuable example of this). The second relates to the (co-)creation of the international law jointly with other actors with the aim of ensuring that the result is compatible with (internal) EU law. While the Union can be seen using both strategies, the second is of particular importance everywhere outwith the Union, not merely within – international law affecting all actors is thereby transformed.

This edited volume focuses on this second field, that is the active (co-)shaping of the international legal order by the EU. As such this collection departs from the majority of the existing studies focusing either on the functioning of international law within the EU or on the role of the EU in implementing international law, where little light is shed on the active role played by the EU in shaping the international legal order. In contrast, in this book the Union is perceived to take on an active rather than a passive role. The key task of this work is to adopt this active perspective in reflecting on EU's achievements and outlining the avenues for the future development of the international legal order. The latter has

³³ A. Tancredi, 'On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order', in E. Cannizzaro, P. Palchetti and R. Wessel (eds.), *International Law as Law of the European Union* (Leiden: Martinus Nijhoff, 2011); A. Tancredi, 'EC Practice in the WTO: How Wide Is the "Scope of Manoeuvre?"' (2004) 15 *European Journal of International Law* 933.

³⁴ Case C-369/90 *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria* [1992] ECR I-4239. For an analysis in the context of international law, see e.g. D. Kochenov, 'Ius Tractum of Many Faces: EU Citizenship and a Difficult Relationship between Status and Rights' (2009) 15 *Columbia Journal of European Law* 169 (181–2).

³⁵ Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351. J. Kokott and C. Sobotta, 'The *Kadi* Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23 *European Journal of International Law* 1015.

³⁶ For criticism, see e.g. G. de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51 *Harvard International Law Journal* 44.

³⁷ J. H. H. Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 *Yearbook of European Law* 267.

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been changed profoundly, we argue, since the moment the EU assumed an active role on the international scene.

It is submitted that the role of the EU is only likely to increase in this regard: the Union's mission and economic power – it is still the largest economy in the world by all counts, the times of crisis notwithstanding – all suggest that its influence as a shaper of the international legal order is bound to grow. In particular, its reluctance (or incapacity) to rely on raw power, leaves it with one option: like the Low Countries of the time of Hugo Grotius, to reshape the legal field. Indeed, the EU's very *raison d'être*, rooted in the history of the European integration project and aptly expressed in the objectives of the Treaties and the principles establishing its place in the world,³⁸ seem to suggest – quite strongly and convincingly – that a more important engagement with the development of international law could be expected of it.

2 Structure of the work

The task given to the authors contributing to this book was not to construct, but to analyse. The main premise, which the editors defend, is that the new, active approach to the role played by the EU in the international legal order flows naturally from the current position of the Union in the world, and is particularly visible in the context of the EU's external action during the last two decades, as Gráinne de Búrca explains in her contribution. The book's structure sets out to illustrate and to test the idea of the EU's active engagement with the world. Correspondingly, the work splits into three Parts. Part I provides some theoretical background for the special role played by the Union in the context of international relations and law, focusing on the Union's potential and means to function as an active co-shaper of its international environment. It is demonstrated that expecting just outcomes of the Union (its *nature non-Étatique* notwithstanding) – including redistributive ones – is not only possible and logically sound, but also necessary³⁹ – and that the Union's very *raison d'être*, particularly as rethought and reassessed during the ongoing economic crisis, supports this vision.⁴⁰ Moreover, this is also reflected in numerous provisions of the Treaties, analysed in a

³⁸ For a meticulous study of these in a comparative context, see the chapter by Joris Larik in this volume.

³⁹ See the chapter by Andrew Williams in this volume.

⁴⁰ See the chapter by Gráinne de Búrca in this volume.

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comparative perspective.⁴¹ To be sure, whether the Union actually lives up to this vision is a different matter open for debate.⁴²

Part II supplies eight concrete case studies of the EU's activities in the context of its attempts to shape the international legal order in a wide array of diverse areas of importance. Such case studies are intended to test the active paradigm of the EU's external relations, including the scrutiny of the ethical side of the EU's action in areas such as development of international law on the recognition of states,⁴³ international approaches to energy law⁴⁴ and climate change,⁴⁵ including energy sustainability,⁴⁶ WTO dispute resolution⁴⁷ and patterns of global migration.⁴⁸

Part III, which is a natural continuation of the Part II, is distinguished for its special focus: it examines the world financial architecture and some steps the Union attempted to take in order to promote world financial stability in the time of crisis.⁴⁹ The crisis, as often happens, offers plentiful opportunities besides triggering negative consequences. EU institutions are very well aware of this: essentially important proposals of a systemic nature are being circulated now, in times of crisis, which will be shaping the Union for the years to come.⁵⁰ The EU's external engagement is not an exception in this regard. So besides the Fiscal Compact,⁵¹ which, as of itself, will also have external implications, important reform suggestions are tabled belonging *de facto*, if not *de jure*, to the field of world economic and financial governance,⁵² such as the introduction of a tax on financial transactions.⁵³ At the same time, the

⁴¹ See the chapter by Joris Larik in this volume.

⁴² See the concluding chapter in this volume.

⁴³ See the chapter by Steven Blockmans in this volume.

⁴⁴ See the chapter by Peter Van Elsuwege in this volume.

⁴⁵ See the chapter by Christina Eckes in this volume.

⁴⁶ See the chapter by Anatole Boute in this volume.

⁴⁷ See the chapter by Tilman Krüger in this volume.

⁴⁸ See the chapter by Laure Delcour in this volume.

⁴⁹ See the chapter by Jan Wouters, Sven Van Kerckhoven and Thomas Ramopoulos in this volume.

⁵⁰ E.g. M. Poiars Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice', Robert Schuman Centre for Advanced Studies (RSCAS) Policy Papers No. 2012/11 (2012).

⁵¹ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed 2 March 2012. See e.g. P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) 37 *European Law Review* 231.

⁵² See the chapter by Christoph Ohler in this volume.

⁵³ See the chapter by Van Vooren in this volume.

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crisis has also brought the redistributive function of the EU back on the agenda, creating tensions between the Member States and questioning some the assumptions of solidarity taken for granted until very recently.

2.1 *The Mechanics of the active paradigm*

The basic idea of the EU's shaping of the international legal order, embracing an active paradigm of the study of this organization's engagement with the world, can only be accepted once three questions are answered. The first is what is the *raison d'être* of the EU – and how far the organization is designed to take on such an active role? The second is whether taking up such a role can seriously be expected at all of the Union, which is not a state, thus facing numerous issues related to the feasibility of conceiving it as a space of justice and expecting ethical outcomes of its activities. The third concerns the black-letter law of the EU itself: once its rationale in the context of external action, as well as its ability, from a legal–philosophical point of view, to generate just outcomes and to be a space of justice are proven, turning to the Treaties is indispensable. Part I of the book focuses on these three issues, preparing the ground for the case studies that follow.

In Chapter 1 Gráinne de Búrca traces the main lines of development of EU law with one main question in mind: what is the EU for? The answer has been evolving rapidly as the Union moves from crisis to crisis. All the story of European integration can be presented as Europe's gradual opening up to the world: from an inward-looking, purely regional organization aiming at achieving concrete objectives for the Member States to the current state of integration where the external component is rapidly gaining in importance both internally – as a potential provider of legitimacy – and externally. It took the EU fifty years to mature to occupy the position of a potential shaper of the international legal environment – and its influence will only grow when the current economic crisis – the most problematic in the Union's history – is overcome.

Once the essential place of the external dimension at the current stage of the Union's development has been clarified, an array of theoretical and also practical issues arises. In Chapter 2 Andrew Williams addresses some of these outstanding issues and approaches the EU from a legal–philosophical perspective to demonstrate that it is possible to theorize this organization as a plausible vehicle of interim global justice, viewing it as being capable of playing a role of a primary agent of justice with the capacity to assume distributive duties. Indeed, defending the EU's

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capability to be viewed in this light opens up the way to expect of it the openness to the idea of justice, which can alone – raw power and pure *Realpolitik* aside – establish the EU as a determining force in the development of the international legal order. Williams chooses distributive justice as a starting point to demonstrate that the EU can indeed be so regarded. Besides the underlying philosophy of EU law, the chapter is perceptive of the practice of the EU's Institutions, and is thus fully grounded in reality. The chapter builds a continuum of stages of interim global justice, proceeding from Thomas Nagel's 'political' understanding of distributive justice on to the 'cosmopolitan' idea in the vein of Kwame Anthony Appiah. Crucially, so theorized, the EU is much closer to the 'cosmopolitan' understanding than many critics would presume, raising our expectations of it as a promoter of justice on the world stage.

In Chapter 3 Joris Larik examines the primary law of the EU, analysing the legal effects of the binding objectives directly related to the EU's activities vis-à-vis the international legal order deploying a comparative perspective of the scrutiny of such objectives in modern jurisprudence in Europe and beyond. The chapter demonstrates beyond any reasonable doubt that shaping the international legal order is among the legal foundations of the integration project as it stands to date, thus amounting to one of its *raison d'être*. Moreover, the growing number, as well as the detailed nature, of the Treaty provisions with external implications in the EU is fully in line with the legal developments in other jurisdictions. Particular attention in the chapter is paid to the analysis of the German and French doctrines regarding the legal effects and nature of such constitutional norms – *Staatszielbestimmungen* and *objectifs de valeur constitutionnelle* – only to demonstrate that dismissing them as pure declarations would be entirely premature. They play an essential role in the functioning of the respective legal systems and the EU is not an exception, merely reflecting a global phenomenon in the constitutionalization of external action and influence. Crucially, the chapter makes it clear that the pursuit of the external objectives is binding on the Union, which places its external influence at the core of the *acquis*: the Union is *obliged by law* to strive to shape the international legal order along the lines of its own principles and values.

2.2 The case studies

Parts II and III essentially set out to test the robustness of the theoretical evidence provided in favour of the active paradigm for the study of the