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Robert Schütze

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Introduction

Foreign affairs are ‘border’ affairs – in both a geographical and a constitutional sense. They are traditionally subject to distinct constitutional principles, for the political questions posed might not be susceptible to legal answers.¹ And yet, in our globalised world, the orthodox distinction between ‘internal’ and ‘external’ affairs has lost much of its clarity. While it might have been possible for states to isolate themselves from international politics in the nineteenth century,² the forces of economic and social globalisation within the twenty-first century have made this choice impossible.³ Not only have (almost) all markets become ‘internationalised’,⁴ the ability of states unilaterally to guarantee internal security or external peace has declined. The contemporary world is an *international* world – a world of *collective* trade agreements and *collective* security systems.⁵ International treaties and organisations today play a decisive role in the formal coordination and substantive shaping of national politics.⁶

¹ T. M. Franck, *Political Questions/Judicial Answers* (Princeton University Press, 1992).

² On the United States’ national policy of international isolationism until the First World War, see G. C. Herring, *From Colony to Superpower: U.S. Foreign Relations since 1776* (Oxford University Press, 2011).

³ On social and economic globalisation, see D. Held and A. McGrew (eds.), *The Global Transformations Reader: An Introduction to the Globalisation Debate* (Cambridge: Polity Press, 2003).

⁴ For a historical overview, see R. Cameron and L. Neal, *A Concise Economic History of the World* (Oxford University Press, 2003); also J. Viner, *Studies in the Theory of International Trade* (Clifton, NJ: Augustus M. Kelley, 1975).

⁵ These international ‘collective’ systems may be regional or global in scope. For a regional trade or security system, see respectively: the North American Trade Association (NAFTA) and the North Atlantic Treaty Organization (NATO). For a global trading or security system, see respectively: the World Trade Organization (WTO) and the United Nations (UN).

⁶ L. Henkin, *Constitutionalism, Democracy and Foreign Affairs* (Columbia University Press, 1992).

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The European Union – as a union of states – embodies this collective spirit on a regional international scale. The Rome Treaty (1957) originally formed part of international law, although the European Court of Justice was soon eager to emphasise that the '[Union] constitutes a new legal order of international law'.⁷ But what was the relationship between the *new* European legal order and the *old* legal order of international law? Was the Union *partly* a creature of international law, and *partly* a creature of constitutional law? Had the *international* treaties on which the Union was founded become *constitutional* treaties? And could the Union autonomously act on the international scene? The Rome Treaty had indeed acknowledged the legal personality of the European Union,⁸ but what were its treaty-making powers? Originally, the Union's treaty-making powers were confined to international agreements under the Common Commercial Policy and association agreements with foreign countries or international organisations.⁹ This restrictive attribution protected a status quo in which the Member States were to remain the central protagonists on the international scene. Has this changed? What are the external powers of the Union today, and how does it conclude international agreements? What is the status and role of international law within the European legal order generally? Would that order constitute a closed 'self-contained regime', or would it be an 'open system'?¹⁰ And what did this imply for the position of the Member States?

This book presents a collection of ten articles and essays published in the past decade, and two hitherto unpublished chapters.¹¹ They provide my (personal, of course) answers to these questions. Each chapter explores a limited aspect within the broader constitutional cosmos of EU external relations. Not originally written with a monographic structure in mind, the resulting twelve pictures will sometimes intersect. For instead of 'cutting' these twelve essays into a seamless whole, this

⁷ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1, 12.

⁸ See Art. 210 EEC: 'The Community shall have legal personality.'

⁹ See Arts. 113 and 238 EEC Treaty.

¹⁰ On the theory of self-contained regimes in international law, see B. Simma, 'Self-contained Regimes' (1985) 16 *Netherlands Yearbook of International Law* 111 defining them as 'a category of agreements, namely those embracing, in principle, a full (exhaustive and definite) set of secondary rules': *ibid.*, 117.

¹¹ These unpublished essays are Ch. 11 on 'The "Treaty Power" and Parliamentary Democracy: Comparative Perspectives', and Ch. 12 on 'External Union Policies: A Substantive Overview'. I have also added a new 'Coda' to Ch. 2 entitled 'Kafka, Kadi, Kant'.

collection has deliberately left the integrity of each ‘framed’ picture intact.¹² However, to allow the reader to create a constitutional map on EU foreign affairs, the chapters have been ordered in such a way that they fall into three main themes that correspond to three parts. These three parts deal – respectively – with the ‘normative’, ‘vertical’ and ‘horizontal’ aspects of the Union’s external relations universe. Each part contains four essays, which address – albeit briefly – nearly all the major constitutional aspects within their sphere of European law.

Part I examines the ‘normative’ relations between the international and the European legal order. Chapter 1 begins by exploring the legal nature of the European Union itself. Following (early) American constitutional thought, a federal Union will be characterised as an entity that stands on the ‘middle ground’ between international and national law. As a hybrid (inter)national phenomenon, the European Union thus had to define its relationship with public international law. This relationship is studied in Chapter 2, which analyses the effects of international norms – contractual and customary – in the EU legal order. Does the Union follow a monist or a dualist approach towards international law; and what is the status of international norms in European law? A particularly complicated aspect of the relationship between international and European law concerns the status of international agreements of the Member States. Would they bind the Union *qua* treaty succession? Chapter 3 presents the doctrine of treaty succession from the ‘external perspective’ of international law and from the ‘internal perspective’ of European law. Chapter 4 then broadens the examination by generally looking at all variants of Member State agreements in the Union legal order.¹³ The central point behind this chapter is that the supremacy of European law over international agreements of the Member States constituted – for a long time – the second ‘infant disease’ of the Union legal order.¹⁴

¹² A section from one chapter may thus – directly or indirectly – find its way into another chapter. However, where I felt that the overlap between adjacent chapters was too great, I decided to ‘cut’ – unless it would destroy the overall structure behind the original essay.

¹³ This general ‘constitutional’ topic has recently experienced a renaissance in the specific context of the relationship between the Union’s Common Commercial Policy (see Ch. 12, section 1(a) below), and bilateral investment treaties of the Member States. On this fashionable problem, see T. Eilmansberger, ‘Bilateral Investment Treaties and EU Law’ (2009) 46 *CML Rev* 383.

¹⁴ On the first ‘infant disease’ – that is, the question of direct effect of European law in the national legal orders – see P. Pescatore, ‘The Doctrine of “Direct Effect”: An Infant Disease of Community Law’ (1983) 8 *EL Rev* 155.

The European Union is an ‘open federation’.¹⁵ Both the Union and its Member States are independent actors on the international scene. But do their international powers overlap? What constitutional mechanisms has the European legal order developed to coordinate the external relations of its two governmental levels? Part II explores this vertical dimension in the division of international powers. Its underlying theme is that the normative ambivalence between the international and the European legal orders – discussed in Part I – has had a lasting impact on the federal structure of the Union’s foreign affairs powers. For one way to avoid the ambivalent scope or nature of Union powers (explored in Chapter 5) is the conclusion of mixed agreements; that is, agreements to which both the EU and some or all of its Member States are contracting parties. A second way to coordinate the international powers of the Union with those of its Member States is inspired by the philosophy of dual federalism. The Union here tries to distinguish its external sphere from that of the Member States through a strategy of exclusive powers. This strategy will be explored in Chapters 6 and 7, which trace – respectively – the emergence and scope of originally and subsequently exclusive external Union powers. Is the dual federalist division of foreign affairs powers waning? Chapter 8 investigates the rise of cooperative federalism by studying the judicial evolution of the *ERTA* doctrine – that is, the idea that an implied external Union power becomes exclusive to the extent that the Union has adopted internal legislation.

Having examined the scope and nature of the Union’s external powers in Part II, Part III aims to provide a ‘horizontal’ overview of the Union’s constitutional regime governing foreign affairs. Chapter 9 begins by offering a summary of the external competences and procedures of the Union after the 2007 Lisbon Treaty. We will see here that it continues to suffer from a split constitutional personality when it comes to foreign affairs: complementing its general (intergovernmental) competence regarding a Common Foreign and Security Policy, it enjoys a wide range of specific (supranational) powers within the Treaty on the Functioning of the European Union. How will the Union exercise these competences, and which institutions need to be involved in, say, the conclusion of international treaties? The effect of Union agreements is explored in Chapter 10. Based on a monist constitutional philosophy, the Union generally gives direct effect to its international treaties. They may thus be described as

¹⁵ The terminology is developed, albeit for states, in B. Fassbender, *Der offene Bundesstaat* (Tübingen: Mohr Siebeck, 2006).

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a form of external 'legislation', and the question arises whether – and if so, to what extent – the European Parliament should be involved in their conclusion. Chapter 11 attempts to measure the 'democratic deficit' in Union treaty-making by comparing it to the democratic credentials of the US treaty power. Chapter 12 concludes Part III (and the book) by providing a panoramic overview of the substantive areas of EU foreign affairs.

It (almost) goes without saying that none of the chapters can possibly give conclusive answers to the many constitutional questions posed above. The Union's constitutional law has been moving with dramatic speed,¹⁶ and any answer valid today might no longer be so tomorrow. For foreign affairs, three general trends are nonetheless identifiable. First, every treaty amendment has so far expanded the Union's external powers. This 'consolidation' and 'centralisation' of the Union as an international actor is to be welcomed. Europe should pull its weight as a whole so as to address the key threats within the contemporary international order.¹⁷ Sadly, this

¹⁶ The European Union was born in 1952 with the coming into being of the European Coal and Steel Community (ECSC). The 1951 Treaty of Paris led to the 1957 Treaty of Rome. The latter created two additional Communities: the European Atomic Energy Community and the European (Economic) Community. These three Communities were partly merged in 1967, but continued to exist in relative independence. A major organisational leap was taken with the 1992 Maastricht Treaty. The latter integrated the three Communities into the European Union. But, for a decade, this European Union was under constant constitutional construction. In an attempt to prepare the Union for the twenty-first century, a European Convention was charged with drafting a Constitutional Treaty in 2001. But the latter failed; and it took almost another decade to rescue the reform by way of the 2007 Reform (Lisbon) Treaty that came into force on 1 December 2009. The Lisbon Treaty has replaced the 'old' European Union with the 'new' European Union, and the latter has also succeeded to and absorbed the 'European Community' (see Art. 1(3) TEU: 'The Union shall replace and succeed the European Community'). This book analyses the constitutional law governing the foreign affairs of the European Union *after* the Lisbon Treaty. It will consequently not revisit old – and by now irrelevant – constitutional debates such as the one on the international legal personality of the (Maastricht) European Union. (For this debate, see D. McGoldrick, *International Relations Law of the European Union* (London: Longman, 1997), ch. 2.) And since much of the constitutional law of EU foreign affairs was within the – replaced and succeeded – European Community, the chapters of this book had to be systematically 'Lisbonised'. Past references to the European Community have thus been consistently replaced by references to the (new) European Union; Community law has become either European law or Union law; and old 'EC' Articles have been replaced by their post-Lisbon equivalent (wherever possible).

¹⁷ European Council, 'A Secure Europe in a Better World: European Security Strategy' (Brussels, 12 December, Council Document 78367). For an analysis of the strategy, see S. Duke, 'The European Security Strategy in a Comparative Framework: Does it Make for Secure Alliances in a Better World?' (2004) 9 *EFAR* 459.

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consolidation of foreign affairs powers has not gone unnoticed. Jealously protecting their prerogatives, the Member States have cautiously placed each new external power within a rigid textual corset. A second general trend in EU foreign affairs law has thus been the enormous expansion of constitutional text. Indeed, when compared to the taciturn minimalism of the US foreign affairs constitution,¹⁸ the European Union almost seems to have ‘too much constitutional law’!¹⁹

Finally, there has also been a remarkable expansion of academic scholarship on EU external relations. Having started as an unexplored corner of European law,²⁰ EU foreign affairs were subsequently dominated by an international trade perspective;²¹ and only in a third phase has academic interest become general.²² This general interest is today shared by political scientists,²³ international lawyers²⁴ and European law scholars alike.²⁵ Such cross-disciplinary attention makes any study of EU foreign affairs an intimidating task. For each ‘discipline’ brings its own methodological perspective to the subject, and any chosen disciplinary point of view will inevitably be reductionist. This study has nonetheless chosen a single constitutional perspective – that is, a perspective that explores

¹⁸ L. Henkin, *Foreign Affairs and the US Constitution* (Oxford: Clarendon Press, 1996), 13: ‘Indeed, where foreign relations are concerned the Constitution seems a strange, laconic document[.]’

¹⁹ For the idea that there is too much European constitutional law on foreign affairs, see B. de Witte, ‘Too Much Constitutional Law in the European Union’s Foreign Relations?’ in M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart, 2008), 3.

²⁰ See P. Pescatore, ‘Les Relations extérieures des Communautés européennes: contribution à la doctrine de la personnalité des organisations internationales’ (1961) 103 *Recueil des Cours* 1, 105.

²¹ See J. Bourgeois, ‘The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective’ (1982) 19 *CML Rev* 3.

²² See I. MacLeod, I. D. Henry and S. Hyett., *The External Relations of the European Communities: A Manual of Law and Practice* (Oxford: Clarendon Press, 1996).

²³ For a political science overview of the EU as an international actor, see C. Hill and M. Smith, *International Relations and the European Union* (Oxford University Press, 2011); and K. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity, 2008).

²⁴ For the international law perspective, see J. Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2008); M. Evans and P. Koutrakos, *The International Responsibility of the European Union: European and International Perspectives* (Oxford: Hart, 2013).

²⁵ For a European perspective, see G. de Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, 2008); P. Eeckhout, *EU External Relations Law* (Oxford University Press, 2011); and P. Koutrakos, *EU International Relations Law* (Oxford: Hart, 2006).

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the *fundamental* legal structures of EU foreign affairs. This constitutional perspective will sometimes contain a minor comparative dimension. The latter shall remind us that the European Union is not an incomparable *sui generis* entity, but a union that can find inspiration in an older union: the United States.²⁶ And it is in homage to that union, and to an admired American scholar of its foreign affairs, that the book is named as it is: *Foreign Affairs and the EU Constitution*.²⁷

²⁶ There are nonetheless distinctive differences between the European and the American foreign affairs constitution, especially when one compares their respective starting points. From a *federal* perspective, the European Union and the American Union seem to have begun from diametrically opposed ends. For whereas the European Union commenced with strictly limited international powers, (almost) all foreign affairs were from the beginning centralised in the externally ‘closed’ American Republic (see Ch. 5 below). This leads to a *substantive* difference: the European Union has traditionally been seen as a ‘soft’ or ‘civilian’ power with only economic external competences at its disposal (see Ch. 12 below); the United States by contrast has long been one of the dominant military powers of the world. Finally, there also existed a major difference in the *horizontal* division of powers. For while the US Constitution identified the ‘President’ – that is, the executive branch – as the central player in the foreign affairs of the American Union, in Europe this dominant role is played by the ‘Council’ – that is, a part of the EU legislative branch (see Chs. 9 and 11). These differences are striking; yet they do not make the European and the American Union ‘incomparable’. Not only have these differences (partly) disappeared over time, a comparative constitutional contrast promises to highlight the constitutional ‘identity’ of the European Union; and it is for that instrumental reason that some of the following chapters will explore aspects of the United States foreign affairs constitution.

²⁷ See Henkin, *Foreign Affairs and the US Constitution*, n. 18 above.

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PART I

International law and the EU Constitution: normative aspects

What are the ‘normative’ relations between the international and the European legal order? Chapter 1 begins by exploring the legal nature of the European Union itself. Following (early) American constitutional thought, a federal Union will be characterised as an entity that stands on the middle ground between international and national law. As a hybrid (inter)national phenomenon, the European Union thus had to define its relationship with public international law. This relationship is studied in Chapter 2, which analyses the effects of international norms – contractual and customary – in the EU legal order. Does the Union follow a monist or a dualist approach towards international law; and what is the status of international norms in European law? A particularly complicated aspect of the relationship between international and European law concerns the status of international agreements of the Member States. Would they bind the Union *qua* treaty succession? Chapter 3 presents the doctrine of treaty succession from the ‘external perspective’ of international law and from the ‘internal perspective’ of European law. Chapter 4 then broadens the examination by generally looking at all variants of Member State agreements in the Union legal order. The central point behind this chapter is that the supremacy of European law over international agreements of the Member States constituted – for a long time – the second ‘infant disease’ of the Union legal order.

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