Marise Cremona and Anne Thies, *The European Court of Justice and External Relations Law. Constitutional Challenges*. Oxford: Hart Publishing, 2014. 314 pages. ISBN: 9781849465045. GBP 50.

Is it possible to provide an objective review of a book edited by two colleagues one frequently works with, containing contributions by many academic friends? Despite the fact that I would lose many friends in one stroke in case of a negative review, I think it is. Indeed, the contributions are written by the usual suspects, but then again, they wouldn't be the usual suspects if they did not deserve their status as EU external relations law experts. This again is reflected in the quality of the book which, in the words of the editors, addresses "the contribution of the Court of Justice of the European Union to the formation of the European Union as an international actor, its approach to and responsibility for the development of EU external relations, and the constitutional challenges the Court faces in this context". Quite a brief indeed and such a book clearly deserves a peer review.

While publications on EU external relations law are booming, in particular as a result of the Union's clearer stance as a global actor, comprehensive studies on the role of the Court in this area are scarce. That could come as a surprise, as this particular sub-discipline of EU law is traditionally largely shaped on the basis of case law. Since the Treaty of Lisbon, more attention is paid in the current treaties to the Union's external role and we still seem to be at the stage where both EU institutions and Member States are seeking their appropriate place in the new external relations regime. In their Introduction, the editors argue that – in contrast to, for instance, the internal market – the EU has no external teleology: "the treaties have not given the Union an external policy end-goal towards which to aim." Yet, the question is whether this is not exactly what was changed by the Lisbon Treaty. It is certainly true that there is no end-goal, but at the same time things have changed considerably. The external identity of the Union is more prominently reflected and the Union's ambitions in that area are reflected in its objective to play a role in almost every global policy field. The coming of age of the EU as a global actor even seems to slowly turn the EU from a recipient into a contributor to the further development of international law. One could perhaps argue that the EU's global ambitions include the idea that the EU should – at least partly – shift its focus from its own Member States to third States (see in particular Arts. 3(5), 21 and 22 TEU).

The role of the Court remains essential, as many external relations provisions are in a rudimentary state or are simply unclear or inconsistent. The book's contribution to the debate is therefore timely. Its first part deals with three different views of the Court's role in the development of external relations law (with contributions by Cremona, De Witte and Hillion). The set-up is nice and refreshing (with chapter titles subsequently starting with "A Reticent Court?", "A Selfish Court?", and "A Powerless Court?"), which makes one wonder why the editors did not choose to continue this throughout the book. In terms of substance, the first part deals with the focus of the Court on institutional questions. It is argued that the Court has largely limited itself to its key task: providing the best possible interpretation of the intentions of the legislature. This may empower the institutions (e.g. the *PFOS* or *BITs* cases), including the Court itself (in filling institutional spaces), but overall the Court does not seem to extend the competences of the EU beyond what could reasonably be read in the treaty provisions. At the same time, the Court has been struggling with its own role in squaring the fact that international agreements form an integral part of the Union's legal order (and that these agreements may provide for dispute settlement by other tribunals than the Court itself), with the autonomy of the EU legal order and the Court's own role to preserve that autonomy. The conclusion that the Court from time to time may have been a bit selfish is certainly underlined by Opinion 2/13 on the (non-)accession of the EU to the ECHR, an Opinion that was issued after this book came out. Finally, the analysis of the Court's contribution to external relations law is completed by the argument that – post-Lisbon – one should not underestimate its potential in the area of the Union's foreign and security policy (CFSP). The effects of the provisions giving some competence to the Court in this area (such as Art. 275 TFEU and Art. 40 TEU) seem to reach further than is often claimed. At the same time it has become more difficult to clearly separate

CFSP from other external relations policies, underlining the Court's role as "the judicature for the whole of the EU".

Part I thus sets the stage for the rest of the book. It also clearly highlights the challenges the Court is facing when confronted with the new global ambitions the Member States laid down in the treaties. The overall conclusion of this part could be that, while largely reticent (in the sense of non-interventionist), the Court still – and occasionally perhaps on the edge of being selfish – values the autonomy of the EU legal order and its own role in that order, something that continues to ensure that it remains a powerful force in EU external relations. Yet, we are again confronted with the fact that most legal disputes on external relations are in fact internal competence battles – an issue that is further analysed in Part II (with contributions by Neframi, Kuijper and Van Elsuwege). The (*vertical*) competence division between the Union and its Member States is first of all regulated by the principle of conferral. Yet, it is not so easy to link directly the overall objectives in Article 21 TEU to concrete external competences. At the same time, external action competences are not necessarily exclusive, which means the Court is called upon to determine where the competence lies. It seems that the Court adopts a global approach by linking objectives to the appropriate legal basis or when regulating the exercise of already allocated external competences. As far as inter-institutional battles (the *horizontal* division of competences) are concerned, the conclusion is drawn that the Court's aim has been to maintain the institutional balance. While a certain shift from initial executive primacy to more democratic control may be discovered in the Court's case law over the years, this is less due to judicial activism than to keeping the balance in line with treaty modifications. This is not to say that inter-institutional battles have become less complicated. "In particular, the division between CFSP and non-CFSP external action remains a major source of tension." With the combination of CFSP and other external objectives, it has become more difficult for the Court to settle legal basis issues. Yet, the Treaties offer clearer duties of cooperation and consistency, which may serve as constitutional tools in the Court's decisions.

Part III of the book (with contributions by Thies, Azoulai and Eckes) bears the perhaps somewhat too general title "External Relations, the Court and the Union Legal Order" and aims to combine different elements that allowed the Court to build the constitutional framework for EU external action. In that sense, this part could also have been placed more at the beginning of the book. Important elements of the constitutional framework are the traditional principles of EU law: the principle of direct effect, EU fundamental rights and the principle of effectiveness. In the foreign affairs context, the Court had to reinterpret the principles and establish how to apply them, and it occasionally had to accept restrictions. As *Kadi* showed us, this called upon the Court's reasoning abilities in quite a new fashion. These reasoning abilities will also be needed where and when the Court has to deal with the fact that Member States may sometimes (have to) act outside the Treaty framework. In other words, how to "solve the conundrum of providing for unity of a non-unitary polity"? Yet, this need for unity will become more apparent now that the Union's own external diplomatic network is developing further. And, finally, the Court will have to find a way to translate what it has learned from its long-lasting and continuous dialogue with domestic courts to an external relations setting. The newly developing international position of the EU calls for a reassessment of the "external discourse with international courts and tribunals".

Indeed, the international context has become more compelling and forms the theme of Part IV (with contributions by Kokott/Sobotta, Heliskoski and Wouters/Odermatt/Ramopoulos). This is in particular true as individuals are more clearly and directly affected by international decisions. As the *Kadi* saga has shown, it may take some time for the Court to find the best possible balance "between constitutional core values and effective international measures to combat terrorism". This balance between the Union's autonomy and international obligations was also sought in the Draft Treaty on the Accession of the EU to the ECHR, whose fate was (for the moment) decided on by the Court in Opinion 2/13. The notion of a so-called "prior-involvement mechanism" in that treaty (allowing the ECJ to participate in proceedings of the ECtHR before a decision of the latter is rendered), clearly reveals the complexity of combining the autonomous legal order of the EU with external judicial scrutiny. More in

general, the Court's somewhat rigid approach to international law "stands in contrast with a more open and receptive approach by the EU legislator". It seems time for the Court to fully accept (and perhaps even embrace) the treaty changes and fully apply the principle of respect for international law rather than adopt judicial avoidance techniques to, for instance, limit the direct effect of international law or to evade a consistent interpretation.

There are many reasons to end positively about this book (see also the introduction to this review). Despite the wish of the Member States to consolidate the external relations elements in the treaties, we are still confronted with treaty compromises which do not always provide a clear picture of where the law stands. EU Institutions and Member States have turned out to interpret provisions differently and all of them are clearly trying to find their place in the new external relations regime. Obviously this entails some arm wrestling once in a while, as all actors are aware of the fact that this may very well be the stage in which crucial interpretations of new provisions are given that may define their position for many years to come. A second recurring element seems to be the tension between the EU's wish to be accepted as a global player (also in a legal sense) and to accept the international rules of the game, while trying to hold on to its autonomy. For Member States this tension may become more problematic in the future. While the Court seems to argue that they are first and foremost *Member* States, they rightfully continue to act as independent *States* in the international arena and will have to live up to their individual obligations under international law. There may be a limit not only to the extent to which Member States are able to square their different identities, but also to the patience of third States to accept EU law as a legitimate argument to question international agreements and obligations.

The value of the book under review here is that one feels these undercurrents in all contributions. Basically the book is about the almost impossible tasks the Court is facing. While providing clear solutions to some of the problems – a reason why the book will no doubt be on many desks at the Kirchberg premises – it also reveals the somewhat messy nature of the Treaties and many of their external relations provisions. True, external relations have always been less well described. Yet, this time the Union's global ambitions call for clarity in order for the substantive objectives in the Treaties to render the intended effect. The Court has its role to play here, but so have the contributors to this book, who no doubt will get more chances to secure their position as "usual suspects".

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