

# Structural Principles in EU External Relations Law

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# 1

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## Structural Principles and their Role in EU External Relations Law

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MARISE CREMONA

### I. Introduction

Our starting point is an observation, based on earlier work on the Court of Justice of the European Union and European Union (EU) external relations objectives.<sup>1</sup> This is that in the external policy field, the Court has not been a driving force behind the EU's policy agenda in the same way that it has shaped the concept of Union citizenship or the way in which its interpretation of the substantive treaty provisions on discrimination, competition policy or free movement have been geared to the creation of the single market. This might be the result of a reluctance to engage with external political choices, but our purpose in this book is not to look for what might motivate the Court. It is rather to explore what role law plays in EU external action and whether, to what extent, law may operate differently in the external from the internal context.

The nature of the Treaty provisions on EU external action, with a set of open-ended policy objectives and fewer policy-directed legal obligations on the Member States, has left much to the agenda-setting of the political institutions. This seems natural: surely it is in the nature of foreign relations to be politics-driven and for law to play a minor role? But in fact law *does* play an important role in EU external relations. The Court has had no hesitation in establishing principles and far-reaching rules governing the scope and nature of Union external competence, institutional questions concerning the exercise of that competence, and the consequent obligations on the Member States, both of compliance and cooperation. For example: its insistence that legal basis is a matter of constitutional significance and subject to judicial control;<sup>2</sup> its insistence on the importance of judicial

<sup>1</sup> M Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice' in A Thies and M Cremona (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford, Hart Publishing, 2014) 15.

<sup>2</sup> For example, Opinion 2/00, EU:C:2001:664; Case C-91/05 *Commission v Council*, Judgment, EU:C:2008:288; Case C-263/14 *European Parliament v Council*, Judgment, EU:C:2016:435.

review and the priority of EU primary law;<sup>3</sup> its development of the doctrines of exclusivity and pre-emption, thereby curtailing the Member States' treaty-making powers;<sup>4</sup> its development of the duty of cooperation, now based on Article 4(3) of the Treaty on European Union (TEU), requiring the Member States to exercise their own powers in ways which are compatible with Union law,<sup>5</sup> which do not hinder the Union's exercise of its competence,<sup>6</sup> and which do not jeopardise the 'unity of international representation' of the Union.<sup>7</sup>

What explains the contrast between these cases and the Court's reticence when it comes to the EU's external policy agenda, and how can we characterise the role that law plays in EU external relations?

The Treaties set broadly-defined policy objectives, or orientations, for EU external action but they do not establish an end-point to which they seek to move the Union. Insofar as there are purposive or set goals (e.g. reduction of poverty, liberalization of trade, sustainable development) these are not objectives which are realizable by the EU alone; it must work towards them in partnership with third countries. And these goals are not prioritised over other EU objectives, such as the pursuance of the EU's interests. We do not find in the Treaties defined policy choices governing external action such as the openness of EU markets or even non-discrimination.<sup>8</sup> Rather, the Union is given a task: to develop relations and build partnerships with third countries and international, regional or global organisations; it is given a number of policy fields in which to operate, a range of instruments, and a set of orienting, open-ended and non-prioritised objectives (international peace and security, sustainable development ...).

Against this background, the direction and goals of EU external policy must be set by the institutions themselves. As Article 22 TEU provides, '[o]n the basis of the principles and objectives set out in Article 21, the European Council shall define the strategic interests and objectives of the Union'. The Court is very rarely driven to find that the Union's external powers have been misused;<sup>9</sup> it emphasises

<sup>3</sup> For example, Joined Cases C-402/05P and C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, Judgment, EU:C:2008:461; Joined Cases C-584/10P, C-593/10P and C-595/10P *European Commission, United Kingdom and Council v Yassin Abdullah Kadi*, Judgment, EU:C:2013:518.

<sup>4</sup> For example, Case 22/70 *Commission v Council*, Judgment, EU:C:1971:32; Case C-45/07 *Commission v Greece*, Judgment, EU:C:2009:81; Opinion 1/03, EU:C:2006:81.

<sup>5</sup> Case C-476/98 *Commission v Germany*, Judgment, EU:C:2002:631.

<sup>6</sup> Case C-266/03 *Commission v Luxembourg*, Judgment, EU:C:2005:341; Case C-433/03 *Commission v Germany*, Judgment, EU:C:2005:462; Case C-205/06 *Commission v Austria*, Judgment, EU:C:2009:118; Case C-249/06 *Commission v Sweden*, Judgment, EU:C:2009:119; Case C-118/07 *Commission v Finland*, Judgment, EU:C:2009:715.

<sup>7</sup> Case C-246/07 *Commission v Sweden*, Judgment, EU:C:2010:203.

<sup>8</sup> Gareth Davies describes the EU's internal policy competences as essentially purposive as opposed to sector-specific, the former being defined in terms of the power to take measures to achieve a specific goal, the latter being defined in terms of a particular field: G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 *European Law Journal* 2.

<sup>9</sup> There have been only two cases where the Court has found that the EC had no external competence. In Opinion 2/94, EU:C:1996:140, the Court based itself on its view that accession to the ECHR would have 'fundamental institutional implications for the Community and for the Member

the need for the institutions to retain their discretion, their room for manoeuvre. It is non-interventionist, tending to take those choices at face value (basing itself on statements in legal instruments and policy documents); it does not question them, nor seek to define or shape them.<sup>10</sup> Instead, it has taken on another role: it ensures that the institutions act within their powers, and that the Member States do not obstruct the formation and implementation of Union policy. It is in fact engaged in establishing and protecting an institutional space within which policy may be formed, in which the different actors understand and work within their respective roles.<sup>11</sup> The principles which have been drawn from the Treaties and elaborated by the Court to establish this institutional space I call 'structural principles'. They include the duty of sincere (and close) cooperation, the principles of conferral and institutional balance, mutual solidarity, subsidiarity, and the principle of autonomy. By identifying and developing these principles, which by their nature are flexible and capable of evolution, the Court of Justice exercises a formidable role in the governance of EU external action despite its hands-off approach to substantive policy choice.

This chapter seeks to explore further the nature and inter-relationships of these structural principles as legal norms, as a basis for the following chapters which examine each of the key structural principles in turn. It proceeds in three stages. First, it offers an explanation for the importance of structural principles in the EU's external relations by exploring the nature of EU external relations powers. Secondly, it begins an enquiry into the nature of structural principles: what does it mean to say that they are *principles*, that they are *structural*, and that they operate within *external relations*? Thirdly, it offers a tentative typology of structural principles and some ideas on the ways in which they may complement and operate in tension with each other.

## II. Absence of a *Telos* in EU External Policy

The original Treaty of Rome contained only two express external powers: the Common Commercial Policy (CCP) and Association Agreements. These original

States' and would exceed the Community's conferred powers. In Joined Cases C-317/04 and C-318/04 *European Parliament v Council*, Judgment, EU:C:2006:346, the Court took the view that internal powers could not be used as a basis for external action where the purposes of that action were expressly excluded by the internal legislation.

<sup>10</sup> Legal basis is a good example; while insisting that choice of legal basis should be based on objective factors amenable to judicial review, in practice the Court will normally derive the aim of a measure (important in the determination of legal basis) from the statements included in the Preamble which have of course been drafted with the desired legal basis in mind.

<sup>11</sup> cf R Post, 'Constructing the European Polity: *ERTA* and the *Open Skies* Judgments' in L Azoulai and M Poiares Maduro (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford, Hart Publishing, 2010) 234.

provisions set no specific end-goals; they gave the Community a field of activity in which to exercise its competence but without specifying the purposes of this action. The Common Commercial Policy, it is true, did mandate the establishment of a policy based on ‘uniform principles’ but here it is the uniformity that is important, the alignment of the different Member States’ trade policies, not the content of the common rules.<sup>12</sup> Association Agreements were simply described as ‘involving reciprocal rights and obligations, common action and special procedures.’ And indeed we can see that these original external powers have been used for a wide variety of purposes, from establishing the World Trade Organization (WTO) to development-oriented selective trade preferences; from pre-accession to integration without accession; from preferential status for former colonies to free trade agreements with strategic trading partners. The EU’s more recent express external powers, such as development cooperation or the Common Foreign and Security Policy (CFSP), share this open-ended character; they are competences to engage in a particular policy field.

In contrast, many (not all) of the EU’s internal powers were, and are, designed to achieve specific objectives (the removal of obstacles to freedom of movement, achieving a common or internal market, undistorted competition, non-discrimination). And there is an overall purpose, recently expressed well by the Court in Opinion 2/13 as the *implementation of a process of integration*:

The pursuit of the EU’s objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute—each within its specific field and with its own particular characteristics—to the implementation of the process of integration that is the *raison d’être* of the EU itself.<sup>13</sup>

The open-ended character of the Union’s external competences is confirmed and even emphasised by the Lisbon Treaty, which creates a general list of external objectives in Article 21 TEU, without linking them to specific external powers. These objectives use words (verbs) which serve to orient policy rather than setting goals: safeguarding values; consolidating and supporting democracy and the rule of law; strengthening international security; fostering sustainable development; encouraging economic integration; the progressive abolition of trade restrictions; helping to develop international measures to preserve and improve the quality of the environment; promoting an international system based on stronger multilateral cooperation and good global governance. The fact that these objectives are general and not tied to specific external policies emphasises the ability of the

<sup>12</sup> M Cremona, ‘The External Dimension of the Single Market: Building (on) the Foundations’ in C Barnard and J Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Oxford, Hart Publishing, 2002) 351.

<sup>13</sup> Opinion 2/13, EU:C:2014:2454, para 172.

policy-makers to engage in their own prioritising and balancing between these objectives which may pull in different directions. It is difficult to see them being used to claim that a particular external act is invalid or that a power is being misused. To be clear: I do not seek to minimise the importance of these external objectives and their normative dimension; rather the contrary. I wish rather to draw attention to the fact that they do not serve to create or delimit competence. As expressed by Larik, ‘they provide a sense of purpose as to the exercise of [the EU’s] powers through the structures of the constitutionalized legal order’<sup>14</sup>

What of policy fields which do not expressly mention external action but where this is deemed necessary to achieve the ‘Treaties’ policy objectives? This latter category of implied external powers introduced by the *ERTA* case-law and now ‘codified’ into Article 216(1) of the Treaty on the Functioning of the European Union (TFEU) is indeed tied to objectives, but these are *internal* objectives (i.e. the objectives of the internal power on which the implied external power is based). As recently expressed by the Court:

[W]henever EU law creates for those institutions powers within its internal system for the purpose of attaining a specific objective, the EU has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect.<sup>15</sup>

Article 216(1) TFEU expresses the same principle. The link to internal objectives may limit the scope of the external powers to which they are linked; in Opinion 1/94 on the WTO, for example, the Court held that:

[T]he sole objective of [the Treaty chapters on establishment and services] is to secure the right of establishment and freedom to provide services for nationals of Member States ... attainment of freedom of establishment and freedom to provide services for nationals of the Member States is not inextricably linked to the treatment to be afforded in the Community to nationals of non-member countries or in non-member countries to nationals of Member States of the Community.<sup>16</sup>

Thus, external action was not essential to achieve the Treaty’s objectives in the field of establishment and services. The Court deliberately rejects an argument made by the Commission at the time that the Treaty power to act internally in the field of services automatically created an external power over trade in services.<sup>17</sup>

<sup>14</sup> J Larik, ‘From Speciality to the Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union’ (2014) 63 *International and Comparative Law Quarterly* 935, 962.

<sup>15</sup> Opinion 1/13, EU:C:2014:2303, para 67, citing also Opinion 1/03 (n 4) para 114.

<sup>16</sup> Opinion 1/94, EU:C:1994:384, paras 81 and 86.

<sup>17</sup> *ibid* paras 74–75: ‘The Commission argues, first, that there is no area or specific provision in GATS in respect of which the Community does not have corresponding powers to adopt measures at internal level. According to the Commission, those powers are set out in the chapters on the right of establishment, freedom to provide services and transport. Exclusive external competence flows from those internal powers. That argument must be rejected’. Note that in this Opinion the Court does not always differentiate clearly between the existence of implied external competence and its exclusive character; this is an important point but is not germane to the argument made here. See further P Eeckhout, *EU External Relations Law*, 2nd edn (Oxford, Oxford University Press, 2011) 87–95.

A couple of examples from recent cases on implied powers illustrate the link between implied external powers and internal objectives. In *United Kingdom v Council*,<sup>18</sup> the Court held that Article 48 TFEU was the appropriate legal basis for a Council decision establishing the Union position on the amendment of a European Economic Area (EEA) annex so as to incorporate revised EU legislation on social security coordination. This internal legal basis was preferred to other more 'external' options<sup>19</sup> because the Court held that the purpose of the EEA agreement was essentially to apply internal market law to the European Free Trade Association (EFTA) parties:

The contested decision is thus precisely one of the measures by which the law governing the EU internal market is to be extended as far as possible to the EEA, with the result that nationals of the EEA States concerned benefit from the free movement of persons under the same social conditions as EU citizens.<sup>20</sup>

The power to adopt an act with external effects is based upon an internal power because its aim is characterised in terms of the application of internal free movement. In Opinion 1/13, the Court discusses the EU's competence in relation to the 1980 Hague Convention on the civil aspects of international child abduction; in finding that the EU has an exclusive external competence based on the existence of Regulation 2201/2003, the Court emphasised the close relationship between the Convention and the EU Regulation, and the risk, were Member States to take different positions on the accession of third countries to the Convention, of undermining the uniform and consistent application of the Regulation within the EU, especially the rules relating to cooperation between Member State authorities. It is the internal system of cooperation which drives the need for an exclusive external EU competence. Some more recently created internal powers from which external powers might be implied are themselves defined in an open-ended way. For example, the Treaty provisions on the common immigration policy have more in common with the common commercial policy (an emphasis on uniformity at external borders and the management of migration; little by way of substantive policy content) than with the Treaty provisions on internal freedom of movement.

Thus, the argument so far is that external powers do not characteristically establish a foreign policy end-goal but rather a field of action in which the EU can operate, and the Court has not created a role for the law (and itself) in determining the use made of those powers. Let me substantiate this in relation to the four key external relations policy competences: trade; association agreements; Common Foreign and Security Policy; and development cooperation.

<sup>18</sup> Case C-431/11 *United Kingdom v Council*, Judgment, EU:C:2013:589.

<sup>19</sup> The United Kingdom had argued for the use of Art 79(2) TFEU which refers to the rights of third-country nationals residing in Member States; AG Kokott had also canvassed the option of Art 217 TFEU on Association Agreements.

<sup>20</sup> *United Kingdom v Council* (n 18) para 58. See also paras 50–51.



The original Treaty of Rome focused on the need for a uniform trade policy rather than on its policy content. The recent post-Lisbon case-law on the scope of the CCP confirms the Court's traditional approach: a measure will fall within the CCP if it 'relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade'.<sup>21</sup> An effect on trade is important, but those effects may include regulation and restriction of trade as well as liberalisation: the Common Commercial Policy is not likely to see a 'tobacco advertising' moment. Trade liberalisation is an objective of the EU's CCP (Article 206 TFEU) but this is subject to institutional policy choices. As expressed by the Court in a case where achieving uniform rules had been preferred over liberalisation, the 'objective of contributing to the progressive abolition of restrictions on international trade cannot compel the institutions to liberalise imports from non-member countries where to do so would be contrary to the interests of the Community'.<sup>22</sup> For the Court to find that the EEC was bound by the General Agreement on Tariffs and Trade (GATT) was a striking way of importing external policy content into the EU, but the lack of direct effect meant that even GATT norms were (and are) not directly enforceable against EU policy choice through EU courts; the institutions decide how to give effect to GATT/WTO.

And as long as a measure affects trade (positively or negatively), it might be designed to achieve any number of different further policy objectives: development; environmental protection; security of supply of strategic materials; granting or withholding political approval; or promotion of human rights. Trade policy has (of course) always been instrumentalised. For example, in 1982 it was agreed for the first time to use trade powers as the legal basis for a Community instrument imposing economic sanctions (by reducing quotas) against the Soviet Union, following European Political Cooperation (EPC) discussion and in the absence of a UN Security Council Resolution.<sup>23</sup> The political reason (events in Poland) is not mentioned explicitly in the Regulation, the Preamble merely stating that 'the interests of the Community require that imports from the USSR be reduced'. Later the same year, a Regulation imposing sanctions against Argentina over the Falkland Islands referred in its Preamble to the EPC discussions and this became standard practice. So the politics has always been there. The Lisbon Treaty is open about this: the Common Commercial Policy is to be 'conducted in the context of the principles and objectives of the Union's external action'.

In the case of Association Agreements, we see the Court accepting the very wide range of purposes to which they have been put, and insisting that their interpretation must be guided by those purposes. Thus, in its interpretation of

<sup>21</sup> Case C-137/12 *Commission v Council*, Judgment, EU:C:2013:675, para 57, citing also C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland*, Judgment, EU:C:2013:520, para 51.

<sup>22</sup> Case C-150/94 *United Kingdom v Council*, Judgment, EU:C:1998:547, para 67, interpreting a predecessor to Art 206 TFEU (Art 110 EC).

<sup>23</sup> Regulation 596/82/EEC [1982] OJ L72/15.

the Europe Agreements with the countries of central and eastern Europe that were to become Member States, the Court recognised their aim of progressive integration of the associated country into the Community and, despite the fact that the agreements contained no general objective of free movement of workers, offered this as a reason for extending its case-law on non-discrimination in conditions of employment to nationals of the associated country legally working in the EU.<sup>24</sup> As we have already seen, the degree of integration envisaged in the EEA has led the Court to espouse an internal legal basis for the adoption of a decision to adapt the EEA *acquis*.<sup>25</sup> This degree of integration was also the basis for a strong statement in *Ospelt* on the need for uniformity of interpretation.<sup>26</sup> In contrast, when interpreting the provisions on services in the Association Agreement with Turkey, the Court has contrasted the ‘purely economic aims’ of that Agreement with those of the EU Treaties in refusing to apply its case-law on recipients of services.<sup>27</sup> These are clear examples of the Court’s willingness to accept the specific degree of integration apparently intended by the parties to these different Association Agreements, despite the fact that they are concluded under the same legal basis. The Court has never tried to extract from the Treaties an ‘ideal-type’ of Association to which it would seek to mould the agreements it is asked to interpret.

In defining the scope of the EU’s development cooperation competence, the Court has been guided by policy documents such as the European Consensus on development,<sup>28</sup> as well as secondary legislation. Although the Treaty states that the reduction of poverty is the ‘primary objective’ of the EU’s development cooperation policy,<sup>29</sup> the general external objectives of Article 21(2) TEU are also to be taken into account,<sup>30</sup> and the Court has contextualised the poverty objective by drawing on references in the European Consensus to sustainable development and the pursuit of the Millennium Development Goals.<sup>31</sup> Even a readmission clause in an international agreement was held to ‘contribute to the pursuit of the objectives of development cooperation’ on the ground that it formed part of an Article headed ‘Cooperation in Migration and Development’, and migration is included in the European Consensus.<sup>32</sup> As Broberg and Holdgaard comment, ‘the real benchmark for determining the scope of the Union’s development cooperation policy competence appears to be derived not from Articles 208 TFEU and 209 TFEU but from the European Consensus and the Development Cooperation instrument’.<sup>33</sup>

<sup>24</sup> See, eg Case C-162/00 *Pokrzepowicz-Meyer*, Judgment, EU:C:2002:57.

<sup>25</sup> *United Kingdom v Council* (n 18).

<sup>26</sup> Case C-452/01 *Ospelt*, Judgment, EU:C:2003:493, para 29.

<sup>27</sup> Case C-221/11 *Demirkan*, Judgment, EU:C:2013:583, para 53.

<sup>28</sup> Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus’ [2006] OJ C46/1.

<sup>29</sup> Art 208(1) TFEU.

<sup>30</sup> Case C-377/12 *Commission v Council*, Judgment, EU:C:2014:1903, para 37.

<sup>31</sup> *ibid* para 42.

<sup>32</sup> *ibid* paras 52 and 55.

<sup>33</sup> M Broberg and R Holdgaard, *EU External Action in the Field of Development Cooperation Policy: The Impact of the Lisbon Treaty*, SIEPS Working Paper 2014/6 (2014) 46.

Perhaps even more striking, since it involves the CFSP, in addressing a challenge by the European Parliament to the choice of procedure for concluding an agreement with Mauritius on the transfer and trial of suspected pirates, the Court simply went along with the Parliament's acceptance that a CFSP legal basis was appropriate in substantive terms.<sup>34</sup> Despite the boundary between the CFSP and other external powers, which while not such a gulf as prior to the Lisbon Treaty, is still significant,<sup>35</sup> the Court argued the case on purely procedural grounds and, unlike the Advocate General, did not address at all the institutions' choice of substantive legal basis. Of course, it is true that neither party sought to contest that substantive legal basis, but since the Court was to hold that the procedural legal basis should follow the substantive legal basis, this would have given it a ground on which to critique the choice of substantive legal basis if it had chosen to do so.<sup>36</sup>

This section has pointed to a characteristic of EU external competence as defined in the Treaties, that is, its absence of concrete end-goals. Whereas, in its internal policies, the Union is generally instructed to construct *something* (an internal market, an area of freedom, security and justice, a system of undistorted competition),<sup>37</sup> in its external policy, the Union is called upon to construct *itself*, to build its actorness and agency. As a result the law (and the Court) does not interfere with the institutions' choice of specific policy objectives or with the use of external competences for varied purposes. When, on the other hand, we turn to the issues which define the institutional structure of EU external policy-making, we see law being used, through structural principles, to construct the Union as an autonomous international actor.

### III. Concept of Structural Principles

The position I have described, of a Union which is granted certain broad policy fields in which to exercise its external capacity, with little by way of clear guidance in the constituent Treaties as to the ends for which those powers have been given, may seem to have much in common with a sovereign state as an international actor. However, the Union, as we know, has international legal capacity but is an

<sup>34</sup> Case C-658/11 *European Parliament v Council*, Judgment, EU:C:2014:2025, paras 44–45.

<sup>35</sup> Art 40 TEU.

<sup>36</sup> Advocate General Bot agreed that a CFSP legal basis was appropriate and sufficient. In a similar subsequent case the Court was specifically asked to address the choice of a CFSP legal basis and accepted that the agreement fell 'predominantly within the scope of the CFSP' because it was designed to facilitate and serve the objectives of an EU naval mission: Case C-263/14 *European Parliament v Council*, Judgment, EU:C:2016:435, para 55.

<sup>37</sup> Where the Union is mandated to create a policy (e.g. employment, environment, energy) it is generally made clear what that policy should entail: responsive labour markets, a high level of employment, preserving protecting and improving the quality of the environment, security of energy supply.

organisation of attributed powers; it does not have the autonomous competence of a state that flows from its recognised sovereign statehood. The fact that the EU is a rule-based (international) actor, the fact that it operates through law, that its powers are derived from law, is strongly evident. When we examine the external relations of the EU we find that law is central to the development of the EU as an international actor—possibly even influencing the type of international actor that the EU is.<sup>38</sup> Given the Court’s unwillingness to interfere with the institutions’ policy agenda-setting, how is it doing this? My argument is that the Court, through an interlocking set of structural principles, is establishing a framework expressed in (or implied from) the Treaties, protecting an institutional space within which policy may be formed, in which the different actors understand and work within their respective roles. These structural principles are both found in the Treaties and developed by the Court of Justice; they structure the system, functioning and exercise of EU external competences and are designed to promote a smooth articulation of the EU’s system of external relations and its effective presentation of an international identity. They regulate the relationships between the different actors in the complex EU system, which includes not only the EU institutions themselves but also the Member States and (indirectly) individuals and third countries, so as to enable the creation of an EU actorness. Structural principles are therefore not concerned with the *substantive content* of policy, but rather with *process* and the *relationships* between the actors in those processes, and their normative content reflects this.

### A. What Does It Mean to Say that These are *Principles*?

These principles are legal norms; they have a legal function and breach of them may result in the illegality of the resulting measure.<sup>39</sup> But a principle is a different type of norm from a rule. A rule is designed to operate in and to govern a

<sup>38</sup> cf the literature on the EU as a normative actor, including I Manners, ‘Normative Power Europe: A Contradiction in Terms?’ (2002) 40 *Journal of Common Market Studies* 235; H Sjurgen, ‘The EU as a “Normative” Power: How Can This Be?’ (2006) 13 *Journal of European Public Policy* 235; I Manners, ‘The Normative Ethics of the European Union’ (2008) 84 *International Affairs* 45. Although outside the scope of this chapter, the law also plays an important part in shaping the content of EU external policy. The EU characteristically uses law as an instrument and objective of its foreign policy, and sees itself as a promoter of a *rule-based international order* (European Security Strategy, adopted by the European Council in December 2003, 9–10). The EU shapes its external relationships through legal instruments and the promotion of a rule-based approach to international relations is threaded through its Treaty-based external objectives. With varying degrees of success, it increasingly seeks to play a part in the development of international law, through the United Nations and in multilateral negotiations: F Hoffmeister, ‘The Contribution of EU Practice to International Law’ in M Cremona (ed), *Developments in EU External Relations Law* (Oxford, Oxford University Press, 2008) 37. It can be argued that this fundamental characteristic of the EU as an external actor is a function of its own law-based nature.

<sup>39</sup> Their legal effects may be direct or indirect; for example, it can be argued that the principle of coherence operates through other principles such as conferral and sincere cooperation: see further section IV below.

specific set of circumstances. A principle has a more fundamental character; we may say that rules flow from, and should be consistent with, underlying principles. As Tridimas has said, a general principle expresses a core value.<sup>40</sup> It is perhaps in this sense that the Treaties refer in Article 21(1) TEU to ‘the principles which have inspired [the Union’s] own creation, development and enlargement’, these being essentially the values expressed in Article 2 TEU, on which the Union is founded. A principle is somehow fundamental, justifying and underpinning the specificity and detail of rules, both procedural and substantive.

How do principles interact with rules? How do the principles we are examining here, such as the duty of sincere cooperation or the principle of transparency, operate in relation to (say) the rules applicable to the negotiation and conclusion of treaties? Clearly, principles may be translated into specific rules (e.g. an inter-institutional agreement<sup>41</sup>) in which case they will inform and guide the interpretation of those rules. Thus, in the *Transfer of Suspected Pirates* case, the Court held that ‘[t]hat rule [i.e. the duty imposed in Article 218(10) TFEU on the Council and Commission to keep the Parliament informed throughout the process of negotiation of an agreement] is an expression of the democratic principles on which the European Union is founded’.<sup>42</sup> But the fundamental nature of principles, their generality as opposed to the specificity of rules, means that principles will inform and guide the interpretation of rules even where those rules have not been adopted to give them specific expression.<sup>43</sup> Thus, for example, in the *CITES* case the Court based its ruling on the principles of legal certainty and conferral, dismissing somewhat cursorily the parties’ ‘terminological arguments’ and concluding that ‘in principle, any measure producing binding effects is subject to the obligation to state reasons’.<sup>44</sup> Since general principles rank with primary law, they may constitute grounds for reviewing the legality of legal acts or rules adopted by the institutions. In several recent cases, the institutional parties have based claims of illegality on breaches of the principles of institutional balance, conferral or the duty of sincere cooperation. To take a single example, in the *ITLOS* case, the Council alleged (unsuccessfully on this occasion) that the Commission, by making a formal submission on behalf of the EU to the International Tribunal for the Law of Sea (ITLOS) without the prior approval of the Council, had infringed the principles of conferral of powers, institutional balance and sincere cooperation, all found in Article 13(2) TEU.<sup>45</sup>

<sup>40</sup> T Tridimas, *The General Principles of EU Law*, 2nd edn (Oxford, Oxford University Press, 2007) 1.

<sup>41</sup> See, eg, Case C-25/94 *Commission v Council*, Judgment, EU:C:1996:114, para 49: ‘[S]ection 2.3 of the Arrangement between the Council and the Commission represents [the] fulfilment of that duty of cooperation between the Community and its Member States within the FAO’.

<sup>42</sup> *European Parliament v Council* (n 34) para 81.

<sup>43</sup> The interaction between principles and rules has long occupied legal scholars; for a discussion of the well-known Hart-Dworkin debate, see, eg, J Mackie, ‘The Third Theory of Law’ (1977) 7 *Philosophy and Public Affairs* 3; S Shapiro, ‘The Hart-Dworkin Debate: A Short Guide for the Perplexed’ in A Ripstein (ed), *Ronald Dworkin* (Cambridge, Cambridge University Press, 2007) 22.

<sup>44</sup> Case C-370/07 *Commission v Council (CITES)*, Judgment, EU:C:2009:590, para 42.

<sup>45</sup> Case C-73/14 *Council v Commission (ITLOS)*, Judgment, EU:C:2015:663.

Principles point to a particular direction of argument or line of reasoning. One result of this character of principles is that they may be held in tension with one another without being seen as contradictory or conflicting. Principles may legitimately pull in different directions. This might raise a question as to whether some principles are more fundamental than others, and should thus be given greater weight. Should we seek to establish a hierarchy of structural principles? At this stage it seems to me that the nature of principles is not to be hierarchic; they accommodate each other and a principle may be given more weight in one case than another. That does not perhaps preclude the possibility of determining that the Court appears to privilege certain principles over others.

Let us take an example from a recent judgment, which is a strong example since one of the principles is conferral, which if any might have a claim to be considered especially fundamental. In *Germany v Council*, Germany contested the use of Article 218(9) TFEU for the adoption of a Council decision determining the position to be adopted by the Member States in the context of an international agreement to which the EU is not a party.<sup>46</sup> Article 218(9) covers Council decisions ‘establishing the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects’. Germany’s argument was that it would be contrary to the principle of conferral to apply this provision in the case of an agreement concluded by the Member States and not the EU.<sup>47</sup> The Court rejected this argument. It did not (of course) deny the principle of conferral, it simply found that it was not contravened in this case, by giving an interpretation of Article 218(9) that (while textual) was fundamentally influenced by the principle of effectiveness. Its argument (following a line of earlier cases) was that in cases where the EU is not a party to an agreement which nevertheless falls within EU competence, the EU may exercise that competence through its Member States acting jointly on its behalf and in its interest.<sup>48</sup> And in the Court’s view, there was nothing in the wording of Article 218(9) which prevented it being used to address a decision to the Member States in such a case, where they are to adopt a position ‘on the Union’s behalf’.

Since principles are not designed to give a once-and-for-all answer to a concrete question (which does not prevent them from being decisive in a particular case), they are open to adjustment and re-interpretation over time and in changing circumstances. In 1971, in the *ERTA* case,<sup>49</sup> for example, the Court conceived the conferral of external powers as a transfer from the Member States to the Community, and consequently treated external competence as naturally excluding the

<sup>46</sup> Case C-399/12 *Germany v Council (OIV)*, Judgment, EU:C:2014:2258.

<sup>47</sup> *ibid* para 33.

<sup>48</sup> *ibid* para 52. See further M Cremona, ‘Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union’ in A Arnall, C Barnard, M Dougan and E Spaventa (eds), *A Constitutional Order of States: Essays in European Law in Honour of Alan Dashwood* (Oxford, Hart Publishing, 2011) 435.

<sup>49</sup> *Commission v Council* (n 4).

Member States (either the Member States or the Community could act, but not both). Rather quickly that view started changing: conferral of powers on the Union does not necessarily disempower the Member States, and we see an emphasis on the need to manage the combined action of Union and Member States through (among others) the principles of ‘unity in the international representation of the Union and its Member States’,<sup>50</sup> and of sincere cooperation.<sup>51</sup> This example illustrates the dominant role of the Court of Justice in identifying and interpreting principles; their flexibility allows them to develop from small beginnings to powerful tools in the hands of the Court and to take on somewhat unpredictable forms on occasion.<sup>52</sup>

## B. What Does It Mean to Say that These Principles are *Structural*?

Structural principles can be seen as a type of general principle. Some of the principles that I have identified as structural are usually included in lists of general principles: effectiveness, transparency, and proportionality and equality (which are ingredients of the rule of law). Others, however, are not, including conferral, sincere cooperation, autonomy and institutional balance. I am not convinced that we gain much from attempting to ascertain whether there is a canon of general principles and that a structural principle somehow gains greater weight by having (also) been categorised as a general principle, or whether all structural principles are to be regarded as general principles.

It might also be argued (and Tridimas does argue) that the value of a classification of general principles is limited. So does it increase our understanding of EU external relations law to identify these principles as ‘structural’? I argue that it does, in that it helps us to make sense of the phenomenon identified in the first section of this chapter and the very particular role played by legal norms *as structural principles* in shaping the decision- and policy-making processes of EU external relations: the contribution to policy-making of each different actor (Member States as well as the institutions) and the balance and constructive relationships between them; their accountability to individuals and third countries affected by their decisions and the transparency that underpins that accountability. This role is important precisely because the substantive content of that policy is left so undefined by EU Treaty law.

These principles are structural in the sense of defining and being inherent to the deep structure of the EU. As principles operating to structure EU external

<sup>50</sup> *Commission v Sweden* (n 7) para 104.

<sup>51</sup> C Hillion, ‘Mixity and Coherence in EU External Relations: The Significance of the Duty of Cooperation’ in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and Its Member States in the World* (Oxford, Hart Publishing, 2010) 87.

<sup>52</sup> See, eg, mutual trust, elevated into a principle of ‘fundamental importance’ in Opinion 2/13 (n 13) para 191.



policy-making they have a specific function. This is both internal and external in effect. Internal in the sense of structuring internal processes (how decisions are made). External in the sense that the legal particularities of the EU as an international actor,<sup>53</sup> e.g. joint participation of EU and Member States in mixed agreements, or the status of international law within the EU legal system, find their source in these principles.

These principles are structural in the sense of being concerned with the process of policy-making rather than its content. In this sense they can be distinguished from the objective-oriented principles of EU external relations policy which we find in Article 21(1) TEU and which reflect the Union's foundational values as expressed in Article 2 TEU, providing a basis for the Union's relations with third countries and international organisations, and playing an important part, along with the objectives set out in Article 21(2) TEU, in guiding the direction of its external policy. The focus on process rather than policy choice in the role that law plays in governing EU external relations, while it can be seen as protecting the institutions' policy space, may also have the effect of de-politicising genuine disputes. Conflicts are framed, so as to engage the Court, in terms of structural process-related principles rather than policy content and this reduces the scope for open and engaged policy contestation.

### C. What Does It Mean to Say that These are Structural Principles of *External Relations* Law?

There are two dimensions to this question, which are inter-related. The first is simple to state (though not to answer). All the principles discussed here also operate in the context of internal action. Do they operate differently when the action is external and if so how? We might argue that all principles, by their nature as principles, operate in their particular context and the external context is simply a manifestation of that inherent contextual operation of principles. So there is nothing special about structural principles operating in external relations, although the sectoral context will have an impact.

But there is another dimension. What if the 'structure' takes a different shape in the case of internal and external action? Structural principles in the internal context may be concerned primarily with the structure that it is the Union's mission to build: that is, its construction of an Area of Freedom, Security and Justice (AFSJ), of an internal market, of an economic and monetary union (EMU) (Article 3 TEU). Thus, the unity of the market may be an important structural principle for the EU. So also might be the internal space within which freedom of movement may take place, or the mutual trust between courts and between Member State

<sup>53</sup> M Licková, 'European Exceptionalism in International Law' (2008) 19 *European Journal of International Law* 463.



authorities which is at the heart of the AFSJ, the internal market, and indeed (in theory) of the EMU.

In the external context, in contrast, insofar as the EU has a mission to construct, it is to construct the EU itself as an effective external actor. Thus, for example, unity becomes a question of the unity of the international representation of the Union and its Member States.<sup>54</sup> It is given the task to build partnerships and relations with third countries in order to pursue together certain broad objectives. Thus, structural principles should provide a solid foundation for the construction of the EU as an international actor, a treaty-maker, a participant in international negotiations. They are concerned with the articulation of power of the EU's constituent parts (including the Member States, who play an important part in building the EU's international presence). They are concerned with the ability of the EU both to establish a distinct identity as a global actor and to project the policies it has developed, and with its need to operate within a system of international law: hence the need for systemic as well as relational principles, principles that define the operation of the system as a whole as opposed to the relations between its constituent parts. It is this dimension which turns these principles from being simply institutional to being structural. In the next section, we turn to look at these different types of structural principles and their functions.

#### IV. A Tentative Typology of Structural Principles

In clarifying what it means to talk of structural principles in EU external relations, it could be helpful to identify two types of function and thus two types of structural principle: relational and systemic.

*Relational* principles govern the relationships between actors or legal subjects (not norms); the structure here refers to the framework within which the actors in the EU's system of external relations can play their roles, deciding and implementing policy. In its recent Opinion 2/13 on the proposed accession of the EU to the European Convention on Human Rights (ECHR), the Court of Justice referred to the 'specific characteristics' of the EU and EU law, which include 'those relating to the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU'. These 'essential characteristics' of EU law 'have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other'.<sup>55</sup> For the Court these principles are the core of the 'constitutional structure' which is specific to the EU and which

<sup>54</sup> *Commission v Sweden* (n 7) para 104.

<sup>55</sup> Opinion 2/13 (n 13) paras 165–67.

is based on common values and mutual trust.<sup>56</sup> The common values provide the normative content of the relational principles and are a source of the mutual trust which is a basis for the principles of (for example) sincere cooperation and mutual solidarity, transparency, institutional balance and conferral of powers.

*Systemic* principles are concerned with the operation of the system as a whole, with building the EU's identity as a coherent, effective and autonomous actor in the world. They make it clear that structural principles are not simply concerned to define the static relations between actors, but are designed to guide their conduct, to ensure that the actors do in fact act, and that their action is directed at constructing an EU capable of fulfilling the external mandate it is given in Articles 3(5) and 21 TEU.

In the following paragraphs I outline these two types of principle, the aim at this stage being illustrative rather than analytic.

## A. Relational Principles

In the EU system we can identify four relational axes and each of these is governed by one or more structural principles.

### (i) *Member State–Member State*

Being a member of the EU entails obligations to fellow Member States as well as to the EU as such and this operates in external policy as well as internally. In fact, it is perhaps more explicitly stated in the Treaties in the foreign policy context. The principle of *mutual solidarity* is mentioned three times in Article 24 TEU which introduces the CFSP, twice as 'mutual political solidarity'. It is described as the basis of the EU's own policy (the CFSP), and it is also linked to the Member States' duty of loyalty to the EU as an effective and cohesive force in international relations (Article 24(3) TEU). Further than this are the 'solidarity clauses' which provide for Member States to assist each other in case of external threats or natural disasters: the obligation of aid and assistance in cases of armed aggression under Article 42(7) TEU (with suitable references to Article 51 of the UN Charter, to NATO and to the 'specific character of the security and defence policy of certain Member States'); and the obligation to act jointly to assist a Member State which is the victim of a terrorist attack or natural or man-made disaster under Article 222 TFEU. In less dramatic contexts, we can see evidence of the principle of mutual solidarity in Article 34(2) TEU, which provides that Member States represented in international organisations or international conferences where not all the Member States participate must keep the other Member States and the High Representative informed of any matter of common interest.

<sup>56</sup> *ibid* para 168.

We can argue that on the basis of the principle of mutual solidarity, the Member States owe obligations to each other as well as to the EU when operating collectively with the EU (e.g. in the context of a mixed agreement) or when operating collectively where the EU cannot participate (e.g. within the United Nations (UN)). Participating as an EU Member State should entail *inter se* obligations as well as obligations towards the EU. As the Court put it in Opinion 2/13:

[T]he Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.<sup>57</sup>

If so, what would these obligations consist of? Information and consultation, presumably, genuine efforts to find common positions, and perhaps also to accommodate and support a fellow Member State's specific needs and concerns. Although there is no obligation to abstain from *inter se* dispute settlement, the Member States' obligations towards the EU may require disputes to be resolved within the EU framework.<sup>58</sup>

Thus, mutual solidarity between Member States is both a precondition for the development of the Union's foreign policy and one of the outcomes or expressions of that policy. Opinion 2/13 also demonstrates that the need to protect the high levels of mutual trust between Member States may constrain the EU in the external obligations it contracts, demanding a degree of separation, or autonomy from general international law, in Member States' *inter se* relations.

### (ii) Member State–Institutions

The principle of *conferral* is important in determining the basis for EU powers and in deciding whether they are exclusive or not. To take a recent restatement of this principle:

[S]ince the EU has only conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the envisaged international agreement and the EU law in force.<sup>59</sup>

Given that 'competences not conferred on the Union in the Treaties remain with the Member States,'<sup>60</sup> conferral is the principle that delimits the boundary between EU and Member State competence. And the principle of conferral requires that

<sup>57</sup> *ibid* para 193.

<sup>58</sup> Case C-459/03 *Commission v Ireland*, Judgment, EU:C:2006:345; *cf* also Opinion 2/13 (n 13) paras 207–13.

<sup>59</sup> Opinion 1/13 (n 15) para 74; see also Opinion 1/03 (n 4) para 124, and Case C-114/12 *Commission v Council*, Judgment, EU:C:2014:2151, para 74.

<sup>60</sup> Article 4(1) TEU.

the boundaries do not become blurred, even in the interests of unity in international representation. Thus, it should be clear whether a decision is adopted by the Council or by the Representatives of the Member States.

In the recent *Air Transport Agreement* case,<sup>61</sup> the Commission challenged the legality of a decision on the signing and provisional application of an international air transport agreement, adopted jointly by both the Council and the Representatives of the Member States (a so-called 'hybrid' decision). The Council argued that the hybrid decision was an expression of the duty of sincere cooperation. Since it was common ground that the agreement should be mixed (concluded by both the Union and the Member States), the Council argued:

it is incumbent upon the Member States and the European Union to cooperate closely with regard to mixed agreements and to adopt a common approach in order to ensure unified representation of the European Union in international relations. The adoption of a joint decision is the expression of the cooperation thereby imposed.<sup>62</sup>

In an earlier case also involving a hybrid decision Advocate General (AG) Sharpston had accepted that cooperation is an 'essential condition' for the exercise of shared competence and that 'a joint decision is an expression of perhaps the closest form of cooperation'; nevertheless she argued both that 'procedural rules cannot be set aside in the name of the principle of sincere cooperation',<sup>63</sup> and that the principle of sincere cooperation 'can be relied upon only by an institution acting within the limits of its competences'.<sup>64</sup> In *Air Transport Agreement*, the Court agreed:

[T]hat principle [the duty of cooperation] cannot justify the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in Article 218 TFEU.<sup>65</sup>

The procedures laid down in Article 218 were compromised as the Member States participated in the adoption of an act which under Article 218(5) should have been adopted by the Council alone, and the position of the Council was compromised by participation in a decision of the Member States.<sup>66</sup> AG Mengozzi in fact took the view that the principle of sincere cooperation requires that the Member States should not interfere with the autonomy of the institutions. In his view, the merger of the Union and the intergovernmental decision into one indivisible whole could 'constitute a dangerous precedent of contamination of the autonomous decision-making process of the EU institutions that is liable, therefore, to cause damage to the autonomy of the EU as a specific legal system'.<sup>67</sup>

<sup>61</sup> Case C-28/12 *Commission v Council*, Judgment, EU:C:2015:282.

<sup>62</sup> *ibid* para 28.

<sup>63</sup> Case C-114/12 *Commission v Council*, Opinion of AG Sharpston, EU:C:2014:224, para 195.

<sup>64</sup> *ibid* para 175. On that occasion the Court did not decide the issue, since it took the view that competence was in any case exclusive.

<sup>65</sup> *Commission v Council* (n 61) para 55.

<sup>66</sup> *ibid* para 50.

<sup>67</sup> Case C-28/12 *Commission v Council*, Opinion of AG Mengozzi, EU:C:2015:43, para 80.

The principles of conferral and sincere cooperation are, as this case illustrates, closely connected. The duty to cooperate does not alter the allocation of powers between the EU and the Member States. Although the duty of cooperation 'is of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries',<sup>68</sup> what is required by the duty of cooperation will vary depending on whether competence is exclusive or shared. In cases of exclusive competence, the Member States may act *only* through joint or collective action.<sup>69</sup> In cases of shared competence the duty of cooperation is more flexible; it can involve an obligation not to obstruct the EU if an international initiative such as the negotiation of an agreement is underway; it can involve an obligation to act jointly with the EU institutions in particular circumstances (e.g. decision-making within mixed agreements or international organisations):

When [a mixed] agreement is negotiated and concluded, each of those parties [the Union and the Member States] must act within the framework of the competences which it has while respecting the competences of any other contracting party.<sup>70</sup>

This proposition can come under strain: *Commission v Sweden* demonstrates a strong reading of the duty of cooperation in the case of a mixed agreement, and while it can be defended it comes perilously close to a denial of Member State competence to act at all.<sup>71</sup>

Despite the centrality of the principle of conferral, there have been very few cases where it has been found that the EU has no competence at all.<sup>72</sup> So we could argue that this principle is not in practice so important as a power-limiting principle, but more because it makes clear the role of law (and therefore the courts) in structuring EU external power; it is a principle which establishes the need for a legal structure to EU power.

While conferral establishes the need for the EU (and each institution) to act within the limits of its powers, the principle of *subsidiarity* governs the decision to exercise that power. The operation of subsidiarity in the external context is not altogether clear. Subsidiarity in the sense of Article 5(3) TEU refers to the choice between EU or Member State action against a background of shared competence. In external relations this choice between Member State or Union action does of course exist, but is complicated in a number of ways. External action is characterised by the fact that the EU and Member States often operate side by side, concluding agreements together. Some important external competences are complementary rather than pre-emptive in effect. In the case of so-called parallel

<sup>68</sup> *Commission v Sweden* (n 7) para 71.

<sup>69</sup> Case C-45/07 *Commission v Greece*, Judgment, EU:C:2009:81.

<sup>70</sup> *Commission v Council* (n 61) para 47.

<sup>71</sup> *Commission v Sweden* (n 7). A Delgado Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations' (2011) 36 *EL Rev* 524.

<sup>72</sup> See n 9 above.

competences such as development cooperation and humanitarian aid, it is explicitly stated that the exercise of Union competence shall not result in the Member States being prevented from exercising theirs.<sup>73</sup> This is the case also for the exercise of competence under the Common Foreign and Security Policy. The principles governing these complementary competences are coherence and cooperation.<sup>74</sup> We could even see the use of mixed agreements, in particular where not strictly required by the absence of Union competence over part of the agreement, as an expression of subsidiarity. The Union acts, but not to the exclusion of the Member States. In such cases, the constraints on the Member States arise not from the operation of subsidiarity and its effect on the decision to exercise competence, but rather from the principle of sincere cooperation and its effect on the ongoing exercise of competence by the Member States.

Subsidiarity is also complicated by the interaction between the internal powers and implied external powers. The exercise of an internal competence, itself subject to the principle of subsidiarity, may lead to a situation of exclusive external competence on the basis of Article 3(2) TFEU, and thus the exclusion of subsidiarity at the external level.<sup>75</sup> We may say, then, that in the context of external policy-making, the choice between Member State or Union action inherent in the concept of subsidiarity is not a clear-cut either/or decision, and when the choice for Union action does preclude action by the Member States this will generally be the result of a (subsidiarity-based) choice to adopt internal legislation at Union level. This leads us to question what role subsidiarity should play in relation to external action. The choice between external action by the Union and external action by the Member States does not imply a choice between different levels of action—national or Union level—since both would act internationally. If we are to maintain the idea of choosing an appropriate level of action (acting as closely as possible to the citizen) which underlies the conception of subsidiarity,<sup>76</sup> then we may consider applying subsidiarity to the choice between acting at EU level (internally) and acting globally (externally).<sup>77</sup> In this sense, implied external powers could be seen as an expression of the principle of subsidiarity based on the decision to use the EU's competence to act at the most appropriate level to achieve its objectives.

<sup>73</sup> Article 4(4) TFEU.

<sup>74</sup> See Art 208 TFEU for development cooperation, Art 210 TFEU for humanitarian aid, and Arts 24(3) and 26(3) TEU for the CFSP.

<sup>75</sup> See, eg, *Commission v Council* (n 59). It is, of course, not always the case that the adoption of internal legislation will lead to exclusive external competence on the basis of Art 3(2) TFEU; an examination of both the legislation and the international agreement will be required.

<sup>76</sup> According to the Preamble to the TEU, decisions are to be taken 'as closely as possible to the citizen in accordance with the principle of subsidiarity'.

<sup>77</sup> B de Witte and A Thies, 'Why Choose Europe? The Place of the European Union in the Architecture of International Legal Cooperation' in B Van Vooren, S Blockmans and J Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford, Oxford University Press, 2013) 23.

*(iii) Inter-institutional Relations*

The principles of conferral and sincere cooperation are closely linked also in the inter-institutional context. Article 13(2) TEU makes this clear:

Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.

In the institutional context, conferral of powers is associated with institutional balance, recognising the different functions of each institution and the importance of the way those powers interact and affect each other. We see this in the choice of legal basis, and especially where there is a possibility of incompatible legal bases.<sup>78</sup> And the institutions have roles and prerogatives that they may seek to defend: the Commission's duty (and right?) to ensure the Union's external representation as provided in Article 17(1) TEU, and in particular its prerogatives as negotiator;<sup>79</sup> the Council's right to conclude international agreements;<sup>80</sup> the European Parliament's position as co-legislator, its right to give or withhold consent to the majority of international agreements, or simply its right to be consulted or to be informed. In determining the Parliament's prerogatives, the Court has referred to democracy as a Union value: for example, in the *GSP* case the obligation to consult the Parliament (as it then was) was said by the Court to be based on the principle of institutional balance and on the 'fundamental democratic principle' of consultation of people through their representatives.<sup>81</sup> In the *Transfer of Suspected Pirates* case, the right of the Parliament to be informed even in the case of a CFSP agreement was held to be an essential procedural requirement, breach of which resulted in the annulment of the Council's act:

[T]he Parliament's involvement in the decision-making process is the reflection, at EU level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly.<sup>82</sup>

The other institutions may not be able to claim such an exalted basis for their prerogatives but this does not mean that the institutional balance is always tipped in favour of Parliamentary involvement.<sup>83</sup>

The Lisbon Treaty introduced for the first time an explicit reference to *the duty of sincere cooperation* applied to the institutions, although the Court had already

<sup>78</sup> Case C-130/10 *European Parliament v Council*, Judgment, EU:C:2012:472.

<sup>79</sup> In Case C-114/12, the Commission argued that 'By acting as it did, the Council blurred the personality of the European Union and its presence and standing in international relations'. Opinion of AG Sharpston (n 63) para 191. See also Case C-425/13 *Commission v Council*, Judgment, EU:C:2015:483, in which it was held that although the Council was entitled to establish a consultative committee in an international negotiation, it had infringed the Commission's prerogative as negotiator by giving the committee the power to determine negotiating positions.

<sup>80</sup> Case C-660/13 *Council v Commission*, Judgment, EU:C:2016:616.

<sup>81</sup> Case C-65/93 *European Parliament v Council*, Judgment, EU:C:1995:91.

<sup>82</sup> *European Parliament v Council* (n 34) para 81.

<sup>83</sup> *European Parliament v Council* (n 78) para 82.

interpreted the general duty of cooperation as also applying to them.<sup>84</sup> Sincere cooperation is increasingly referred to by the institutions in litigation,<sup>85</sup> and the Court is starting to give some substance to the principle, as it has in dealing with Member State–EU relations. For example, the Court has held that ‘the principle of sincere cooperation requires the Commission to consult the Council beforehand if it intends to express positions on behalf of the European Union before an international court.’<sup>86</sup> Whereas institutional balance applies to the allocation of institutional roles in the Treaties, sincere cooperation operates on the institutions when acting *within* their respective spheres of competence.<sup>87</sup> So while the European External Action Service may be seen as an institutionalised opportunity for (though not the ‘fulfilment’ of) the duty of cooperation between the Council, the Commission and the Member States,<sup>88</sup> Article 40 TEU, which requires the preservation of and respect for the distinct ‘procedures and the extent of the powers of the institutions’ under CFSP and non-CFSP competences, can be seen as an expression of the principle of institutional balance. As we have already seen, sincere cooperation cannot be used to justify a departure from the allocation of competences to the different institutions. The 2010 inter-institutional agreement between the Commission and the European Parliament, including its provisions on the negotiation of international agreements, is clearly intended to provide a framework for ‘sincere cooperation’, as well as the effective and transparent exercise of the institutions’ respective powers.<sup>89</sup> The Council has taken the view that the agreement nevertheless threatens the institutional balance established in the Treaties, although the possibility of legal action threatened in 2010 has not materialised.<sup>90</sup>

Mutual sincere cooperation expresses the idea that each institution should respect and allow full expression to the powers of the other institutions: ‘[E]ach

<sup>84</sup> See, eg, *European Parliament v Council* (n 81).

<sup>85</sup> See, eg, *Commission v Council* (n 61); *Commission v Council* (n 79); *Council v Commission* (n 45); Case C-48/14 *European Parliament v Council*, Judgment, EU:C:2015:91.

<sup>86</sup> *Council v Commission* (n 45) para 86.

<sup>87</sup> *ibid* para 84: ‘Under Article 13(2) TEU, the European Union’s institutions are to practice mutual sincere cooperation. That sincere cooperation, however, is exercised within the limits of the powers conferred by the Treaties on each institution. The obligation resulting from Article 13(2) TEU is therefore not such as to change those powers.’

<sup>88</sup> Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L201/30.

<sup>89</sup> Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L304/47. According to the Preamble, ‘this Framework Agreement does not affect the powers and prerogatives of Parliament, the Commission or any other institution or organ of the Union but seeks to ensure that those powers and prerogatives are exercised as effectively and transparently as possible.’

<sup>90</sup> ‘The Council notes that several provisions of the Framework Agreement have the effect of modifying the institutional balance set out in the Treaties in force, according to the European Parliament prerogatives that are not provided for in the Treaties and limiting the autonomy of the Commission and its President. The Council is particularly concerned by the provisions on international agreements, infringement proceedings against Member States and transmission of classified information to the European Parliament.’ Council Statement on relations between the European Parliament and the Commission, 21 October 2010, Council doc 15172/10.



of the institutions must exercise its powers with due regard for the powers of the other institutions.<sup>91</sup> This is not just a question of respecting institutional balance and the other institutions' prerogatives, although it does encompass this. It also means that the institutions in their mutual relations should seek to maximise the degree to which each can fulfil its functions in the EU system. Each institution has an autonomy, which is represented by its particular role, but that autonomy should not be exercised at the expense of the autonomy of the other institutions. Here, perhaps, we can see the meaning of mutuality and the sense in which mutual cooperation is needed to preserve, or achieve, institutional balance.

This aspect of mutual sincere cooperation requires an understanding, not only of the formal legal powers of each institution but also the purpose of those powers: what function it serves, and the role it plays in a particular process or specific procedural context. In the process of treaty-making, for example, we need to understand the part played by the Council, the Commission and the European Parliament, as well as that of the Court of Justice. As expressed by the Court itself, the mutual sincere cooperation required by Article 13(2) TEU 'is of particular importance for EU action at international level, as such action triggers a closely circumscribed process of concerted action and consultation between the EU institutions'.<sup>92</sup> From this perspective, mutual sincere cooperation may contribute to the interpretation of the scope of the institutions' powers, as well as to how they are exercised.

The principle of *transparency* expresses the need for communication and information-sharing between institutions. It is implemented, *inter alia*, via inter-institutional agreements and in this context transparency serves the aims of institutional balance (for example, enabling the Parliament to play its role by initiating debate and passing resolutions on policy choices) and the systemic principles of effectiveness and coherence, facilitating effective policy-making and enabling the institutions to ensure that the EU's external face is unified and coherent. This invites the question: to what extent is transparency a principle in its own right, and to what extent is it a means of ensuring that other principles are respected? It is perhaps in the fourth axis of relations, between the EU and individuals and third countries, that the principle of transparency takes on a more autonomous and normative role.

#### (iv) *EU Institutions–Individuals/Third Countries/International Organisations*

The structuring of the EU as an international actor implies the need to structure its relationships with those 'outside' itself, individuals affected by its actions, as well of course as the third countries and international, regional and global organisations

<sup>91</sup> *Commission v Council* (n 79) para 69.

<sup>92</sup> *ibid* para 64.

with which the Union is mandated to ‘develop relations and build partnerships’ (Article 21(1) TEU). The fact that we may claim that these relations are governed by principles of EU law, and not simply the constraints of international law, illustrates the extent to which the EU as an international actor is legally bounded. And while it is the EU itself which establishes these principles, it nevertheless conducts those relations within the legal environment of international law. Put another way, the autonomy of the European Union necessary to establish its identity as an actor does not imply that the EU is closed to international law and legal relationships (that EU law and international law ‘pass by each other like ships in the night’ to use the metaphor of AG Maduro in *Kadi I*<sup>93</sup>). The principle of autonomy and its relationship to the task of contributing to the ‘strict observance and development of international law’ which is at the heart of EU external action (Article 3(5) TEU) operates as a systemic principle, a principle which helps to define the actorness of the EU. But there is also a need to address the principles which govern the EU’s conduct towards individuals and its international partners in a relational sense. Here, we will turn to two principles in particular: the rule of law (itself a compendium) and transparency.

The conception of a Union based on the *rule of law*, of the rule of law as a founding value of the EU (Article 2 TEU) which it is to uphold and promote in the wider world (Article 3(5) TEU), and one of the principles which ‘inspired its own creation, development and enlargement, and which it seeks to advance in the wider world’ (Article 21(1) TEU) implies certain obligations on the Union in its dealings with individuals affected by its actions<sup>94</sup> and perhaps also towards third countries. I am not here referring to the substantive content of policy (the EU as a promoter of the rule of law in third countries, or the EU’s ability to discriminate in terms of substantive policy between countries or individuals through trade preferences or visa requirements<sup>95</sup>). The claim is rather that the framework of external action needs to abide by certain procedural standards. Some outlines of this principle have been developed through the case-law on restrictive measures, including the obligation to state reasons, and rights of judicial review. The *Schrems* case is rather special, since the Data Protection Directive explicitly requires that the Commission in adopting a ‘safe harbour’ or adequacy decision must be satisfied that the level of protection of fundamental rights in a third country is at least equivalent to that in the EU, but it raises the question of the more general applicability of Charter rights of effective judicial protection and good administration to external action.<sup>96</sup> In the recent judgment in *H*, the Court of Justice accepted jurisdiction

<sup>93</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (n 3) para 22.

<sup>94</sup> *ibid.*

<sup>95</sup> Of course, the EU may commit itself to the principle of non-discrimination through political choice through its membership of an international organisation (such as the WTO), its international treaty commitments or the adoption of autonomous measures.

<sup>96</sup> Case C-362/14 *Schrems v Data Protection Commissioner*, Judgment, EU:C:2015:650.

(despite the limits imposed by Article 24(1) TEU and Article 275 TFEU) to review a decision adopted by a CFSP head of mission on the grounds that it concerned staff management. Its judgment, reversing that of the General Court, refers to the Union being founded on the ‘values of equality and the rule of law’, effective judicial review being ‘inherent in the existence’ of the rule of law. The principle of the rule of law is here used to help to define the scope of the Treaty rule excluding the Court’s jurisdiction over provisions relating to the CFSP and acts based on those provisions.

The principle of *transparency* in this context is concerned in particular with public access to documents, and the tendency of the EU institutions as well as governments towards secrecy in matters of international relations. There are perhaps two angles of transparency to consider: towards the EU public, and towards the outside world. A more traditional approach has argued that the need to restrict access of third countries to information justifies restricting information also to the EU public.<sup>97</sup> However, the Court has not interpreted the international relations exception in the Access to Documents Regulation as simply excluding all questions of external relations from transparency requirements.<sup>98</sup> It requires justification in each case that the EU’s interests will be damaged. And there are signs that the general expectations are changing: witness the decision (finally) to release the Transatlantic Trade and Investment Partnership (TTIP) negotiating mandate. This is at least in part due to a realisation that if the EU is to achieve the aims it has set itself in its external relations it needs to convince not only its external partners but also its own institutions (in particular the European Parliament) and its own public.<sup>99</sup>

## B. Systemic Principles

The structural principles that we may call *systemic* characterise the type of international actor the EU is, and the norms it produces in its external policy-making. They are concerned with the operation of the system as a whole as opposed to the interaction between its individual components, with building the EU’s identity as a *coherent, effective* and *autonomous* actor in the world. Autonomy is reflective of the EU’s need to project its international identity as distinct from its Member States, and also of the Court’s insistence that the EU represents a system autonomous from international as well as national law. The institutional policy-making space which is built and protected by the structural principles is open to international

<sup>97</sup> Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43, art 4.

<sup>98</sup> Case C-350/12P *Council v Sophie in’t Veld*, Judgment, EU:C:2014:2039; Case T-301/10 *Sophie in’t Veld v Commission*, Judgment, EU:T:2013:135.

<sup>99</sup> The cases of the SWIFT and ACTA agreements provide ample evidence of this, as does the current debate over TTIP.

law,<sup>100</sup> but the relation is mediated through rules of EU law, established in the Treaty and developed and applied by the Court of Justice. Coherence and effectiveness are assessed with reference to the Union's objectives, as defined in the Treaties and operationalised by the political actors.

How do these systemic principles interact with relational principles? In the discussion of relational principles we have referred several times to these systemic principles and it is clear that they work closely together. They may be complementary. On the one hand, the relational principles are designed to further the systemic principles: the Member States, for example, in an expression of the principles of loyalty and solidarity, are to refrain from any action 'likely to impair [the Union's] effectiveness as a cohesive force in international relations' (Article 24(3) TEU). On the other hand, the systemic nature of coherence, effectiveness and autonomy implies that these principles serve to guide and shape the other structural principles and their implementation. Thus, the principle of effectiveness, based on the conception of the EU as an actor with international legal capacity, is behind the interpretation given to the principle of conferral in *ERTA* so as to allow for the emergence of implied external powers. The principle of autonomy underpins the Court's approach to the rule of law in *Kadi* and to mutual trust in Opinion 2/13. The principle of coherence has been used by the Court to guide its interpretation of the principle of institutional balance reflected in the relationship between substantive and procedural legal basis in Article 218 TFEU.<sup>101</sup> There may also be tensions between them, for example, between coherence and the principle of conferral; or between effectiveness and the principle of transparency; as well as tensions between the two systemic principles of coherence and effectiveness, in the sense of consistency versus *real-politik*, and between relational principles such as conferral and sincere cooperation.<sup>102</sup>

## V. Conclusion

This chapter has introduced the concept of structural principles in EU external relations law by putting forward a preliminary assessment of their rationale, their nature and their function. It starts from an observation about the character of external relations competences: the task of the Union, guided by its values, is to

<sup>100</sup> To take a couple of examples: the Court's recognition that the EU is bound by customary international law, and its use of the canons of interpretation of international law in its interpretation of the EU's international treaty commitments. For a critique of the Court's approach to international treaty law, see J Odermatt, 'The Use of International Treaty Law by the Court of Justice of the European Union' (2015) 17 *Cambridge Yearbook of European Legal Studies* 121.

<sup>101</sup> *European Parliament v Council* (n 34) paras 52–60.

<sup>102</sup> On the latter, see *Commission v Sweden* (n 7), and the Opinion of AG Sharpston in *Commission v Council* (n 63).

‘develop relations and build partnerships’ with third countries and international organisations, and to work for a high degree of cooperation in order to further its objectives (Article 21 TEU). The Treaty does not establish end-goals for the Union’s external policy, its objectives being orientational and general rather than functional. This is not to downplay their importance, but rather to understand the nature of their role. Policy goals certainly exist, but they are created as a result of policy-making by the Union’s institutional framework, giving concrete shape to the Union’s objectives in specific situations or on particular issues.

The chapter then argues that this characteristic of EU external competence shapes the role of law in external relations. Its focus is not on shaping the uses to which that competence is put, but rather on shaping or constructing an institutional space within which policy can be made. The legal structure thus created is protective of the policy autonomy of the Union, of the powers of the different actors in the system, and has developed principles which govern their relations.

These principles I have termed structural, since they help to define the structure of the EU as an international actor, both internally and externally. As principles they operate alongside rules, they may find their expression in detailed rules (e.g. rules of procedure) and they may help to interpret or apply rules in specific cases. They may complement but may also be in tension with each other. As structural principles they are concerned with process rather than the content of policy, and this has an impact on the context in which policy contestation can take place and the role that law and the courts can play in this process. The chapter identifies two types of structural principles, relational and systemic. Relational principles operate on the different relational axes between Member States, institutions and individuals or third countries. They concern the existence and exercise of competence, solidarity and cooperation, transparency both between the EU institutions and towards the public, and observance of the rule of law. Systemic principles are concerned with the solidity of the structure: the building of the EU as a coherent and effective and autonomous actor. The following chapters will address each of these principles individually; our hope is that this attempt to look at EU external relations through the lens of structural principles will help us to understand better the role that law plays in this construction project.