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5. The role of values in EU external relations: a legal assessment of the EU as a ‘good’ global actor

Ramses A. Wessel and Yuliya Kaspiarovich

INTRODUCTION

In the context of this book, the present contribution will assess the ‘value of EU values’¹ in the Union’s dealing with other international actors. The importance of the values in internal situations relating to the rule of law is high on the political agenda.² Far less studied is the way in which these values have, or should have, an impact on the EU’s external relations.³ Article 2 TEU presents these values as forming part of its very foundation and lists them in the following manner:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

¹ The term was recently coined by Enzo Cannizzaro, ‘The Value of the EU International Values’ in Wybe Th. Douma, Christina Eckes, Peter Van Elsuwege, Eva Kassoti, Andrea Ott and Ramses A. Wessel (eds), *The Evolving Nature of EU External Relations Law* (T.M.C. Asser Press 2021).

² See for example this extensive study: Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, ‘EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union’ (2020) 39 *YB Eur L* 3; and earlier literature: Stephen Weatherill, *Law and Values in the European Union* (Oxford University Press 2016).

³ Notable exceptions are Sonia Lucarelli and Ian Manners, *Values and Principles in European Union Foreign Policy* (Routledge 2006); Marise Cremona, ‘Values in EU Foreign Policy’ in Malcolm Evans and Panos Koutrakos (eds), *Beyond the established legal orders: policy interconnections between the EU and the rest of the world* (Hart Publishing 2011); Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016).

Article 3(1) TEU adds that these values are also to be 'promoted'. And, as is well known, Article 3(5) TEU makes clear that this promotion is not only done internally, but is also part of the EU's external relations: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens.'⁴ This provision also adds a number of substantive issues that need to be part of that promotion. Finally, Article 21 TEU not only provides that the values are to be 'safeguarded' in the EU's international relations, but also links the values to a large set of principles that should guide the Union's action on the international scene.⁵

This highlights that a study of the role of EU values in its external relations cannot be limited to Article 2 TEU, but needs to take a broader perspective by including the related provisions in Articles 3(5) and 21 TEU. As indicated by Larik, this is also necessary from a more substantive perspective.⁶ For this reason, Larik highlights the 'translation dimension' of values as enshrined in Article 2 and mirrored in EU external objectives from Article 3(5) TEU.⁷

The present chapter can be seen as forming part of a large group of studies that have been dealing with the legal dimensions of the EU's global normative actorness over the past decade or so. This set comprises studies ranging from the extraterritorial application of EU law,⁸ and its Charter of Fundamental Rights,⁹ the link between internal and external competences and principles,¹⁰ non-trade elements in EU trade agreements,¹¹ the influence of the EU on

⁴ Larik (n. 3) 80.

⁵ Vivian Kube, 'The European Union's External Human Rights Commitment: What Is the Legal Value of Article 21 TEU?' (2016) EUI Working Papers Law 2016/10

⁶ Larik (n. 3) 118–119.

⁷ Ibid. 119–120.

⁸ Elaine Fahey, *The Global Reach of EU Law* (Routledge 2018); Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

⁹ Violeta Moreno-Lax, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights* (Nomos Verlagsgesellschaft mbH & Co. KG 2014); Jan Wouters, 'The EU Charter of Fundamental Rights – Some Reflections on Its External Dimension' (2001) 8 *MJECL*; also Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *MJECL*; as well as for instance Eva Kassoti and Ramses A. Wessel, 'The Conclusion of Trade Agreements and the EU's Duty to Respect Human Rights Abroad: Extraterritorial and Territorial Considerations' in Nuno Cunha Rodrigues (ed.), *Extraterritoriality of EU Economic Law* (Springer 2021).

¹⁰ Christina Eckes, *EU Powers under External Pressure: How the EU's External Actions Alter Its Internal Structures* (Oxford University Press 2019).

¹¹ See, among others, chapters by Jean-Baptiste Velut, Martin Trybus, Tonia Novitz or Eva Pander Maat in this book.

international law and international organisations,¹² or third state perspectives on all of this.¹³

Despite the abundant attention paid to the EU as a normative actor, the legal position of the values in the Treaty and the ways in which they do indeed impose concrete legal constraints on the EU to act externally (or call for action) remain largely in the dark. While recent studies have, for instance, addressed ways in which values play a role in the EU's trade policy,¹⁴ conceptual studies on the role of values in EU external relations are less easy to find. As recently held by Cannizzaro, 'Articles 3(5) and 21 TEU do not clarify the nature and effect of the normative notions they lay down. Nor do they clarify the impact of these notions on the EU's competence system and, in particular, on the new external action of the Union.'¹⁵ This is even more problematic for Article 2 TEU. The purpose of this chapter is to assess the legal role EU values may/should have in the EU's engagement with third states and other international organisations and in the process of formulating its external policies. This will be done on the basis of an analysis of the normative force of norms that are relevant in the EU setting, but also by assessing the extent to which EU values are part of key instruments in EU external relations and contribute to the EU's 'good' global actorness.¹⁶ The second section will first examine the position of values in the EU legal order. The next section will then look at the role of values in the practice of EU external relations. Our conclusion will critically assess whether, in the current rule of law crisis, the EU can remain a 'good' global actor. Given the limited scope of this chapter, it will only be able to provide a short overview of the issues.

¹² Jed Odermatt, *International Law and the European Union* (Cambridge University Press 2021).

¹³ Jed Odermatt and Ramses A. Wessel (eds), 'The European Union's External Action: Views from the Outside' (2021) Special Issue *Europe and the World: A Law Review*.

¹⁴ Angelos Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 *Eur Foreign Aff Rev*; Jacques Pelkmans, 'Linking "Values" to EU Trade Policy – A Good Idea?' (2020) 26 *ELJ*.

¹⁵ Cannizzaro (n. 1) 4. See on a recent analysis of Art. 3(5) TEU, Eva Kassoti and Ramses A. Wessel, 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union' in Paula García Andrade (ed.), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch 2022).

¹⁶ It thus aims to address a number of questions raised by Elaine Fahey and Isabella Mancini in the Introduction to this book.

THE NORMATIVE FORCE OF VALUES IN THE EU LEGAL ORDER

Unfortunately, the Treaties do not simply list the EU values in one single coherent provision. Moreover, some of the values are sometimes referred to as 'principles', or even (just) 'objectives'.¹⁷ Thus, in the Preamble to the TEU, the signatories to the Treaties not only draw inspiration from 'the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law', but at the same time confirm 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law'.¹⁸ The term 'principles' returns in Article 21(1) TEU and paragraph 3 refers to 'objectives'.¹⁹ As we have seen, similar values are more elaborately listed in Article 2 TEU. In addition, Article 7 TEU deals with the situation of 'a serious breach by a Member State of the values referred to in Article 2'. Furthermore, the list is repeated or confirmed in Articles 3, 13, 21, 32, 42(5) TEU, and Article 14 TFEU, which extend the obligations to the Union and its institutions; something that is also reflected by Article 8 TEU on the 'special relationships with neighbouring countries'. And, of course, respect for 'the values referred to in Article 2' is one of the accession criteria mentioned in Article 49 TEU.²⁰ Thus, both the Union and Member States are bound to uphold the values.

This brief categorisation not only shows a semantic variation, but also explains why in this chapter we sometimes refer to 'principles' rather than to 'values'. Article 21(1) uses 'principles' in a way that seems to be synonymous to 'values'. This should not come as a surprise. As Cremona held,

a general principle expresses a core value. It is perhaps in this sense that the Treaties refer in Article 21(1) TEU to 'the principles which have inspired [the Union's]

¹⁷ Cannizzaro (n. 1) 5. The terminology is indeed largely confusing: while Art. 3(5) refers to 'values and interests', Art. 21 TEU uses the term 'objectives' and other provisions (e.g. Articles 207(1), 208(1), 212(1), 214(1) TFEU) refer to 'principles and objectives'.

¹⁸ Emphasis added.

¹⁹ See also, on the history of the articles and the terminology, Larik (n. 3) Chapter 2.

²⁰ Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International BV 2008); Dimitry Kochenov, 'Overestimating Conditionality' in Inge Govaere, Erwan Lanon, Peter Van Elsuwege and Stanislas Adam (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Brill Nijhoff 2014).

own creation, development and enlargement', these being essentially the values expressed in Article 2 TEU, on which the Union is founded.²¹

Treaties, after all, are the result of complex negotiations and path dependency. For this reason, the intended effects of the values seem to differ and a combined reading of Articles 2, 3 and 21 TEU is needed to make sense of, not only the substantive content of the values, but also of the function and intended legal effects in the Union's external relations. Given the somewhat 'programmatic' nature of these provisions,²² it may not come as a surprise that their actual normative effect is not always immediately translatable to clear Union obligations. While Article 3(5) TEU clearly states that 'In its relations with the wider world, the Union *shall uphold and promote* its values',²³ underlining the legally binding nature of the values, Article 2 itself 'merely' mentions the values as part of the foundation of the Union and Article 21(1) TEU indicates that the Union's action on the international scene 'shall be *guided*' by the 'principles'. At the same time, paragraph 3 of the same provision is again stricter and provides that 'The Union *shall respect* the principles',²⁴ by referring to the first two paragraphs of that article, which not only lay down 'the principles which have inspired [the Union's] own creation', but also link these principles to the 'third countries, and international, regional or global organisations' in developing relations and building partnerships. In turn, paragraph 2 of Article 21 TEU does not merely see the principles as *procedural* elements in the Union's engagement with third countries and other international organisations, but as *substantive* policy goals. Thus, 'safeguarding its values, fundamental interests, security, independence and integrity, consolidating and supporting

²¹ Marise Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart Publishing 2018); quoting also Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2007) 1. Yet, in an earlier study (cf. Cremona, 'Values in EU Foreign Policy' (n. 3) 280–281), she also noted the difference:

A value may be defined as something which has intrinsic worth, which is esteemed for its own sake. Values can be seen as part of the cultural patrimony or common heritage of Europe, and thus creative of a sense of belonging. A principle is defined as a fundamental truth, a fundamental motive or reason for action, in particular one that is consciously recognised and followed.

See also as Larik (n. 3) 162:

Even though there is a degree of overlap, the legal term 'structural principles' is not equivalent to that of 'values'. The latter are 'normative convictions of a highly abstract order and are part of the social identity of the individual'. However, by codifying them in the highest laws of the Union, they become legal concepts, and serve as a source for the interpretation of Union law.

²² Case C-149/96 *Portugal v Council* [1999] EU:C:1999:574, para. 86.

²³ Emphasis added.

²⁴ Emphasis added.

democracy, the rule of law, human rights and the principles of international law' are not presented as necessary elements of a process, but rather as end goals of the Union's 'common policies and actions'.

Nevertheless, these semantic differences in the designation of core EU values do not undermine their importance in the internal hierarchy of EU law. The Court has been quite clear on the role of these types of norms, including in the Union's external relations. In its famous judgment *Defrenne v Sabena*, the CJEU was asked whether the 'principle' that men and women should receive equal pay for equal work, as an effect of implementation of former Article 119 of the Treaty establishing the European Economic Community, should produce a direct effect between two individuals. Facing for the first time the issue of horizontal direct effect, the Court carefully analysed the value and reach of the notion of 'principle'. In response to the government of the UK, it stated:

First of all, it is impossible to put forward an argument against its direct effect based on the use in this article of the word 'principle', since, in the language of the Treaty, this term is specifically used in order to indicate *the fundamental nature of certain provisions*, as is shown, for example, by the heading of the first part of the Treaty which is devoted to 'Principles' and by Article 113, according to which the commercial policy of the Community is to be based on 'uniform principles'. If this concept were to be attenuated to the point of reducing it to the level of a vague declaration, the very foundations of the Community and the coherence of its external relations would be indirectly affected.²⁵

Thus, according to the Court, principles of EU law are of fundamental importance for its external policy and its coherence.

Articles 3(5) and 21 TEU thus provide a rather inconsistent and fragmented picture of the role of the exact principles and values, both in terms of their status and their function.²⁶ Apart from these inconsistencies (and sometimes clear potential conflicts²⁷) in the intended legal effects of the values, it is also difficult to compare the different values as many different ones seems to have been brought together under the same heading. Thus, the Union's 'own' values in Article 2 TEU (respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights) are combined with more 'inter-

²⁵ Case 43/75 *Gabrielle Defrenne v Sabena* [1976] EU:C:1976:56, paras 28–29, emphasis added.

²⁶ See more extensively Eva Kassoti and Ramses A. Wessel, 'The Normative Effect of Article 3(5) TEU' (n. 15).

²⁷ A clear example is that Article 3(5) mentions the obligation of the EU to 'uphold and promote its values' in tandem with the 'strict observance' of international law (leaving aside that 'strictly observing' and 'developing' international law may also not always go hand in hand).

national values'²⁸ (including contributing to peace, security, the sustainable development of the Earth, free and fair trade, eradication of poverty and the strict observance and the development of international law). What *is* clear, however, is that through the cross-referencing between the various provisions, there is a legal obligation for the Union not to act contrary to values and principles in *all* its external relations: 'The Union *shall respect* the principles ... in the development and implementation of the different areas of the Union's external action ... and of the external aspects of its other policies' (Article 21(3) TEU).²⁹ This provision, in combination with all of the above, hints at a role for the principles (and connected values) mentioned as the standard of review for EU external acts.³⁰

THE ROLE OF VALUES IN THE PRACTICE OF EU EXTERNAL RELATIONS

The Definition of EU External Competences in Relation to Values

The link between the EU principles and the Union's external competences emerged in the context of Opinion 2/15. In contrast to the AG, the Court first of all held that 'The obligation on the European Union to integrate those objectives and principles into the conduct of its common commercial policy is apparent from the second sentence of Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU.'³¹ In other words, the principles and objectives in Article 21(3) directly impact the common commercial policy (CCP). Yet, the Court refers to 'the conduct' of the CCP, rather than to the competence as such. If anything, not so much the *existence* of a competence, nor its *nature* (exclusive or shared), but the *scope* of the competence may be influenced by the principles (in this case by taking into account environmental protection in the context of the CCP).³² Yet, obviously, viewing the scope of an exclusive competence in the context of the mentioned principles has an effect on the substantive division of competences between the EU and its Member States. Indeed, even though according to the Court's reasoning the conduct of the CCP shall only be 'guided' by the principles enshrined in Article 21(3)

²⁸ Cannizzaro (n. 1).

²⁹ Emphasis added.

³⁰ See for a similar conclusion Cannizzaro (n. 1) 5.

³¹ Opinion 2/15 [2015] EU:C:2017:376, para. 143.

³² See, on the difference between these three dimensions, Andrea Ott, 'EU External Competence' in Ramses A. Wessel and Joris Larik (eds), *EU External Relations Law: Text, Cases and Materials* (Hart Publishing 2020).

without affecting its nature and scope,³³ the Court concludes that the objective of sustainable development forms an integral part of the CCP.³⁴

Focusing more on the correct choice of legal basis than on the scope of an existing competence, the Court has made a link between Articles 21 and 40 TEU, the latter supplying the rule that a centre of gravity test needs to be performed to decide on either a Common Foreign and Security Policy (CFSP) or a TFEU legal basis for decisions (and international agreements) that include CFSP elements. In the *Kazakhstan* case,³⁵ the AG already made a reference to Article 21 TEU by using that provision to bridge CFSP and other external relations issues:

[T]he aims and content of the Partnership Agreement with references to the foreign and security policy, as identified above, may not only be implemented by the conventional means of the CFSP. Rather, the commitment to democracy and the rule of law, respect for human rights, peaceful settlement of disputes and observance of international law belong to the fundamental values of the European Union, guiding it in all of its action on the international scene in accordance with the cross-cutting clause of Article 21(1) TEU, that is to say not only in the context of the CFSP, but also for example in the context of the common commercial policy (Article 207 TFEU) and development cooperation (Article 208(1) and Article 209(2) TFEU).

However, in the *Mauritius* case, AG Bot was more nuanced regarding the horizontal nature of Article 21 than AG Kokott in the *Kazakhstan* case.³⁶ Considering specific characteristics of the CFSP, AG Bot claimed that it was essential to 'define the boundaries between the CFSP and the Union's other policies'.³⁷ In order to justify the link of the agreement between the EU and the Republic of Mauritius on the conditions of transfer of suspected pirates from the EU-led naval force to the Republic of Mauritius, AG Bot identified values and principles in Article 21(2) TEU specifically related to the sphere of

³³ See on this particular issue Dimitry Kochenov, 'The Issue of Values' in Roman Petrov and Peter Van Elsuwege (eds), *The Application of EU Law in the Eastern Neighbourhood of the European Union* (Routledge 2014).

³⁴ Opinion 2/15, [2015] EU:C:2017:376, paras 144–148.

³⁵ Opinion of AG Kokott in Case C-244/17 *European Commission v Council of the European Union* [2018] EU:C:2018:364, para. 77.

³⁶ Opinion of AG Bot in Case C-658/11 *Parliament v Council* (Mauritius) [2014] EU:C:2014:41, paras 85–88.

³⁷ *Ibid.* para. 86.

the CFSP. He first referred to the list of pre-Lisbon objectives of the CFSP as enshrined in former Article 11(1) TEU.³⁸ He concluded then:

As in that case, the fact the Agreement constitutes one of the instruments by which the European Union takes action at international level which was the subject of numerous Security Council resolutions and was indisputably intended to *preserve international peace and security* is an important factor in the formation of the view that that Agreement can be linked to the sphere of the CFSP.³⁹

The EU values undoubtedly form a constitutional element of the Union's identity. With the constant increase in the EU's competences, there is a need to conceptualise the respect and promotion of values in external relations.⁴⁰ This development is similar to the internal European integration process, when the protection of fundamental rights was badly needed following the increasing contestation by national courts. While Articles 3(5) and 21 TEU cannot serve as a proper legal basis in their own right,⁴¹ they nevertheless are to 'guide' EU external action in different fields and thus become the missing link in the exercise of the 'centre of gravity' test by the Court.

Values in the External Relations Case Law of the Court

EU values have featured in the case law of the Court of Justice of the European Union from early cases such as *J.J. Zwartveld and Others*⁴² to recent ones like infringement proceedings against Hungary or Poland.⁴³ The values have, however, also featured in external relations case law.

With regard to Article 2 TEU, the CJEU's case law database reveals interesting dynamics. In total, Article 2 TEU, in its post-Lisbon phrasing, is mentioned in 168 cases relating to any type of policy in internal and external

³⁸ Ibid. para. 87.

³⁹ Ibid. para. 91, emphasis added.

⁴⁰ Marise Cremona, 'Values in EU Foreign Policy' (n. 3).

⁴¹ Eva Kassoti and Ramses A. Wessel, 'The Normative Effect of Article 3(5) TEU' (n. 15).

⁴² Case C-2/88 *Imm. J.J. Zwartveld* [1990] EU:C:1990:315, paras 16–17: 'The European Economic Community [...] is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.'

⁴³ Especially recent infringement actions against Poland and Hungary, for example: Case C-619/18 *Commission v Poland* [2019] EU:C:2019:531; Case C-192/18 *Commission v Poland* [2019] EU:C:2019:924; Case C-286/12 *Commission v Hungary* [2012] EU:C:2012:687; Case C-66/18 *Commission v Hungary* [2020] EU:C:2020:792; Case C-78/18 *Commission v Hungary* [2020] EU:C:2020:476.

settings. When limited to 'external relations', there are 27 cases in total for the post-Lisbon period, most of which relate to the CFSP. When 'accession' is added to the search, 28 cases were found. We shall discuss the case of accession later.

It was clearly acknowledged by the Court that the values and principles on which the Union is founded must inform the EU's external action.⁴⁴

First of all, it should be recalled that Article 2 TEU and Article 3(5) TEU require the institutions of the EU to promote, in particular in international relations, the *values and principles* on which the EU is founded, namely, in particular, respect for human dignity, the rule of law and fundamental rights. Secondly, ... respect for those values and for the principles on which the EU is founded is required of all actions of the EU, including those in the area of the CFSP ...⁴⁵

Furthermore, in many recent cases relating to restrictive measures, or other measures situated in the field of the CFSP, the Court and the General Court referred to values and principles guiding EU external action as enshrined in Articles 2 and 21 TEU. The formula most used by the CJEU is the following:

As is apparent from both Article 2 TEU, which is included in the Common provisions of the EU Treaty, and Article 21 TEU, concerning the European Union's external action, to which Article 23 TEU, relating to the CFSP, refers, *one of the European Union's founding values is the rule of law*.⁴⁶

Another interesting link is made by the Court in the recent *Venezuela v Council* case,⁴⁷ where Article 2 TEU is used in conjunction with Article 263 TFEU to grant the Republic of Venezuela legal standing before the Court. In its contextual and teleological interpretation of the fourth paragraph of Article 263 TFEU, the Court states that 'the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law'.⁴⁸

⁴⁴ See more extensively Ramses A. Wessel, 'General Principles in EU Common Foreign and Security Policy' in Katja S. Ziegler, Päivi J. Neuvonen and Violeta Moreno-Lax (eds) (n. 5).

⁴⁵ Case T-288/15 *Abdelaziz Ezz* [2018] EU:T:2018:619, paras 57–58, emphasis added.

⁴⁶ See among others: Case C-455/14 *H v Council and Commission* [2016] EU:C:2016:569, para. 41 (also the value of equality); Case C-72/15 *Rosneft* [2017] EU:C:2017:236, para. 72; Case C-134/19 P *Kargarán* [2020] EU:C:2020:793, para. 35.

⁴⁷ Case C-872/19 P *Venezuela v Council* [2021] EU:C:2021:507.

⁴⁸ *Ibid.* para. 48. In para. 49 the Court also recalls its above-mentioned findings on the role of the rule of law.

In most external relations cases where Article 2 TEU is mentioned by the Court, it is linked to Article 3(5) and/or Article 21 TEU. Even though, as we have seen, there is indeed a semantical difference between ‘values’, ‘principles’ and ‘objectives’, it appears that values inform EU external action via principles enshrined in Article 3(5) and/or Article 21 TEU. And the latter provisions can also be found in the Court’s external relations case law protecting objectives other than the rule of law.⁴⁹ As explained by Cremona:

Perhaps the shift from values in Article 2 to principles in Article 21 signifies the shift from defining the Union’s identity to setting out its policies and the actions ... More specifically, the reference to ‘principles’ in Article 21 is significant in terms of the potential of the provision in the hands of the Court of Justice. Principles, as we have seen from the Court’s case law on general principles of law, are at least potentially justiciable, as well as offering a degree of flexibility and a recognition that different competing principles may need to be reconciled when engaging in concrete actions.⁵⁰

It appears from the above-mentioned – and admittedly scarce – case law that the EU values are mostly used by the Court as ‘the essential presumption’ informing the exercise of external competences.⁵¹ This supports our theoretical observations above that the EU does not act to enforce EU values and principles, but rather uses them as an essential tool to transform its external actions into ‘good’ actions.

Values in External Instruments of the EU

As Cremona already found in relation to the pre-Lisbon situation, values can be promoted via technical assistance (through either direct support of the development of values or the implementation of international norms, or as an element of conditionality based on respect for human rights and democracy); via unilateral trade instruments (incorporating incentives for partners to implement certain standards); and via non-binding instruments (ranging from human rights dialogues; the use of Council conclusions, Guidelines and CFSP Decisions). Post-Lisbon, these instruments are still used.⁵²

In legal acts related to EU external relations, references to Article 2 TEU are difficult to find, but may, for instance, appear as a standard for third states (e.g.

⁴⁹ Eva Kassoti and Ramses A. Wessel, ‘The Normative Effect of Article 3(5) TEU’ (n. 15).

⁵⁰ Marise Cremona, ‘Values in EU Foreign Policy’ (n. 3) 280–281.

⁵¹ Dimitry Kochenov, ‘The Issue of Values’ (n. 33).

⁵² Ingo Borchert, Paola Conconi, Mattia Di Ubaldo and Cristina Herghelegiu, ‘The Pursuit of Non-Trade Policy Objectives in EU Trade Policy’ (2021) 20 *WTR* 623.

as part of conditions third states need to accept when participating in Common Security and Defence Policy (CSDP) projects⁵³). A similar limited number of references can be found in relation to Article 3(5) and 21 TEU, which may appear in relation to Decisions on restrictive measures, or in relation to European Neighbourhood Policy instruments. Zooming in on international agreements (as perhaps the external instrument par excellence), the common way of addressing EU values is still through the inclusion of an 'essential elements' clause, through which, for instance, 'respect for human rights and democratic principles' becomes an integral part of the agreement.⁵⁴ References to Articles 2, 3(5) and 21 TEU proper are again scarce.⁵⁵

Whereas references to Article 2 TEU as such are less common in international agreements (and their signing and concluding decisions), the values do seem to play a key role in one specific type of agreements, that is, accession agreements. As these agreements smoothly transform the legal relationship between two parties into an internal relationship under EU law, the respect and promotion of EU values is of particular importance. Article 49 TEU states that 'any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union'. The wording of this provision stems from the 1993 Copenhagen criteria,⁵⁶ which also form the basis for an examination by the Commission of the concrete implementation of the political conditionality. While this situation may indeed be specific and primarily relates to (prospective) Member States, the link with external relations law is also clear after accession. Only by making sure that acceding Member States conform to the EU's values, will the EU be able to live up to the rules laid down in Articles 3(5) and 21 TEU. Thus, in a recent judgment the CJEU responded to a set of preliminary references made

⁵³ Council Decision (CFSP) 2020/1639 of 5 November 2020 establishing the general conditions under which third States could exceptionally be invited to participate in individual PESCO projects, Art. 3 [2020] OJ L 371.

⁵⁴ See for instance Anne-Carlijn Prickartz and Isabel Staudinger, 'Policy vs Practice: The Use, Implementation and Enforcement of Human Rights Clauses in the European Union's International Trade Agreements' (2019) 3 *Eur World*; Narine Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood' (2015) 40 *ELR*.

⁵⁵ For an exception see Council Decision of 2 September 2011 partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic (2011/523/EU) [2011] OJ L 228.

⁵⁶ Christophe Hillion, 'The Copenhagen Criteria and their Progeny' in Christophe Hillion (ed.), *EU Enlargement: A Legal Approach* (Hart Publishing 2004); Joris Larik, Peter Van Elsuwege and Bart Van Vooren, 'The External Dimension of Joining and Leaving the EU' in Ramses A. Wessel and Joris Larik (eds), *EU External Relations Law: Text, Cases and Materials* (Hart Publishing 2020).

by Romanian courts regarding the Treaty of Accession of the Republic of Bulgaria and Romania to the EU, related in particular to the verification by the Commission of the respect by Romania of political conditionality following its accession to the EU.⁵⁷ The applicants in the main proceedings disputed the compatibility with EU law of some reforms related to the organisation of their judiciary.⁵⁸ The Court noted that the possibility of joining the EU as enshrined in Article 49 TEU is conditional on the voluntary commitment of the acceding state to common values referred to in Article 2 TEU.⁵⁹ Furthermore, the Court stated that

compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot, therefore, amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU. The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary ...⁶⁰

The value of the rule of law, by virtue of Article 19 TEU, put a negative obligation (not to amend legislation in a way contrary to the value of the rule of law) and a positive obligation (to ensure that adopted rules would not undermine the independence of the judiciary) upon Member States.

The link between Article 19 TEU and 2 TEU is not new. The Court has reaffirmed it quite extensively in its recent case law.⁶¹ The value of the rule of law, as enforced by Article 19 TEU, has a very important function, according to the Court, as it creates the foundation for the principle of mutual trust, a principle that is crucial also to ensure consistency in the EU's and Member States' relations with third states.⁶² In Opinion 2/13 on the EU's second unsus-

⁵⁷ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociatia 'Forumul Judecatorilor din Romania'* [2021] EU:C:2021:393.

⁵⁸ *Ibid.* paras 47–51.

⁵⁹ *Ibid.* para. 160.

⁶⁰ *Ibid.* para. 162.

⁶¹ Case C-64/16 *Association of Portuguese Judges* [2018] EU:C:2018:117, para. 36; Case C-284/16 *Achmea* [2018] EU:C:2018:158, para. 34; Opinion of AG Bot in Opinion 1/17 [2019] EU:C:2019:72, para. 82.

⁶² Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociatia 'Forumul Judecatorilor din Romania'* [2021] EU:C:2021:393, para. 160. The Court reiterates its settled case law on the foundation and importance of the principle of mutual trust in paras 188–191.

cessful attempt to join the ECHR, the Court referred to that same constitutional principle in the following words:

This legal structure [of EU law] is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and therefore, that the law of the EU that implements them will be respected.⁶³

Thus, the constitutional foundation of the EU is all about values as enforced through Article 19 TEU and practised in respect of the fundamental principle of mutual trust.

Mirroring accession, in the *Wightman* case, the Court also referred to EU values in order to allow the UK to unilaterally revoke its notification of withdrawal from the EU:

As is apparent from Article 29 TEU, which provides the possibility for any European State to apply to become a member of the EU and to which Article 50 TEU, on the right of withdrawal, is the counterpart, the EU is composed of States which have freely and voluntarily committed themselves to those values, and EU law is thus based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that those Member States share with it, those same values.⁶⁴

Despite the internal justifications used by the Court in its argumentation, the strong link between international and external obligations reflected in Articles 3(5) and 21 TEU, discussed above, underlines the importance of the Article 2 TEU values in the Union's external action.

CONCLUSION

'People who live in glass houses shouldn't throw stones.' This idiom was used by Joseph Weiler to criticise the functioning of the CJEU in the context of the

⁶³ Opinion 2/13 [2014] EU:C:2014:2454, para. 168.

⁶⁴ Case C-621/18 *Wightman* [2018] EU:C:2018:999, para. 63; for in-context reading, paras 62–67; also European Parliamentary Research Service, 'Protecting EU common values within the Member States: An overview of monitoring, prevention and enforcement mechanisms at EU level' (2020), <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652088/EPRS_STU\(2020\)652088_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652088/EPRS_STU(2020)652088_EN.pdf)> last accessed 31 January 2022.

rule of law crisis in the EU.⁶⁵ The same expression can be used to assess the sad reality of the EU as a ‘good’ global actor. While, through Articles 3(5) and 21 TEU, the constitutional status of the EU’s values in Article 2 is extended to its relationship with third states, the effect increasingly depends on the role of these values internally.

Parallelism in the exercise of EU internal and external competences is a key notion in the EU’s external relations law. During the accession phase, Article 49 TEU, as linked to Article 2 TEU, and coupled with Copenhagen conditionality, bases the implementation of the EU *acquis* by acceding Member States on EU values. The rule of law crisis within the EU put the foundation of mutual trust among Member States under pressure, and the obvious question is to what extent internal EU practice has an effect on the way in which the Union can continue to ‘uphold and promote’ EU values in its relations with the world (Articles 3(5) and 21 TEU). Of course, there is no obligation of mutual trust towards third parties in the EU’s and its Member States’ external commitments. But even based on the principle of reciprocity, it becomes more and more difficult for the EU to keep its role as a ‘good’ values-promoter in its external relations. Keeping the above quote by Weiler in mind, the Union’s main task may very well be to find a way to remain a credible promotor of its own values in its relations with third states.

⁶⁵ Joseph H.H. Weiler, ‘Those Who Live in Glass Houses ...’ (EJIL: Talk!, 8 November 2017) <<https://www.ejiltalk.org/those-who-live-in-glass-houses/>> last accessed 31 January 2022.