

Constitutional and administrative paradigms in judicial control over EU high and low politics

by

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Abstract

This article explores the particular tensions surrounding judicial review in EU external relations. The tensions are classified using a two-dimensional framework. Firstly, a distinction based on policy domains of high and low politics, which is derived from constitutional theory, and external to the CJEU; and secondly a distinction based on legitimizing paradigms of administrative (EU as effective global actor) or constitutional (judicial review as guarantee of fundamental rights) in character and determined by the Court itself. Even though one would expect a dominance of the administrative paradigm in the domain of high politics, the Court uses both the administrative and the constitutional paradigm in its external relations case-law. The decision on which of these becomes the guiding frame seems to depend more on the policy domain, and be made case by case, which suggests politically sensitive adjudication, rather than a coherent approach to legitimizing the nascent judicial review in EU external relations.

Key-words

EU external relations, judicial review, Court of Justice of the EU, EU constitutional law

“When no wind blows, even the weathervane has character”

Stanisław Jerzy Lec, Unkempt Thoughts, 1962

1. Introduction

The tension between the “administrative” and the “constitutional” paradigms is expressed in a particular way in the domain European Union (EU) foreign policy. In the EU context, the policy domain of EU external relations encompasses not only traditional domains of foreign policy, such as trade or development cooperation, but also the external dimension of internal EU policies (Eeckhout 2011: 5). The particularity of this domain is that it necessitates taking into account two dimensions of analysis – both internal and external to the EU. In order to paint an analytical picture of these interactions, this article adopts the perspective of one particular institutional actor – the Court of Justice of the European Union (CJEU).

The CJEU faces particular systemic challenges when adjudicating in the domain of EU external relations. On the one hand, the scholarship has explored the causal links between EU internal cohesiveness and the efficiency of its external representation (da Conceição-Heldt & Meunier 2014, Thomas 2012). This cohesiveness could then be promoted by an increased role of the European Commission in EU external relations. On the other hand, there have been recurring calls for rethinking and improving the democratic legitimacy of the EU (Müller 2016, Patberg 2017). These calls would also translate into more checks and balances in the EU’s external relations domain. In a longer-term perspective of its EU external relations case-law, the CJEU is balancing calls for more efficiency with those for more checks and balances.

In its adjudication, the CJEU can choose between different justificatory arguments derived from the EU’s constitutional structure. This article categorizes these arguments into two broad alternative paradigms of legitimizing the Court’s decisions. They can be legitimized either because they improve the efficiency of the EU’s external representation or because they contributed to the consolidation of the EU’s constitutional legal order. While the administrative paradigm prioritizes concerns of efficiency, the constitutional one shifts the emphasis to democratic legitimacy guaranteed by a system of checks and balances. The administrative paradigm sets up expectations of transparency, expertise and

accountability (Shapiro 2005). The constitutional paradigm bases the legitimacy of the CJEU on its unifying role guarding the respect of the deliberative democratic process across the whole domain of EU law as a “constitutional umpire” (Lenaerts 2013: 1302).

While efficiency concerns would push the Court to align with the policy goals pursued by the EU in a particular project in the global arena, the constitutionalist paradigm would rather channel considerations catering for its internal political project of the democratization of supranational institutions. The particularity here is that consistency and efficiency of the EU as a global actor appears to be diminished by a broad institutional involvement, which creates a tension between the two paradigms in EU external relations.

A further particularity of the EU external relations domain is the traditional limitation of judicial review in foreign policy. Traditionally, executive actors in foreign policy were given more leeway in a constitutional structure. The courts would apply a lower scrutiny of judicial review or even refrain from exercising it, such as in the case of the “political question doctrine” of the Supreme Court of the United States (Seidman 2004). The approach of the CJEU in EU external relations has, from the beginning, departed from traditional ideas of foreign policy as “high politics” and as a prerogative of the executive power. However, while the Court has taken up an active role in reviewing the actions of the EU and its Member States (MSs) in foreign policy, this article submits that it has done so with a varied degree of scrutiny.

I explore the hypothesis that, in its case-law, the CJEU defies the traditional constitutional law distinction between high and low politics, and the scrutiny of its judicial review seems to rather depend on the issue area. According to the theorization of the legitimacy of judicial review and the traditional understanding of the separation of power doctrine, we should expect the administrative paradigm to be dominant in the domain of foreign policy. The administrative paradigm emphasizes efficiency and submits foreign policy instruments to an administrative rather than a constitutional standard of review. This tends to result in more deference being shown by the judiciary towards the executive in that context. The executive branch is responsible before parliament and hence, indirectly, before the voters. However, the CJEU seems to be paying little attention to inter-institutional balance when deciding on the scrutiny of its review and on the deployment of competing legitimizing paradigms. As a result, the Court uses both administrative and constitutional approaches in its external relations case-law. The decision on which of these

becomes the guiding frame seems to depend rather on the policy domain of individual cases, which suggests a lack of coherent approaches to legitimizing the nascent judicial review in EU external relations. Instead, the CJEU acts rather like a weather vane, adjudicating in a policy sensitive manner.

This article analyzes examples of the CJEU's post-Lisbon judgments in the domain of external relations from the perspective of establishing the relative relevance of two distinctions – first, whether the Court frames the question raised before the bench in the administrative or constitutional paradigm and, second, whether the questions raised before the Court stem from the domain of high or low politics. The article proceeds in three parts. First, I “translate” the tensions between the administrative and constitutional paradigms from general EU law to the domain of external relations. Thereafter, I proceed to the analysis of the CJEU's case-law to explore whether the administrative paradigm is deployed in its reasoning in judgments concerning low politics, while the constitutional paradigm is preferred in high politics. In the second part, I analyze selected judgments where the Court relies on the administrative paradigm, both in the domain of high and low politics. Third, I repeat this exercise for the constitutional paradigm. In order to increase the explanatory value of the case studies analyzed, they are framed not as individual judgments, but as series of decisions on a particular subject matter. This analysis of specific jurisprudential lines of cases allows for the presentation of the broader context in the particular policy domain.

2. Constitutional and administrative paradigms in EU external relations

In order to guide the analysis of the case-law, it is necessary to first explore the distinction between the alternative legitimizing paradigms in the adjudication of the CJEU. These paradigms operate in the background of the legal argumentation deployed by the Court and they can be categorized in two broad alternative categories for the purposes of highlighting the differences (rather than similarities) in their deployment in EU external relations. The article introduces a twofold differentiation – on the one hand, between the deployment of administrative or constitutional paradigm and on the other hand, between the policy domains belonging to low or high politics.

Based on the structural choice in the Treaties to separate the domains of Common Foreign (CFSP) from other policy domains, as well as the stronger constitutionalization of low politics, one would expect a higher scrutiny of judicial review in the domain of low politics. However, the construction of implicit external competences as mirror images of internal policies of the EU can be construed as a move away from the special nature of foreign policy in the EU context.

The first distinction made for the purposes of this analysis is between constitutional and administrative paradigms as ways of framing the legitimacy of the EU in general, and the CJEU more specifically. The administrative paradigm, as a legitimation pattern, builds on arguments of efficiency and output legitimacy, whereas the constitutional paradigm links to democratic legitimation and input legitimacy (Schmidt 2012). The administrative and constitutional paradigms deployed here, to categorize the legitimization strategies of the Court in its external relations adjudication, resonate with approaches theorizing global governance in general, namely global administrative law and global constitutionalism respectively. Sometimes these theoretical approaches are referred to as paradigms of European or international law; however, for the purposes of this analysis, I distinguish between the theories that have a normative component and the paradigms that perform the role of an analytical framework. Paradigms “function as mediators between scientific theories and the world” (Avbelj 2016: 406). They have also a normative dimension as they serve as a prescription to “coherently organize” reality (Fabbrini 2014: 2).

The administrative and constitutional paradigms need to be understood in a particular manner when framing the legitimacy of the EU in external relations specifically. Whilst internal policies strengthening the supranational features of the EU may generally be classified as one of the factors defining the constitutional paradigm, this view needs to be adjusted in the context of EU external relations. Here, the perspective of the constitutionalization of the EU’s foreign policy usually implies submitting it to more control of supranational institutions - the European Parliament and the CJEU. This in turn, is perceived as diminishing the effectiveness of the EU as an actor on the global scene. Hence, the argument of strengthening the EU as a unified actor in the particular context of external relations is the corner stone of the logic of the administrative paradigm. The pragmatic logic of the administrative paradigm focused on effectiveness is not limited to expanding the scope of prerogatives of the Commission. Especially, in the context of the

Eurozone crisis, the intergovernmental path has appeared as an efficient decision-making mode and has resulted in the “straight-jacketing” of the Commission (Schmidt 2015). Hence, for the purposes of this article, the administrative paradigm will be understood as the CJEU furthering the goal of the EU as an efficient actor on the international scene, whereas the constitutional paradigm will be identified in judgments based on individual rights. Whilst the exercise of judicial review in EU external relations can be justified in terms of the constitutional paradigm, the administrative paradigm rather suggests a systemic deference of the Court to political decision-makers in this domain.

A second crucial distinction is the one between judicial review in the domain of high and low politics. In the specific context of external relations, the jurisprudential approach of the CJEU seems to defy the classic distinction between high and low politics. Traditionally, foreign policy would be the domain of high politics - subject to diplomatic negotiations and immune to judicial review. Low politics would concern the external dimension of predominantly internal and presumably more technical policy domains. This traditional understanding seems to be reflected in the exclusion of the CJEU’s jurisdiction over Common Foreign and Security Policy (CFSP) in the Treaties. Hence, one could imagine a formal distinction between high and low politics, which, in the case of the EU, would go along the lines of the former pillars, or now along the policy domains covered by ordinary legislative procedure. According to this formal definition of low politics, the Common Commercial Policy (CCP) would also be part of low politics as it is subject to the ordinary legislative procedure and judicial scrutiny. However, this purely formal distinction between low and high politics based on the type of legislative procedure prescribed in the Treaties seems to miss the constitutional and political concerns lying at the root of the distinction.

The CCP has been an exclusive external competence from the beginning, and has been the crucial domain for the global presence of the EU in international relations. Hence, a more substantial definition of the distinction between low and high politics appears appropriate to capture the political sensitivity of particular policy domains in the EU. High politics can be understood as “the promotion of larger political principles and ideological goals” (Balkin and Levinson 2001: 1062). The EU has been promoting particular political goals in its CCP, distinct from internal policies. Therefore, for the purposes of this article I define high politics as “inherently external” areas of foreign policy, such as the CFSP and

CCP, whereas low politics will encompass the external dimensions of EU internal policies, in particular the Area of Freedom Security and Justice (AFSJ). Even though such an understanding does not necessarily correspond to the structure of the Treaties, it appears justified in view of the normative underpinnings of the special status of high politics as a domain of diplomatic negotiations, where the hands of the executive should not be bound by internal politics and institutional approval process. With that reason in mind, it seems more coherent to analyse the CCP together with the high politics.

3. Administrative paradigm

In its ambition to become a global actor, the EU has developed a “governance mode of foreign policy” (De Burca 2013). The Court’s role in the development of EU external relations as an effective and coherent domain of EU policy “simply cannot be overstated” (Van Vooren et al. 2014: 28). The EU Treaties provide a general framework for EU external action, which has been subject to extensive revision and centralization with the Lisbon Treaty (Eeckhout 2012: 265). However, in view of the inherent vagueness of constitutional provisions, there is a need for more operationalizable principles, which the Court has developed.

3.1. Low politics

Through a gradual process of jurisprudential development, the Court has built up a range of EU competences in external action in a parallel construction to EU internal competences (3.1.1.). Without this jurisprudential construction, the EU might not have emerged as an important international actor at all. A more recent example of the CJEU prioritizing an efficient mode of decision-making over the possibility of constitutionalizing a particular domain is the external dimension in the Eurozone crisis (3.1.2.).

3.1.1. *Implied external powers*

One of the main lines of case-law, where the Court has adopted the functional justifications in EU external relations, relates to the implied competences of the EU in concluding international agreements. Apart from such express external powers as the area of CCP, the EU can also dispose of an implied competence. The Court was the main actor

in the process of establishing and developing the doctrine of such implied external powers of the EU. It responded to the expectations of international partners to align EU competence with developments in the multilateral trading system (Ankersmit 2014: 196). The doctrine of implied competence concerns, however, only the existence of an external competence of the EU, and not its nature that is decided separately (Koutrakos 2006: 80).

The doctrine of implied competences was first established in the CJEU's *ERTA* judgment. In a nutshell, the conferment of internal competence in a specific area of activities on the EU (then the EC), by the Treaty, implies the conferment of external competence in that area (Koutrakos 2006: 78). This can be the case *inter alia* when "internal power has already been used in order to adopt measures which come within the attainment of common policies" (para.4).

In its *Opinion 1/76* the Court went as far as to acknowledge the existence of a supranational competence, even if the internal measures in the domain in question were to be taken only after the conclusion of an international agreement: "in so far as the participation in the international agreement (...) is, as here, necessary for the attainment of one of the objectives of the Community". However, this far-reaching jurisprudence is mostly justified by the particular character of the case before the Court, that concerned the inland waterway in the Rhine, which can in fact only be regulated effectively by an international agreement including Switzerland (Koutrakos 2006: 95).

In subsequent judgments, such as *Opinion 2/92*, the Court upheld such broad understandings of the existence of a European external competence. It has merely raised the bar higher with regard to conditions under which such a competence may become exclusive (Koutrakos 2006: 103). The next controversial decision concerning the implied external competences was *Opinion 1/94* that dealt with the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The Court rejected submissions by the Commission that the content of those agreements fell within the scope of the CCP, as well as all three arguments construing an implied external competence: an application of the *ERTA* principle, of the "necessity principle" pursuant to *Opinion 1/76* or of the general clauses of art.95 and 308 EC. The focus of this opinion was not on the international dimension but rather on internal unity.

3.1.2. *European Stability Mechanism*

In the *Pringle* (2012) case, the argument was raised that art. 3(2) TFEU prohibits Member States from concluding an agreement between themselves which might affect common rules, or alter their scope. In her Conclusions for *Opinion 2/13*, Advocate General (AG) Kokott suggested that this rule could also apply to the case of EU's accession to the ECHR, but solely in those parts not superseded by art.6(2) TEU as *lex specialis*. Indeed, an international agreement about a European Stability mechanism (ESM) established in Luxembourg by all the Member States of the Eurozone could be susceptible of interfering with the EU policies on the single currency. But instead of entering into comparable detail as in its *Opinion 2/13* about the human rights protection in the EU, in *Pringle* (2012) the Court in five short paragraphs dismissed the application of art.3(2) TFEU. The reasoning appears slightly confusing as the Court, on the one hand, underlined the institutional continuity from the European Financial Stability Mechanism (EFSF) based on art.122(2) TFEU to the ESM but, on the other hand, highlighted the fact that establishment of an institution such as the ESM is not covered by the Treaties (para.101-105).

The administrative paradigm limiting constitutionalization can be understood within the context of the particular policy domain of economic and fiscal policy. The setting-up of the ESM was followed by numerous judicial challenges, mostly in its ratification before national constitutional courts. In terms of academic coverage, while some authors have talked about “high degree of judicial intervention” (Fabbrini 2014) in the domain, others have claimed that “courts possibly offered a unique forum for participation and contestation (...), which was largely not availed of” (Fahey and Bardutzky 2013). These contrasting accounts can be explained by differentiating the quantity of judicial challenges from the level of scrutiny applied by the courts. The highest courts in Estonia, France, Ireland, Austria, Poland and Germany have all taken up the task of adjudicating on the compatibility of the ESM Treaty with their national constitutions. As the ESM was not an EU law, they were not bound by their deferential case-law such as the *Solange* judgments. However, none of the courts have seriously engaged with the possible fundamental rights challenges arising from the implementation of the ESM mechanism. In the context of national post-crisis measures, the Portuguese *Tribunal Constitucional* stands out as an exceptional example, with its scrutinizing of the budget law passed under the Memorandum of Understanding (MoU) with the Troika, in the light of social rights

(Nogueira de Brito, 2014, p.71). The national courts did not engage in substantive constitutional review. In the context of other post-crisis measures, the CJEU too, in its *Gauweiler* (2015) judgment, “effectively relinquished judicial review as a mechanism to hold the ECB accountable for potential ultra vires acts” (Transparency International Report 2017: 46). From that perspective, it might seem less surprising that the CJEU also adopted a rather “administrativist” perspective in the *Pringle* (2012) judgment.

3.2. High politics

The administrative paradigm can also be observed in the CJEU’s adjudication in the domain of high politics. In order to observe the similarities and differences to the approach adopted in low politics domains, I analyse three lines of case-law. The first line relates to the expansion of the scope of CCP, and the second revolves around the doctrine of loyal cooperation, which the Court has made a powerful tool; it has identified art. 4(3) TEU as an efficient mechanism of ensuring the effectiveness of EU external action. In the third, I discuss cases concerning the delimitation of the scope of CFSP and AFSJ. The institutional stakes in this delimitation are the necessity or complementarity of the European Parliament’s consent, which impacts on the perceived efficiency of the conclusion of international agreements.

3.2.1. Scope of the CCP

In order to illustrate the question of the delimitation of the CCP in view of guaranteeing an effective external representation of the EU in all trade related issues, I analyse the question of the inclusion of intellectual property in the CCP. The Court has walked a thin line of not including intellectual property as an exclusive competence, but allowing international rules to indirectly bind national judges. Even though the CJEU has not been as expansionist on the scope of exclusive competence as it was on the existence of an EU external competence, it has not adopted constitutional justifications for those outcomes, but has rather prioritized the administrative perspective in its reasoning.

The Court issued a series of judgments interpreting art.50 (6) of TRIPS. In spite of the fact that in *Opinion 1/94* the Court concluded that the TRIPS Agreement belongs for the most part to the competence of Member States, in subsequent judgments it went on to interpret its legal provisions (Lavranos 2005: 15). The Court was thus pushing the

boundaries of its jurisdiction. It did so in order to avoid divergences in interpretations of TRIPS articles by national courts of the MS (para.32-35). In *Dior* (2000) the Court clearly stated the circumstances under which the provisions of TRIPS can lead to this indirect effect. The issue has to concern a “field to which TRIPs applies and in respect of which the Community [EU] has already legislated” (para.49). In that case, the national courts are obliged to apply and interpret the national provisions “as far as possible in the light of the wording and purpose (...) of TRIPs” (para.49).

In spite of the gradual permeating of TRIPS content into enforcement by national courts, the Court did not overrule its *Opinion 1/94*. The approach of denying the EU the possibility of being unequivocally in charge of negotiations in that domain, at the international level, has been criticised as a failure of the Court to align the scope of the EU’s CCP with the dynamic of developments within the WTO (Ankersmit 2014: 196). The Court’s tergiversation has even been described as taking three steps forward and two steps backward as in the *Echternach Procession* (Bourgeois 1995). However, the Court’s concern has been to a large extent internally motivated. The doctrine of implied competence is based on the parallelism of internal and external competences; this also means that, as AG Cruz Villalón pointed out in his Opinion in *Daiichi Sankyo* (2013), the competences shared in the internal context cannot be *de facto* turned into exclusive competences via external relations (para.57-59).

The Court had been loyal to its *Opinion 1/94* logic until *Merck Genéricos* (2007). However, the Treaty of Lisbon brought about changes in legislation, notably as art. 207 TFEU now included “commercial aspects of intellectual property” as an EU exclusive competence. The first decision interpreting this provision was *Daiichi Sankyo* (2013); basically, the Court could have adopted two possible solutions, which Laurens Ankersmit describes as “inwardly oriented option” and “outwardly oriented option” (Ankersmit 2014: 197). The former was proposed by AG Cruz Villalón who emphasised the risks of encroachment upon the shared nature of the competence to regulate intellectual property rights (para.57-59). He adopted an internal perspective, submitting that the notion of “commercial aspects of intellectual property” in art.207 TFEU should be interpreted as an “autonomous concept of European Union law” and not in parallel to the scope of TRIPS (para.58). Moreover, the approach proposed by the AG would represent a continuation of the Court’s approach to TRIPS since *Opinion 1/94*. The inward-looking option would have

emphasized the complexity of the internal distribution of competences rather than the efficiency of the EU's external representation, so it would have better fitted the constitutional paradigm.

In its *Daiichi Sankyo* (2013) judgment the Court took a different approach; it admitted that the Treaty amendments provide sufficient grounds for discontinuing its jurisprudential line. It ruled that *Opinion 1/94* and *Merck Genéricos* (2007) were not “material for determining to what extent the TRIPS Agreement, as from the entry into force of the TFEU, falls within the exclusive competence of the European Union in matters of the common commercial policy” (para.48). The Court's new conclusion was that the TRIPS now falls “in its entirety” within the scope of the EU's competence in CCP (para.43). The CJEU relied on historical interpretation, emphasising the intention of the authors of the amendment (para.55). This shift appeared more justified now, as the MS as “masters of the Treaties” included the amendments changing the distribution of the competences within the EU (para.48).

The interaction between the amendment of art. 207 TFEU and the Court's interpretation of EU competences with regard to the TRIPS provides a good illustration of the Court's tendency to internalize the administrative paradigm. It can be considered a “considerable victory for the Commission” (Ankersmit 2014: 200), for in *Daiichi Sankyo* (2013) the Court almost fully aligned with the Commission's submissions. All the intervening MS presented a different approach, so that the AG even referred to these submissions as “the single dissenting voice” (para.43). Since the judgment, the Commission has become not only *de facto*, but also *de jure*, the sole negotiator in the WTO meetings in the domain of intellectual property (Ankersmit 2014: 200).

Laurens Ankersmit interprets the *Daiichi Sankyo* (2013) judgement as a *revirement jurisprudential* (Ankersmit 2014: 198). I believe that the Court's approach on “indirect effect” of TRIPS in case-law, developed between *Opinion 1/94* and *Daiichi Sankyo* (2013), had already revealed the Court's readiness to encroach upon the distribution of competences within the domain of intellectual property rights. Hence, the *Daiichi Sankyo* (2013) judgment did not come as a surprise, but it provided the Court with a possibility of profiting from a change in written law to justify a new, more general, approach. Conversely, we can see that in other domains, such as the access of non-privileged applicants to the CJEU, the Court was not ready to change its case-law in spite of an

amendment of the text of the Treaties. Therefore, the Court's tendency to prioritize an administrative solution to the question of competences in CCP cannot be solely attributed to legislative change.

A similarly dynamic interpretation is proposed by AG Sharpston for *Opinion 2/15*, who advanced an interpretation of the scope of the CCP as a "living instrument", to the extent that it can "neither be determined in the abstract nor identified in a static and rigid manner" (para.100). She clearly stated that it followed from *Daiichi Sankyo* (2013) that the whole TRIPS, and not only the articles relevant for deciding the case, fell within the scope of CCP (para.430). Nonetheless, the AG concluded that the draft EU-Singapore Free Trade Agreement (EUSFTA) also included non-commercial aspects of intellectual property, which were not covered by art. 207 TFEU (*i.a.* through incorporation of the Berne Convention, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (apar.451-456).

The inclusion of TRIPS within the CCP means that the Court had integrated these provisions into its scope of jurisdiction. The risks of divergences across MS that it was trying to mitigate in cases such as *Dior* (2000) disappear. Hence, the Court clearly came to the fore as a gatekeeper for the effect and application of TRIPS within the EU legal order. The justifications of the Court's case-law on implied competence in external relations were parallel to those applicable to the establishment of doctrine of supremacy of EU law (Van Vooren and Wessels 2014: 130). They were based on the efficient and uniform application of EU law across the MS.

3.2.2. *Duty of loyal cooperation limiting MS actions*

Another illustration of the Court adopting the administrative paradigm is its case-law on the duty of loyal cooperation enshrined in art. 4(3) TEU. The CJEU has put flesh on the bones of this constitutional principle in the EU legal order (Hillion 2009: 34).

The *portée* of the duty of loyal cooperation is easier to justify in the domains of exclusive competence of the EU, where MSs should not act on their own. For instance, in the case *Commission v Greece* (2009) the Court concluded that Greece had violated its obligations under art.4 (3) TEU by submitting to the International Maritime Organisation (IMO) a proposal for monitoring the compliance of ships and port facilities with the requirements of the International Convention for the Safety of Life at Sea, concluded in

London on 1st November 1974, and the International Ship and Port Facility Security Code (para.38). The question of the reach of art. 4(3) TEU gets a good deal more controversial in the area of shared competences, where a broad interpretation might encroach upon the distribution of competences between the EU and the MSs. If any individual action by a MS were to violate the duty of loyal cooperation, a shared competence would be *de facto* transformed into an exclusive one. Still, the Court in Luxembourg did not shy away from a far-reaching understanding of the significance of art. 4(3) TEU in the domain of external relations.

The central message of *Opinion 1/94* can be identified by emphasising the essential role of duty of cooperation for bringing mixed competences (shared by the EU institutions and MSs) within the EU legal framework (Koutrakos 2006: 117). The Court, by its *Opinion 1/94*, took up an active role in shaping the practical exercise of shared competences within the domain of WTO law (Persin 2013: 76).

The same EU-internal perspective was adopted by the Court in the series of judgments concerning Open Skies Agreements. In practice, its decision that the ownership and control clause of those agreements was contrary to the principle of free movement of services put an obligation upon the MS to denounce Open Skies Agreements. Similar to the case-law on the scope of the CCP, when establishing the principle of parallelism of internal and external competences, the Court based its jurisprudence on the same effectiveness concern that it had invoked for the establishment of the principle of supremacy of EU law (Baquero Cruz 2006: 231).

In its judgement *Commission v Sweden* (2010) the CJEU did not make a clear-cut differentiation between the fact of exercising a competence and the manner in which it is done, as suggested by the AG. However, it insisted on distinguishing the current proceedings from *Commission v Greece* (2009) on the basis that the latter concerned EU exclusive competences (para.72). It might suggest that the Court was not ready to take a sweeping position as to the effects of the duty of loyal cooperation in the area of shared competences. Nonetheless, the Court did follow the AG as to the results, and it condemned Sweden for its failure to fulfil its obligations under art. 4(3) TEU. It emphasised the underlying policy considerations of the duty of loyal cooperation, in a similar formulation to Christophe Hillion's, by stating that Sweden's actions risked compromising "the principle of unity in the international representation of the Union and

the Member States”, as well as undermining their negotiating position on the international scene (para.104).

The duty of loyal cooperation represents another illustration of the Court’s tremendous contribution to the operationalisation of principles governing EU external relations, and simultaneously, it provides an illustration of the inherent tensions in that domain. When the CJEU opts for a solution providing great flexibility in the delimitation of EU and MS powers, it might often come at a risk of undermining the common position in the international arena. Hence, the Court has a tendency to adopt an administrative paradigm by aligning with the European Commission and contributing to the construction of coherent EU external policy.

3.2.3. Delimitation of Common Foreign and Security Policy

A certain decline of the administrative paradigm can be identified in the case-law of the CJEU in respect of the delimitation of CFSP and the external dimension of AFSJ. These are all cases challenging the applicability of certain legislative procedures. In principle, the CFSP is a domain where the Council is the sole legislator. Hence, it has been the Commission or, recently, the European Parliament that have demanded a different procedure that anticipates their involvement.

In the *ECOWAS* (2008) case the Court struck down a Decision of the Council regarding the contribution of the EU to the Economic Community of West African States (ECOWAS) in the framework of the Moratorium on Small Arms and Light Weapons. The Court ruled that as this decision not only fell within the scope of CFSP, but also within development cooperation policy, the proper legal basis was to be found in the EC Treaty at the time (now TFEU). Thus, the Commission should have been involved.

In the same vein, the European Parliament made an unsuccessful challenge against the Regulation imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban. The EP claimed that this measure was covered by the external dimension of the AFSJ and hence the appropriate legislative procedure should be the ordinary procedure requiring a positive vote by the Parliament. The Court concluded that the Regulation was rightly based on art.215 (2) TFEU and not on art.75 TFEU.

The European Parliament also brought a challenge concerning the Council Decision on the signing and conclusion of the Agreement between the EU and the Republic of Mauritius. This concerned the conditions of transfer of suspected pirates and associated seized property from the EU-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer (EU-Mauritius Agreement). The Council had concluded that the EU-Mauritius Agreement was a matter solely of CFSP and the Parliament was only informed *post factum*. In line with the other instances of the Parliament actively invoking its rights within the EU decision-making procedure, it introduced an annulment procedure before the Court in Luxembourg.

The main challenge raised by the Parliament was based on a violation of art.218(6) TFEU by the Council. This subparagraph introduces a list of instances when consent or consultation of the European Parliament is necessary in the procedure of concluding an international agreement. It can be considered that the sole exception is an agreement relating exclusively to CFSP. In the case *Parliament v Council* (2014) the Parliament submitted that the EU-Mauritius Agreement concerned not only CFSP, but also “judicial cooperation in criminal matters, police cooperation and development cooperation” (para.25). It admitted that the centre of gravity lay with the CFSP and that other domains were concerned “only incidentally” (para.46).

AG Bot suggested that the Court should depart from the literal interpretation of art. 218(6) TFEU and instead focus on the parallels between institutional competences in the internal and external domains (para.30). He put forward the *telos* of “symmetry between the procedure for adopting measures internally and externally”, as well as the “parallelism between the Parliament’s powers internally and its powers externally”.

The Court followed AG Bot on that point. It concluded that the Council can complete an international agreement without involving the Parliament when “the decision concluding the agreement in question is legitimately founded exclusively on a substantive legal basis falling within the CFSP” (para.59). Furthermore, it considered this distinction among different procedures foreseen for conclusion of international agreement by art. 218(6) TFEU as “objective criteria that are amenable to judicial review” (para.60).

Nonetheless, the Court still annulled the Council Decision on the conclusion of the EU-Mauritius Agreement due to the infringement of art.218(10) TFEU (para.78). This provision guarantees the European Parliament the right to be “immediately and fully

informed”. Hence, the CJEU did guarantee the formal right of the Parliament to be informed, but refused to extend the Parliament’s substantial powers to its participation in the making of international agreements by the EU.

Were it to have adopted a literal interpretation of the agreement relating “exclusively” to CFSP, the Court would have in fact enlarged the competences of European Parliament in external relations. It can be argued that this would then diminish the capacity of the EU to efficiently negotiate and conclude such international agreements. These negotiations are usually entrusted to the European Commission, which puts the Court’s judgment *Parliament v Council* (2014) in line with the pro-integrationist tendency of strengthening the EU as a global actor and aligning with the Commission.

This entanglement of the internal and external dimensions can be compared to the question of the delimitation between art.114 TFEU and art.207 TFEU addressed *i.a.* in *Daiichi Sankyo* (2013) case. The Court had to decide whether agreements such as TRIPS should be concluded on the basis of the competence of the EU to introduce the necessary harmonisation for the functioning of the internal market, or whether the EU should rather rely on its competences in the domain of external action (para.56). The Court could also have relied on the gravity test to determine the adequate legal basis. It did not do so expressly, but it did consider the “primary objective” of TRIPS as a decisive argument, which seems to be a similar approach (para.58).

The CJEU’s expansive approach to the affirmation of the existence of an EU external competence has been moderated by the Court’s prudence in delimiting the domains of shared and exclusive EU competences. The tendency has been to guarantee that both the EU and its Member States find themselves at the table.

4. Constitutional paradigm

In a piece summing up an annual conference of the European Constitutional Law Network, Wendel et. al. singled out primacy and fundamental rights as basic fundaments of the EU legal order under a constitutional paradigm (Wendel, Angelov, Belov 2009: 231). Following this logic, and the introductory discussion of the constitutional paradigm, I analyse cases where the Court has adopted the primacy of EU law and fundamental rights

as the overarching framework legitimizing the exercise of counter-majoritarian judicial review.

4.1. Low politics

Following the logic of low politics covering mainly internal policy domains, which have an external dimension, two policy issues that represented serious human rights challenges are presented in the following subchapters. When adjudicating on the issue of blacklisting potential terrorists and data protection, the CJEU has adopted a markedly constitutional legitimizing paradigm.

4.1.1. *The Kadi saga*

The *Kadi* cases, widely discussed in the literature (for an overview of the debate see De Burca 2010; Avbelj et al., 2014), became a flagship example of the exercise of judicial review based on fundamental rights by the CJEU. In the *Kadi* cases, the Court gave priority to the consideration of fundamental rights and the autonomy of the EU legal order. At the same time, it put EU institutions in a very uncomfortable position in the international scene. It imposed two obligations on EU institutions that can prove problematic in the context of EU-UN relations. The first is to provide reasons for the listing of an individual. The practice of the UN Sanctions Committee has not been to demand detailed reasons for listing proposals, but rather the process was based on mutual trust and classified information. Hence, it is difficult for the Council to demand information that even the UNSC does not possess. The second problematic issue is the obligation to guarantee access to justice. If the EU were to allow an internal “in principle full review” of the listing by European courts, it might lead to incompatibilities with the UN system. Consequently, the Member States might face the dilemma of whether to follow their obligations within the EU or the UN framework.

One of the arguments used to justify the extensive scope of judicial review is its effectiveness - a well-known argument in EU law (*Kadi* (2008) para.119). In its position, the Court is defending the integrity of the EU legal order and human rights as the “very foundations of the Community” (*Kadi* (2008) para.5), thus in fact performing fact a similar

role to a constitutional court (Lavranos 2010: 273). When reviewing the implementation of a UN blacklisting into EU law, the CJEU adopts a constitutional paradigm and *de facto* performs a constitutional review of the EU measures adopted to implement the UN sanctions.

4.1.2. Data protection

Certain elements of judgements relating to data protection fall within the scope of EU external relations, as they concern the interactions with non-European partners, in particular the US, with regard to dealing with personal data. However, the general context of the policy domain should not be forgotten. The CJEU has become a forerunner in the protection of the fundamental right to data privacy – it provided the first instance for exercise of its judicial review on the basis of the Charter of fundamental Rights of the EU (CFREU) and as the first international court to develop “the right to be forgotten” (*Google Spain* (2014): right to be forgotten, and *Digital Rights Ireland* (2014): data retention directive). This particularly high importance attached by the Court to data protection provides the necessary context for explaining its tendency to adopt the constitutional paradigm in that domain.

In the *PNR* (2006) cases, responding to an inter-institutional challenge introduced by the European Parliament, the CJEU annulled the arrangements on the transfer of name records of air passengers from the EU to the US Bureau of Customs and Border Protection, because the Council and Commission relied on the wrong legal bases (Fahey 2012). In order to limit the negative effects of its “constitutionalist” decision, the court awarded the EU institutions a “grace period” to remedy the situation internally, without having to re-engage the international partner. A similar solution was also adopted in the *Kadi* (2008) case, even though the awarded time period was specifically meant in this case for further negotiations (to obtain more evidence) with the international partner (the UN). In the pending request for *Opinion 1/15*, once again submitted by the European Parliament, AG Mengozzi has already argued that the PNR agreement envisaged between the EU and Canada appears incompatible with human rights guaranteed in the CFREU.

In the *Schrems* (2015) case, the Irish High Court asked whether the relevant EU Directive had to be interpreted, in light of CFREU, as prohibiting national control of “Safe Harbour decisions” pursuant to individual human rights claims. The CJEU held that

classifying the US as a “safe harbour” at the EU level, does not preclude national authorities from examining individual claims about human rights violations. The Court read the relevant Directive in light of art.47 CFREU (para.64) when it prescribes control by national supervisory authorities (para.43). It cited *Kadi* (2008), underlining that the EU is a “union based on the Rule of Law” (para.60). The Court applied strict scrutiny, justifying it by the “important role” of data protection, the large scale of the interference, as well as the automatic processing of the data in the case (para.78,91). It stated that the level of data protection in the US would not need to be absolutely identical to that in the EU for an opposite result (para.73). However, the lack of possibilities for redress for individual claimants invoking breaches of fundamental rights led it to conclude that the protection level was not “adequate” (para.70, 95).

4.2. High politics

In the high politics domain, focusing mainly on the EU’s competence to enter into international agreements, the CJEU also sometimes adopts a constitutional paradigm and emphasizes the autonomy of a consolidated European legal order and the protection of fundamental rights. In terms of inter-institutional balance, the judgments discussed in this section provide important illustrations for the claim that a limited role for the Commission fits into the particular expression of the constitutionalist paradigm in EU external relations.

4.2.1. *Opinion 1/09*

Opinion 1/09 can serve as an illustration of a CJEU decision that curtails the leading role of the Commission in shaping the EU’s foreign policy on broader issues of economic policy. Several private stakeholders had been unhappy with the decentralised system of patent protection in Europe (Lock 2011: 576). The EU institutions, in particular the European Commission, had been steering a legislative process for the introduction of a unified patent regime for at least a decade before the judgment in March 2011 (Adam 2011: 280). It was supposed to promote innovation and investment in the single market, as well as the competitiveness of the European economy, as the existing patent enforcement system was costly and cumbersome. Moreover, the unified patent project formed part of a bigger initiative of the European Commission for a new integrated industrial policy that would include intellectual property rights (Wealde et al 2010: 385). In the interest of the single

market, the Commission had, since 2000, been considering possibilities of EU accession to the European Patent Convention (*Opinion 1/09* para.4); a binding jurisdiction had always been a crucial element for such a regime to work (Adam 2011: 281).

The Court's opinion forced the EU institutions to change strategy. Due to the technical nature of patent litigation, the options of entrusting either EU or national judges with this task were off the table (Lock 2011: 586). The MS had to reach the desired result in the framework of enhance cooperation (art.326 *et seqq.* TFEU).

In *Opinion 1/09*, the Court rejected the possibility of setting up a unified patent regime as an international agreement parallel to the EU Treaties. The crucial aspect was the inclusion of a Unified Patent Court in this regime; the crucial problem was that this agreement foresaw a judicial body, a Unified Patent Court (UPC) (para.8).

The challenges relevant for the purposes of this analysis arose from the risk to the principle of primacy of EU law (para.20, 22). There would have been no control over the application and interpretation of EU legislation falling under the jurisdiction of the UPC. The recurring argument was also the preservation of the autonomy of the EU legal order. Further, the new agreement would have undermined the exclusive nature of the CJEU's jurisdiction. Some MS doubted the competence of the EU to conclude such agreement as there has not been a complete harmonisation in the patent domain (para.23). If there were no current existence of either a unique patent covering the EU territory or a unified jurisdiction, then the EU would have had nothing to transfer by virtue of an international agreement. Moreover, *Opinion 2/94* had previously confirmed that the EU did not possess a competence allowing it to transfer the patent competence to an international organisation (para.26).

Most MSs defended the compatibility of the envisaged agreement with European law (para.33). They pointed out that a mechanism allowing the UPC to ask the CJEU preliminary ruling questions already existed in the draft agreement (para.34). The UPC already had an obligation to respect EU law and follow the answers given by the Court in Luxembourg to preliminary ruling questions (para.41). As legal basis for EU competence, the parties had submitted either art.81 TFEU in combination with art.114 TFEU, or the "catch-all" art.352 TFEU (para.35, 37). A possible way of understanding the exclusive jurisdiction of the CJEU would have been to limit it to the domains of exclusive

competences of the EU, which was not the case for the domain of patent regulation (para.39).

The Court admitted that the envisaged agreement did not represent a violation of articles 262 and 344 TFEU as these did not establish a monopoly for the CJEU in the domain of intellectual property rights (para.62). A crucial point weighing in favour of a judgment on incompatibility was the exclusiveness of the CJEU's jurisdiction intertwined with the consideration of the autonomy of EU legal order. The Court went as far back as *Van Gend en Loos* (1963) to affirm the different nature of EU Treaties, which created a new legal order, from "ordinary international treaties" (para.65). This represented another broad reference to the principles of EU law that reflects the wish to emphasise the continuity in the Court's approach. The Court in Luxembourg considered itself vested with the task to "ensure respect for the autonomy of the European Union legal order thus created by the Treaties" (para.67). The appearance of the UPC in the European judicial landscape would have constituted a risk for the effective and uniform application of EU law. The UPC would not have been an EU court nor a national court of a MS; it would, however, have enjoyed exclusive jurisdiction over patent issues and in part applied EU law, which is usually a task of national and EU judges (para.71-73).

Another major problem that the CJEU identified was the absence of a mechanism to effectively enforce the obligation of the UPC to make a preliminary reference under art.48 of the envisaged agreement. The Court referred to the *telos* of art.267 TFEU, namely to the guarantee of the uniform and effective application of EU law across the EU territory (para.83). The "correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order" executed by a tandem of EU and national judges were the *raison d'être* of the preliminary ruling procedure (para.84). This joint application system involves safety mechanisms, such as state responsibility for breaches of EU law by judicial bodies established in *Köbler* (2003). The UPC, however, would not have been subject to such safety mechanisms.

In conclusion, the Court considered that it would be too much of a threat for the "powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law" (para.89). It was a different approach than the one adopted by the Court in the *Pringle* (2012) judgment discussed above. In the *Pringle* (2012) case, the Court

accepted the involvement of EU institutions in the ESM created outside of the EU framework and it set very few limitations to the discretion of the institutions with regard to this involvement (Craig 2013).

The logical consequence of the autonomy logic has been the co-opting of the project into the EU legal order. Accordingly, the Member States switched tactics, to implementing a common patent agreement as a measure of enhanced cooperation. The UPC was finally established by an Agreement on the Unified Patent Court in February 2013. Spain and Italy contested the decision authorising enhanced cooperation under art.329 (1) TFEU. This time the Court upheld the decision as the UPC no longer posed a threat to its exclusive and ultimate jurisdiction.

4.2.2. *Opinion 2/13*

In *Opinion 2/13* the Court ruled that the Draft Accession Agreement of the EU to the European Convention on Human Rights (ECHR) was incompatible with the EU Treaties. This judgment can be classified as constitutionalist both because of the legitimizing paradigm adopted by the Court, and in view of its consequences in terms of judicial politics. The Court listed several reasons to justify the incompatibility of the negotiated accession deal with the EU Treaties. According to the ECHR's approach, the international level of human rights protection represents the "floor" and the member states are free to go beyond it and introduce higher levels of protection. This might be in conflict with the approach adopted by the CJEU in the *Melloni* (2013) judgment, where national rules guaranteeing higher levels of human rights protection had to give way to the interest of a uniform and efficient application of EU law across all MS (para.188). Moreover, the EU principle of mutual trust that might allow MS to "skip" human rights controls through cooperation agreements (e.g. European Arrest Warrant, distribution of asylum seekers) might be endangered by a conventionality control exercised by the European Court of Human Rights (ECtHR) (para.191). The new Protocol no.16 of the ECHR might lead to the circumvention of the EU preliminary ruling procedure as the ECtHR might theoretically, in some cases, be the first and only supranational instance deciding on cases concerning EU law (para.196). The prior involvement mechanism would guarantee a participation of the CJEU only in cases concerning validity (and not necessarily interpretation) of EU law. The rarely used possibility of inter-state disputes under ECHR

might be in tension with the principle of autonomy, loyal cooperation and art.344 TFEU. The Court was not convinced by the envisaged co-respondent mechanism's guarantees in view of the inter-institutional balance among the EU institutions (para.231).

Opinion 2/13 has delayed the EU's accession to the ECHR indefinitely and hence created a chance for the CJEU to develop its own jurisprudence in the domain of human rights on the basis of the CFREU (Halberstam 2015). Therefore, the judgment can also be interpreted as constitutionalist with this broader political and institutional context in mind, as it might allow the Court to develop its constitutional role with an autonomous practice of judicial review.

5. Conclusions

The continuing litigation shows that the format and intensity of judicial review in various domains of EU external relations are not yet settled. The CJEU's active role in establishing the *modus operandi* of EU external relations is not always voluntary. Sometimes, just as a weather vane without wind still needs to point in some direction, the Courts need to render a decision even if the legislative framework has been intentionally drafted in a vague manner. Hence, the Court is channeled by its external environment to delimit between the competences of the EU and its MS as well as among the institutions.

Questions concerning the correct legal basis, as well as the procedural rights of particular institutions, reflect the more general tensions explored in this article. The CJEU can legitimize its decisions by deploying the administrative or constitutional paradigm, and respond to different concerns raised about the position of EU external relations in the constitutional structure of the EU. On the one hand, the Court can orient itself rather internally and incorporate external relations in the increasingly constitutionalized EU legal order. On the other hand, it can further cohesiveness of EU's external representation by leaving more leeway to the European Commission. Classifying these various legitimizing arguments as two broad alternative paradigms reflects the tensions between Court's role of overseeing the exercise of governance in the EU and its innate role as part of the dynamic project of European integration.

Traditionally, this balance is struck by limiting judicial review in the domain of high politics. When trying to test how the CJEU strikes the balance between its judicial

oversight, and leaving the leeway to the MS in foreign policy, the first difficulty is that the EU legal framework does not reflect the distinction between high and low politics. This can, however, be overcome by looking at the rationale of the distinction and classification of the issue area in various policy domains of the EU that have an external dimension. The analysis of the Court's adjudication in high and low politics does not show a particular pattern of deployment of administrative vs. constitutional paradigm to legitimize the scrutiny of its judicial oversight. Instead, it seems that particular issue areas relating to human rights and the autonomy of the EU's legal order are more prone to be adjudicated within the constitutional paradigm, while issues such as trade policy or economic and fiscal policy tend to fall within the administrative legitimizing paradigm.

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