Introduction[Φ]

Marise Cremona[*] and Joanne Scott[**]

1. The Aim of this Book

The former Advocate General Francis Jacobs recently expressed a view, certainly shared by many, that 'the EU is based exclusively on law, not on power … [and] that over the past sixty years or so law has made a unique contribution to the European story'.[1] While it may be true that the EU is based on law not on power, this book explores the possibility that in its international relations we can also see law *as* power. As an international legal actor, law is at the foundation of the EU's external power; it may have profound effects on the laws and governance arrangements of other countries, upon global governance arrangements and international and transnational norms. This book will address the impact of EU law beyond its own borders, which may be termed the 'global reach' of EU law;[2] it examines the ways that law is used as a powerful instrument of EU external action, the impact this has on the nature of the EU's external relationships and some of the normative challenges this poses.

What do we mean by the global reach of EU law? It includes the extraterritorial application of EU law, the presence of territorial extension,[3] and the so-called 'Brussels Effect',[4] all phenomena concerned with the effects of unilateral legislative instruments and regulatory action beyond the EU's borders.[5] But 'global reach' also refers to the impact of the EU's bilateral relationships in the form of agreements with third countries or third country agencies, and of the EU's engagement with multilateral fora and the negotiation of international legal instruments.[6] Although this book is concerned with the impact of (EU) *law*, the instruments used by the EU to facilitate its global reach include, alongside 'hard' law such as legislation and international agreements, non-binding—though sometimes highly institutionalized—instruments, such as dialogues, agendas for action and guidelines.

Three points flow from this conception of 'global reach'. First is the need to appreciate the relationship between these different modes of EU action—unilateral, bilateral and multilateral—and the ways in which they interact. As we will see in the following chapters, the movement is not all one way and cannot simply be characterized as the export or import of

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[Φ] Forthcoming in M. Cremona and J. Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP, 2019).

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[1] Jacobs, Foreword to R. Schütze and T. Tridimas (eds), *Oxford Principles of European Union Law, Volume 1: The European Union Legal Order* (2018).

[2] Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *American Journal of Comparative Law* (2014) 87. See also E. Fahey, *The Global Reach of EU Law* (2016) which focuses on the EU's Area of Freedom, Security and Justice.

[3] Scott, 'The New EU "Extraterritoriality"', 51 *Common Market Law Review* (2014) 1343.

[4] Bradford, 'The Brussels Effect', 107 *Northwestern University Law Review* (2013) 1.

[5] See further Joanne Scott, Chapter 1 in this volume.

[6] See further Marise Cremona, Chapter 2 in this volume.

norms. Second, this interplay indicates that the global reach of EU law is not limited to the export of the EU's own internal *acquis*; it may involve the use of EU instruments (both unilateral and bilateral) to support the adoption and application of international law. And, third, the instruments of the global reach of EU law are often presented (not least by the EU itself) as mechanisms for the promotion of its values, as part of the EU's external mandate under Articles 3(5) and 21 of the Treaty on European Union (TEU).

This external mandate also explicitly requires the EU to promote and safeguard its interests; claims that the EU's interests and values coincide—that, in fact, it is in the EU's interest to see its values more widely accepted[7]—reveal the tensions implicit in this relation between values and interests. This tension permeates discussion of the global reach of EU law. Instances can be identified where the EU's value-promotion represents an attempt to extend to third countries international law norms by which it is itself constrained. But the EU also faces the charge that it seeks to export to third countries values and standards which it is less rigorous about applying to itself, and that the external application of EU law may in some instances put into question the EU's own responsibility to comply with international law. In any event, the EU's desire to promote its own values as global is clearly linked to EU interests in promoting the EU law norms based on those values; however, as Christopher Kuner points out in Chapter 3, 'it would be unreasonable to expect third countries to accept the EU's political interests as universal values'.

2. The Structure and Scope of this Book

The book starts with two introductory chapters by Joanne Scott and Marise Cremona that descriptively map this phenomenon and offer some analytical tools for understanding it. These are followed by four chapters, all looking at very different legal fields, which seek to assess to what extent we can indeed identify an extraterritorial impact of EU law; explore the interaction between EU law, the domestic laws of third countries and international or transnational governance regimes; and identify some of the normative issues raised by these interactions. The legal fields chosen—the environment, the Internet and data protection, banking and financial markets, competition policy and migration—each possess natural cross-border characteristics, as well as being fields in which the EU has been notably active, both internally and externally. The EU may seek to influence conduct and governance regimes beyond its borders for a multiplicity of reasons, whether through the extraterritorial impact of its own legislation, participation in international governance structures, or entering into bi- or multilateral agreements. It may be concerned with ensuring the integrity and efficacy of its own internal regulatory regime and preventing evasion; it may wish to influence the development of regulation in line with its own values and interests, and then seek to promote a specific regulatory approach more widely; or it may claim wider jurisdictional responsibility or seek to divert responsibility to other actors. The five diverse policy fields examined here by Joanne Scott, Christopher Kuner, Paul Davies, Giorgio Monti and Bernard Ryan each offer a different balance between these motivations and techniques, and the conclusions reached by these authors indicate that the EU's willingness and ability to exercise global influence is by no means uniform.

[7] European Union, 'Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy' (June 2016), at 13. See further Marise Cremona, Chapter 2 in this volume.

The complexity of the concept of the global reach of EU law and the diversity of its operation in (and within) different policy fields suggests the difficulty of drawing firm conclusions. Some initial interpretations and assessment of the material presented in this book are offered below, with the hope that this may encourage both further empirical research and further work on developing an understanding of the normative justifications for EU law's global reach, and of the conditions that would help to ensure that it operates in compliance with its own self-proclaimed values.

Joanne Scott's chapter (Chapter 1) performs two functions. The first part of the chapter provides an overview of some of the key techniques which the EU uses to extend the global reach of its laws. It highlights the variety of jurisdictional triggers upon which the EU relies and draws a distinction between extraterritoriality and territorial extension. It also considers the relationship between territorial extension and the influential concept of the Brussels Effect. Although the EU's effort to extend the global reach of its laws has sometimes proven to be controversial, Scott explores the permissive approach of the Court of Justice of the European Union (CJEU). Many of the concepts introduced by Scott in this chapter are illustrated by examples in the chapters that follow. The first part of Scott's chapter is intended to be descriptive and analytical rather than normative.

The second part of Scott's chapter is, however, to some degree normative. She uses environmental protection as a case study to evaluate territorial extension in EU law. To this end, she provides an overview of the EU's global environmental footprint, arguing that the EU is a major importer of raw materials and ecological assets and that it uses more than its fair share of these. She argues further that the processes of extracting, harvesting or making products destined for the EU market, or managing the associated waste products, frequently cause severely negative impacts globally and in third countries. With this in mind, Scott explores the question of whether an understanding of the EU as being complicit in environmental wrongdoing in third countries can help to justify the presence of territorial extension in EU environmental law. Drawing upon the understanding of complicity developed by Lepora and Goodin,[8] she argues that complicity can serve both as a justification for territorial extension and as a launching pad for critique. Thus, in contrast with much recent literature on this theme, Scott argues that territorial extension can sometimes be justified even where activities in third countries do not cause direct, substantial and foreseeable effects within the EU.

The aim of Marise Cremona in Chapter 2 is to explore the ways in which, and for what purposes, the EU uses its external relations powers and its wide range of external instruments to extend the reach of EU law beyond its borders. Within the framework of its external policies and governed by EU constitutional law, the EU maintains a complex web of international legal relations, taking part in a multi-layered process of unilateral, bilateral and multilateral normative interactions which cannot be categorized simply as either norm export or import. In exploring this process the chapter clarifies the way in which the law shapes the EU's external action, and the centrality of law to the EU's international actorness. Cremona examines three dimensions of the EU's 'actorness' which illustrate different meanings that might be attributed to the notion of 'the global reach of EU law' in the context of external relations and show three distinct—though overlapping—dynamics to the relationship between law and external action.

[8] C. Lepora and R. E. Goodin, *On Complicity and Compromise* (2013).

First, the role law plays in the construction of the EU's international legal presence as a Union of values, as it navigates between its own constitution and international legal principles. To what extent is law used to promote EU values externally, and to what extent does law act as a constraint, ensuring that the EU upholds its values (including human rights norms) in its external relations?

Second, law mediates between the EU and its external partners. The EU uses law as a way of conducting its foreign policy, and of promoting its interests. Cremona argues that the building of the EU as an integration project—'integration through law'—has an external as well as an internal quality. It is as a legal order that the EU relates to the outside world, and the boundary between what is internal and what is external to that order is a legal one; establishing that boundary is a necessary part of defining the EU's autonomous identity in relation to other actors. Law thus constrains the degree to which it is possible to integrate third countries into EU structures as well as the ways in which the EU can integrate itself into external, international, legal regimes.

The third dimension presented by Cremona shows the EU as a regulatory actor with a Treaty-based commitment to 'multilateral solutions to common problems' and 'good global governance'; an actor engaged in shaping, importing and promoting international legal norms. Its participation in these processes involves an interaction between unilateral, bilateral and multilateral relations. If we look at the ways in which the EU engages with the creation of norms at the international level, what challenges does this pose for its claim to be a Union of values?

The governance of the Internet, and especially the application of the EU data protection rules which are examined by Christopher Kuner in Chapter 3, might be said to be a paradigmatic illustration of the phenomena introduced in these first two chapters. The interaction between EU law and the Internet is multi-directional: while EU law has impacts beyond its borders, the Internet poses both jurisdictional and normative challenges for EU law. As Kuner shows, the global reach of EU law is manifested in a variety of ways, ranging from requiring compliance with EU legal standards beyond its borders to influencing the scope and content of third country legislation and undertaking regulatory investigations in third countries. After introducing the complex multi-level structure and highly fragmented character of Internet governance, including the interplay between EU and Member State competence and action, Kuner's chapter addresses four sets of issues. First, it explains the role played in this field by key principles (or values) of EU law introduced in Chapter 2: the principle of autonomy ensures that the EU's constitutional principles, including the rule of law and fundamental rights, are given priority even over international obligations, and indeed constrain the type of international obligation that the EU may contract. Given the fragmentation of Internet governance and the resulting overlap of jurisdictions, this principle has become a powerful tool in the hands of the CJEU, as *Opinion 1/15* and the *Schrems* case illustrate.[9]

Second, the chapter outlines the areas of law where the Internet and EU law interact, directly or indirectly, notably Internet governance, data protection and rules on jurisdiction and applicable law such as those contained in the General Data Protection Regulation (GDPR). The

[9] *Opinion 1/15*, Draft agreement between Canada and the European Union—Transfer of Passenger Name Record data from the European Union to Canada (ECLI:EU:C:2017:592); Case C-362/14, *Schrems v. Data Protection Commissioner* (ECLI:EU:C:2015:650), paras 84–87.

GDPR in particular is an example of the application of EU law beyond its territory, with its reach capable of extending to Internet activity in third countries. The chapter then considers the mechanisms of global reach, many but not all of which are the result of deliberate policy choices by the EU: emulation and learning (from judgments such as *Google Spain* as well as legislation such as the GDPR); participation in international fora and negotiations (where there EU may compete for influence with others, such as the US); coercion and conditionality, including adequacy decisions; and the (non-)recognition of third country regulation or other legal measures such as court judgments.

Finally, Kuner addresses some of the normative issues raised by these mechanisms and the EU's approach to Internet governance beyond its borders. These include the tension, also referred to in Chapter 2, between the EU's legal values and its political interests; Kuner advocates greater honesty in differentiating political agenda from law and warns of the 'risk that legal values will be diluted to fit a particular political agenda'. Closely connected is the risk that the EU's stated commitment to promoting rules-based 'multilateral solutions to common problems' will turn into an attempt to promote its own legal solutions by equating the latter with universal values. And, Kuner argues, if the EU is seeking to gain widespread acceptance for its own regulatory model of data protection, including in developing countries, then this carries responsibilities; the EU needs to recognize the commitment that this will entail, as well as being alert to the risk of double standards.

Paul Davies explores the global influence of EU law in relation to the pursuit of financial stability. He starts by explaining why the EU has a strong incentive to exert global influence in this domain, having regard to the fragility of the business model in global finance and to the high probability that a financial crisis starting in one country will spread contagion across borders. Davies then turns to consider the implications of this for regulation, pointing out that there are three distinct ways in which a country can respond to these challenges: reversing globalization; imposing its rules extraterritorially; or coordinating laws at an international level.

Having identified these three possible routes, Davies then assesses the influence of EU financial regulation. He starts by considering the EU's influence at the international level in bodies such as the G20/Financial Stability Board or the Basel Committee on Banking Supervision. He then considers the extent of the EU's influence via 'mutual recognition' by analysing the EU's influence on the regulation of Central Counterparties (CCPs) which are responsible for clearing over-the-counter derivatives. He sees mutual recognition as a modified form of extraterritoriality, whereby one country's legislation includes an exception which allows for the recognition of another jurisdiction's rules where these are regarded as equivalent to its own. Davies points out that the extent of the EU's global influence may be expected to depend not only upon the pull factor of the EU's market for third country institutions, but also upon the desire of EU institutions to be able to sell their products on third country markets while being subject to EU rather than third country law.

In discussing the EU's influence via mutual recognition, Davies provides a careful exploration of the progress of mutual recognition between the EU and the US. He alerts us to the important difference between the 'equivalence' mechanism in EU law and 'substituted compliance' in US law. Whereas the former permits mutual recognition of a third country's substantive rules and its system for supervision and enforcement, the latter only permits the mutual recognition of a third country's substantive rules. Focusing on the example of CCPs, Davies illustrates the lengthy and acrimonious nature of the EU-US dialogue on mutual recognition of CCPs.

Davies is alert to the implications of his analysis for the UK on the occasion of its departure from the EU. He points out that at present three-quarters of all euro-denominated interest rate derivatives are cleared by clearing houses established in the UK. The Commission has formulated proposals that could require some systemically important third country CCPs to become established within the EU. Even where third country CCPs can continue to benefit from mutual recognition, this would operate in a manner that is more akin to 'substituted compliance' in the US than to equivalence, which has been the norm within the EU. An equivalence determination would therefore imply recognition of the adequacy of a third country's substantive rules but not of its arrangements for supervision and enforcement.

In his chapter on the extraterritorial effect and global reach of EU competition law (Chapter 5) Giorgio Monti assesses the degree to which it is possible to identify a 'Brussels Effect'. He argues that although the Commission's application of EU competition law has a global reach, claims of a Brussels Effect or hegemony are overstated. The global reach of EU competition law is, rather, based on cooperation between agencies and an incremental convergence which emerges as the result of sharing ideas and information. Identifying the risk of over- and under-enforcement as being of more concern than the risk of EU hegemony, and considering the prospect of the establishment of a global antitrust authority to be unrealistic, Monti asks to what extent the two main external relations techniques used by the EU in this field—cooperation agreements and the inclusion of antitrust clauses in bilateral agreements—may help with these concerns.

The chapter takes the three core elements of EU competition law in turn: merger control; unilateral conduct by dominant companies; and cartels. In the case of merger control, Monti argues that the Brussels Effect (the wielding of unilateral regulatory power) does not explain the global reach of EU antitrust law, and there is little evidence of EU hegemony. Companies in merger cases are more concerned by the problems caused by overlapping jurisdictions and the need for multiple notifications. Cooperation between antitrust agencies has become the norm; it is designed to ensure coordination and where possible avoid divergent outcomes and the consequent enforcement difficulties. In contrast, in the case of unilateral conduct by dominant companies, the basis on which the EU exercises jurisdiction has been controversial. The tests used (the economic entity and implementation doctrines) mean in practice that EU law will apply if conduct which takes place abroad has an effect on the EU market. There is, as Monti shows, more divergence between antitrust agencies and laws than in the case of either mergers or cartels, and coordination between agencies has proved difficult. In the case of cartels, where the jurisdiction rules are essentially the same as for unilateral conduct, the main controversy over the reach of EU law has been over the level of fines imposed, although, as Monti points out, it can be argued that in this way the EU contributes to global deterrence. Agencies cooperate in handling investigations (e.g. in coordinating the inspection of premises), with the most significant barrier to cooperation being the absence of agreements on the sharing of confidential information.

Unilateral antitrust enforcement may be tempered by comity, but in Monti's opinion comity is more a matter of rhetorical goodwill than of practical value. More important are inter-agency cooperation and exchanges of information, facilitated by agreements. For the EU, especially in relation to the more significant economies, it appears that cooperation is more important than seeking to export norms. As Monti shows, the latest generation of antitrust cooperation agreements, such as the agreement with Switzerland, establishes a level of cooperation close to that between the European Commission and Member State national authorities. Where

clauses on antitrust are included within broader agreements, they may—depending on the nature of the relationship—seek to align the partner country to the EU's model of competition law, but in other cases such as agreements with emerging economies, 'the emphasis is placed more on conversation than on exporting rules'. Contact between authorities, cooperation and conversation may lead to convergence of rules, but Monti counsels caution here: in his view it is important to maintain sufficient divergence to allow for different positions (particularly between countries at different levels of development) on the role played by antitrust law.

In Chapter 6, Bernard Ryan begins by charting the history and development of the EU's border regime before 2011. He sees this as 'the joint product of the functional and intergovernmental forces which shape EU integration' and explores the relationship between functional and intergovernmental elements. Already in this pre-2011 phase, third countries were encouraged to play a role in EU border control by preventing irregular migration and by readmitting persons who were present in the EU on an irregular basis. Ryan's chapter includes a detailed overview of EU cooperation on migration, which was conducted on a largely regional basis.

In the second part of his chapter, Ryan charts the shifting nature of the EU's border control regime, arguing that migration developments in the Central Mediterranean (e.g. Albania, Tunisia and Libya) and Eastern Mediterranean (e.g. Syria, Afghanistan and Iraq) served as a catalyst for these changes. Among the most important of the changes tracked by Ryan is an expansion in the substantive and geographical reach of EU law through cooperation with third countries. The conclusion of a revised agreement with Tunisia in 2011 is exemplary in this respect. It provided for a simplified procedure for the readmission of irregular migrants, an enhancement of Tunisia's efforts to prevent departures, and the supply of boats and vehicles to the Tunisian authorities.

The migration crisis transformed the EU's border control regime in both its internal and external dimensions. As far as the internal dimension is concerned, it led to a strengthening of the powers of the EU's border control agency, Frontex. Ryan demonstrates how the evolution of Frontex's powers has led to 'an enhancement of the territorial reach of Frontex, by enabling far closer cooperation with third states'. This includes the deployment of Frontex officials and teams to the territory of third countries. This period also witnessed a series of Schengen governance reforms which both sanctioned the reintroduction of internal controls by Member States and enhanced EU supervision of Schengen states struggling to police their external borders. This latter element served to enhance the substantive reach of EU law.

As far as the external dimension is concerned, the EU has engaged in enhanced cooperation with third countries both to prevent irregular migration to the EU and to facilitate the return of irregular migrants to these third states. The EU relaunched its Global Approach to Migration and Mobility (GAMM) in 2011 and pursued dialogue and cooperation with a wide range of third countries. The EU has both broadened the range of countries with which it engages and altered the forms of cooperation that it has pursued. For example, the EU has started to work more closely with countries of transit such as Libya and Niger in order to prevent the departure of irregular migrants from those countries. This includes cooperation with African states and the launch of the EU Trust Fund for Africa in 2015. This fund has committed funding of nearly €2bn and has financed initiatives aimed at migration control and at improving employment opportunities and social services within the countries from which the greatest number of irregular migrants originate. Substantial financial support has also been provided to state authorities in Turkey and to humanitarian organizations assisting Syrian refugees in Turkey (€3bn made up of EU and Member State contributions).

Significantly, Ryan argues that the EU's strategy of preventing irregular migration is not intended to export EU norms but rather to reduce the level of protection accruing to migrants, while simultaneously enabling the EU and its Member States to avoid acquiring legal responsibility for them. The EU's desire to side-step this responsibility is apparent even in situations where third countries are unable to provide an adequate level of protection. Ryan points out that this is particularly an issue in relation to Libya, which is not a party to the Refugee Convention. Ryan raises the question of whether EU support to third countries for the purpose of controlling irregular migration may in itself be sufficient to trigger international responsibility under the European Convention on Human Rights (ECHR) or international law. Ryan also raises concerns in relation to EU-Turkey cooperation which similarly weakens guarantees of legal protection, even providing for the possibility of the return of applicants who are currently seeking legal protection to third countries. This includes Turkey, even though Turkey does not include non-Europeans within the scope of the protection conferred by the Refugee Convention.

3. What Kinds of Global Reach?

All of the chapters included in this volume include examples of the global reach of EU law. Cremona offers examples across the spectrum, ranging from unilateral EU measures to bilateral and multilateral agreements which the EU has entered into. The EU has endeavoured to export its *acquis* to its close neighbours, particularly in the economic domain, and has developed sophisticated institutional mechanisms for tracking developments in EU law.

Cremona also offers an example of the EU seeking to promote its own fundamental rights values globally by taking steps to avoid being complicit in the administration of the death penalty in third countries. It does so with the aim of building acceptance and working towards a universalization of an anti-death-penalty norm, seeking to further reinforce its status in third country and international law. In relation to this and other examples, the EU can be seen 'taking' norms from international law, including soft law such as recommendations, and seeking to influence their content. The EU then promotes these international norms via bilateral instruments within and beyond its immediate neighbourhood. The area of money-laundering offers a good example of this elaborate interplay between the unilateral, bilateral and multilateral techniques that the EU uses to influence third country and international law.

Scott introduces the concept of 'territorial extension' and exemplifies the different levels at which this operates in EU law. She offers multiple examples of territorial extension, including country-level territorial extension, to explore the different modalities used by the EU to extend the global reach of its data protection laws. Kuner uses this concept of territorial extension to explain the global reach of EU data protection law. In this example, the effects of extending the EU *acquis* are felt at different levels: internationally as the EU acts in international fora to shape international norms; and in third countries as the EU *acquis* is used as a model to incentivize the adoption by third countries of 'adequate' data protection laws. EU data protection law is also shown to influence private actors in third countries. Private actors exhibit a willingness to abide by EU norms in order to ensure the free flow of data across EU borders through the inclusion of EU-recognized standard contractual clauses.

Monti offers the clear example in competition policy of the EU targeting actions that take place outside of the EU if their effects will be felt within the EU. Though the EU has exhibited a

willingness to act unilaterally in this respect, it has also cooperated bilaterally with third countries to facilitate the enforcement of EU and third country competition law. In the merger field, firms are keen to avoid being faced with multiple, overlapping, regulations, and so they generally do not object to bilateral cooperation when it is designed to prevent this. Nonetheless, by contrast to other examples discussed in this book, including data protection, there is little evidence of the EU seeking to influence the substantive content of third country competition law through binding means. There is likewise limited evidence of a 'Brussels Effect'.

While Davies understands why the EU may wish to exert global influence on financial regulation, he paints a picture of the EU which suggests that it has not been very successful in this respect. He appraises the extent of the EU's global influence at the international level and as a result of its equivalence dialogue with the US in relation to CCPs. As far as the EU's influence in international standard-setting is concerned, Davies reaches a quite stark conclusion. The EU's influence on the development of international standards since the financial crisis has been low, and Davies explores some of the reasons for this. The EU has largely been a rule-taker rather than a rule-maker in this respect, and even where the EU has 'struck out on its own', Davies suggests that it has struggled to find followers.

As far as the EU's influence through mutual recognition/equivalence is concerned, Davies argues that the EU has made only limited gains as a result of its efforts to 'export' its norms regarding CCPs to the US. While it may appear as if the EU has made better 'defensive' use of equivalence in order to resist the importation of US norms, the EU's victory regarding the preservation of its net margining model for CCPs was no more than a pyrrhic one. Retention of this model resulted in EU financial institutions being placed at a competitive disadvantage. Ultimately, therefore, the EU decided to revise its previously hard-fought for norms. 'One might say that the impact of mutual recognition dialogue was in fact to undermine, not to preserve, the EU net margining rule'. Interestingly though, Davies points out that third country law can only be recognized as equivalent under EU law if the third country in question has a comparable system of mutual recognition in place. The EU does therefore seek to project the concept of equivalence as a norm externally.

Ryan traces EU cooperation with third countries aimed at reducing irregular migration and readmitting irregular migrants who do reach the EU. Overall, he argues there has been an unprecedented level of EU involvement in the migration policies of third countries since 2011. As was noted previously, the EU has broadened the range of countries that it engages with and has engaged in novel forms of cooperation, including on operational matters. Ryan observes that cooperation has been more successful in relation to some countries (e.g. Libya) than others (e.g. Morocco, Algeria, Tunisia and Egypt).

In the Central Mediterranean, the cumulative effect of EU initiatives (together with Italy's cooperation with the Libyan authorities) has been a reduction in the level of irregular migration to the EU. For example, in the first four months of 2018, arrivals from Libya were down by 82 per cent compared with the previous year. In the Eastern Mediterranean, EU cooperation with Turkey and border controls in the Western Balkans has led to a dramatic decline in the number of migrants arriving on the Greek islands in 2016 and 2017. Ryan notes that this latter decline can help us to understand why EU-Turkey cooperation in relation to migration is ongoing, notwithstanding the Turkish Government's suppression of dissent and opposition internally since the failed coup in 2016.

However, it bears repeating that Ryan makes a convincing case that EU-third country cooperation on migration results in a reduction of the level of international protection accruing to migrants, including current applicants for protection, rather than at exporting higher standards of protection enshrined in EU law.

4. The Role of Law: Enabling and Constraining the Extraterritorial Reach of EU Law

This book seeks to understand more fully the role of law as a foundation of EU external power. Our contention is that there is a need to look beyond the instrumental function of law and the use by the EU of the legal tools in its toolbox—although this function is undoubtedly important—and to identify the ways in which law shapes the EU's external identity and its relations with other legal regimes. In this, the law may both enable and constrain the EU's external action. Each of the chapters in this volume exemplifies the important role that law plays in enabling and constraining the extraterritorial reach of EU law, and some elements of this are highlighted below. Although the enabling and constraining functions of law have been separated out, there is often an iterative dimension present whereby constraints serve as a catalyst for the emergence of enabling devices and the emergence of new enabling devices will occasionally provoke the emergence of additional constraints.

5. Law as an Enabler

A. The Permissive Stance of the CJEU

The CJEU has accepted that EU law may operate outside the borders of the EU, and multiple examples can be found in the CJEU's case law to support this claim. In her chapter, Scott points to many of the relevant cases, particularly as they relate to the lawfulness of territorial extension in EU law. She points out that the CJEU has upheld the validity of measures giving rise to territorial extension and exhibited a willingness to construe EU legislation broadly to permit its application to foreign conduct.[10] Following the *Zuchtvieh* case, Scott concludes that there appears to be no presumption against extraterritoriality in EU law.[11] Monti also explores the case law of the CJEU, including a discussion of the recent *Intel* case in which it endorsed the presence of a 'qualified effects' doctrine in EU law.[12] Monti also points to the fact that the CJEU has upheld the Commission's practice of setting fines for breach of competition law without taking account of fines that have been imposed by third country agencies. Kuner also offers examples of the CJEU's permissive stance, including the well-known cases of *Google Spain*[13] and *Schrems*.[14] In the latter, the CJEU adopted a strict approach to enforcing country-level territorial extension in EU law.

B. Equivalence as an Emerging Principle of EU Law

[10] For one example of the former see Case C-366/10, *Air Transportation of America ex parte Secretary of State for Energy and Climate Change* (*ATAA*) (ECLI:EU:C:2011:864) and of the latter see Case C-424/13, *Zuchtvieh-Export GmbH* (ECLI:EU:C:2015:259).
[11] *Ibid*.
[12] Case C-413/14 P, *Intel Corporation* (ECLI:EU:C:2017:632), judgment of 6 September 2017.
[13] Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González* (ECLI:EU:C:2014:317).
[14] *Schrems*, *supra* note 9.

As is explained by Davies in his chapter, the concept of equivalence operates to soften the impact of a full-blown extraterritorial application of norms. It does so by preventing direct conflicts of norms and/or by preventing the emergence of overlapping norms from different jurisdictions even where these norms are not in direct conflict. The concept of equivalence also serves to accommodate differences in regulatory approach, at least up to the point where these differences are deemed to impede unduly the attainment of the EU's regulatory objectives.

Equivalence is found in different forms throughout EU law giving rise to territorial extension. In its narrow form, it permits the disapplication of EU law when it is in direct conflict with EU-equivalent third country laws. In its broader form, it permits the disapplication of EU law in favour of third country law, even in the absence of a direct conflict. An example of a broader conception of equivalence can be seen in Kuner's discussion of the *Schrems* case.[15] Here, the CJEU has interpreted the concept of adequacy in the data protection directive as necessitating an evaluation of whether a third country has EU-equivalent standards of protection in place. In its narrow form, the concept of equivalence has recently found favour with the CJEU when construing legislation that did not contain an explicit reference to this concept. In *Zuchtvieh*, the CJEU emphasized that where the law or administrative practice of a third country verifiably and demonstrably precludes full compliance with EU law, EU competent authorities are entitled to accept compliance with third country measures which ensure an EU-equivalent level of protection.[16] This indicates that at least in its narrow form, which aims at the avoidance of direct conflict, equivalence may be emerging as a principle of EU law.

C. Law Enabling New Forms of Integration

Cremona's chapter notes the central importance in the EU's external relations (as in the EU's internal evolution) of the development of relationships based on economic, political and legal integration. These relationships are driven by and based on law; complex institutional frameworks have enabled new highly dynamic forms and structures of close integration, which, as illustrated by the European Economic Area Agreement and the Association Agreement with Ukraine, have been especially effective in the EU's neighbourhood. This external law of integration, as well as promoting the EU's regulatory approaches across a wide range of economic fields, enables the EU's efforts to achieve further objectives, such as the modernization of the economies of neighbouring countries, and an increase in their legal and political stability. The innovative solutions found, such as the EFTA Court and the EFTA Surveillance Authority, have at least in part been prompted by the legal constraints imposed by the principle of autonomy, as examined below.

Law also acts as a catalyst for cooperation. The extraterritorial application of EU law may trigger agreements with third countries which mitigate these effects, either through mechanisms of equivalence, as mentioned above, or by facilitating cooperation in enforcement. In the field of data protection, for example, an impetus can be seen towards bilateral agreements with third countries, which are designed to ensure the adequacy (equivalence) required by the EU's own legislation, such as the 'Privacy Shield' agreed with the US. Agreements may also be designed to meet the requirements of the EU's Charter of Fundamental Rights, such as the agreements on the transfer of airline passenger name records (PNR) to third countries.

[15] *Supra* note 9.
[16] *Zuchtvieh*, *supra* note 10, para. 54.

Cooperation agreements in the domain of competition law are more concerned with enforcement than the equivalence of substantive norms.

D. Law Enabling New Forms of Extraterritorial Enforcement of EU Law

As will be discussed below, public international law precludes states from enforcing their laws extraterritorially. However, the chapters included in this volume illustrate that the EU has developed mechanisms and strategies that aim to ensure that its laws are enforced in third countries while not breaching the norm prohibiting extraterritorial enforcement. Four such mechanisms will be highlighted here.

First, as was noted in the discussion of Davies' contribution, mutual recognition in EU law extends not only to a third country's substantive rules but also to its system for ensuring compliance with EU law. Thus, when the EU makes market access conditional upon a third country achieving an EU-equivalent level of protection, it performs a meta-regulatory function by, on the one hand, outsourcing responsibility for securing compliance to third countries and, on the other hand, by overseeing the adequacy of their arrangements for supervision and enforcement.

Second, and closely related, the EU frequently makes access to the EU's market conditional upon a third country and/or private actors within that country making it permissible for EU or EU-approved personnel to conduct inspections within the territory of that third country. EU law is replete with examples of this kind. For example, EU aviation security validators act on behalf of EU Member States when they assess the appropriateness of security measures applied by air-cargo handling entities in third country airports.[17] EU aviation security validators must be approved by an EU Member State. EU regulation of recognized organizations in the maritime sector offers another good example.[18] The European Maritime Safety Authority regularly inspects third country recognized organizations in third country ports; and in entering in contracts with shipowners, such organizations must include a contractual clause to ensure that the EU Commission may gain access to ships, even when they are situated in third country ports.

Third, the EU enters into cooperation agreements with third countries to facilitate enforcement of its laws extraterritorially. Monti offers an excellent example of this in his chapter on competition law. In this arena, cooperation agreements serve not only formalize comity (e.g. by ensuring that a merger will be acceptable to both authorities), but also lay down rules enabling joint investigations and the transfer of confidential information.

Finally, in at least one recent example, the EU has sought input from individuals within third countries to assist in monitoring compliance with EU law. Thus, natural and legal persons affected or likely to be affected by a breach of relevant provisions in the EU's ship recycling regulation, or having a sufficient interest in environmental decision-making in relation to such

[17] Commission Implementing Regulation (EU) No 2015/1998 laying down detailed measures for the implementation of common basic standards on aviation security, OJ 2009 L 299/1.
[18] Regulation 391/2009 of the European Parliament and of the Council on common rules and standards for ship inspection and survey organisations, OJ 2009 L 131/11. For details of inspections in the EU and in third countries see http://www.emsa.europa.eu/visits-a-inspections/assessment-of-classification-societies.html.

matters, are entitled to request the Commission to take action with respect to such a breach or imminent threat of such a breach.[19] Where such a request shows in a plausible manner that a breach is imminent or has already occurred, the Commission shall give the ship recycling company in question a right to be heard, and shall inform the party making the request of its decision to accede to or refuse the request for action, and provide reasons for this decision. In this scenario, individuals or organizations within third countries are empowered to alert the Commission to the existence of a breach of EU law.

6. Law as a Constraint

In identifying some of the ways in which law may act as a constraint to the extraterritorial reach of EU law, it becomes clear that although these responses form part of the broader structure of EU constitutional and administrative law, they are not as such parts of a considered legal response to extraterritorial reach. In that sense, they are ad hoc. Some (such as autonomy) are rather fully developed through case law; others are in a process of evolution (such as the extraterritorial impact of fundamental rights); others are rather under-developed (such as the principles governing third country interests, and procedural constraints).

A. The Principle of Autonomy

The principle of the autonomy of EU law imposes constraints on institutional arrangements negotiated with third countries. It requires that these ensure the independence of EU institutions in matters of decision-making, and the primacy of the CJEU in its interpretation of EU law, including in particular the division of competence between the EU and its Member States. As the EEA case law demonstrates, this poses a challenge for the EU in developing close relationships of integration with third countries under conditions of equality. Since it precludes full third-country participation in EU decision-making, agreements which envisage a high degree of integration or even homogeneity between the EU *acquis* and the integration regime, will essentially require the third country partner to become a norm-taker. In other contexts where equivalence rather than legal integration is the basis of an external relationship—such as in the EU's bilateral agreements on data protection—the principle of autonomy is less constraining, although it may impact institutional choices, for example on the role of the CJEU.

The principle of autonomy also makes it difficult for EU to participate in external regulatory regimes, especially if these include decision-making or adjudication.[20] Where the EU has sufficient negotiating strength it may be able both to influence the content of an external regime and to ensure—through the insertion of a 'disconnection clause'—that as far as the EU Member States are concerned the external regime does not displace the operation of EU law.[21] The EU *acquis* is protected but at a cost in terms of fragmentation of the international regime.

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[19] Regulation 1257/2013 of the European Parliament and of the Council on ship recycling, OJ 2013 L 330/1, Article 23 on 'request for action'.

[20] See, e.g., *Opinion 1/09* on the European and Community Patents Court (ECLI:EU:C:2011:123).

[21] See, e.g., the United Nations Convention on the Use of Electronic Communications in International Contracts 2005, 2898 UNTS, Registration No. 50525, Art. 17, cited by Kuner. See also the priority given by the CJEU to the EU's internal integration objectives over wider international cooperation in private international law in Case C-533/08, *TNT Express*

B. Public International Law

The CJEU has stated repeatedly that when the EU adopts an act, it is 'bound to observe international law in its entirety', including customary international law.[22] The CJEU has been willing to review the validity or legality of an EU act in light of customary international law, albeit that it limits judicial review to appraising whether the EU has committed a manifest error of assessment as far as the principles of customary international law are concerned.[23] In the *Air Transportation of America* case, the CJEU endorsed the validity of an EU measure giving rise to territorial extension on the basis that aircraft that are physically present within the EU are subject to the unlimited jurisdiction of the EU and its Member States.[24] Regardless of whether one reads this case as being concerned with the exercise of prescriptive or enforcement jurisdiction by the EU, it remains true that customary international law prohibits states from enforcing (as opposed to prescribing) their laws extraterritorially.[25] However, as was noted above, the EU has developed a number of novel mechanisms to facilitate the extraterritorial enforcement of EU law.

The CJEU has also been willing to assess the validity or legality of an EU act by reference to the standards laid down in an international agreement where a number of conditions are met. The agreement in question must be binding on the EU, its nature and broad logic must not be such to preclude it being relied upon by individuals, and the content of the agreement must be unconditional and sufficiently precise.[26] In practice, these conditions can be difficult to fulfil and the CJEU has often concluded that international agreements that are binding on the EU are not suitable to confer rights on individuals which they can rely on in court.[27] For example, subject to exceptions which have been narrowly construed, the CJEU has not proven to be willing to review the validity or legality of an EU act on the basis that it is alleged to infringe World Trade Organization (WTO) law.[28]

C. Fundamental Human Rights in EU Law and International Law

Fundamental human rights are among the EU's values as set out in Article 2 TEU and the CJEU has taken a clear position that human rights compliance 'is required of all actions of the European Union', including external action.[29] Likewise, international agreements concluded

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Nederland BV v. AXA Versicherung AG [2010] ECR I-4107 (ECLI:EU:C:2010:243). See further Cremona, 'A Triple Braid—Interactions between International Law, EU law and Private Law', in M. Cremona and H.-W. Micklitz (eds), *Private Law in the External Relations of the EU* (2016).

[22] *ATAA*, *supra* note 10, para. 122; citing Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.*, [1992] ECR I-6019 (ECLI:EU:C:1992:453).

[23] *ATAA*, *supra* note 10, para. 110.

[24] *Ibid.*, para. 124.

[25] See C. Ryngaert, *Jurisdiction in International Law* (2nd ed., 2015), at 31.

[26] *ATAA*, *supra* note 10, paras 52–54.

[27] *Ibid*., para. 77 as far as the Kyoto Protocol is concerned and Case C-308/06, *Intertanko v. Secretary of State for Transport*, [2008] ECR I-4057 (ECLI:EU:C:2008:312).

[28] Case C-149/96, *Portugal v. Council*, [1999] ECR I-8395 (ECLI:EU:C:1999:574).

[29] Case C-263/14, *European Parliament v. Council* (ECLI:EU:C:2016:435), para. 47.

by the EU are required to comply with EU primary law, including fundamental human rights as protected by the Charter.[30] The priority of EU constitutional law (including the Charter) imposes constraints on what the EU can agree to, and the Charter thus provides a baseline or set of minimum standards which third countries wanting to conclude agreements with the EU have to accept, given the risk of an *ex ante* or *ex post* finding of illegality.[31] This legal constraint on the EU may thus appear as a strength: as Kuner points out, the priority that the CJEU insists should be given to fundamental principles of EU law in cases such as *Schrems* gives the EU some leverage in a 'pluralistic and fragmented' scenario where several jurisdictions may cover the same actors or conduct without clear priority rules.

The precise degree to which the EU Charter of Fundamental Rights applies in extraterritorial contexts may still be debated, although it seems clear that the references to human rights in Article 3(5) and 21 TEU provide a firm basis for arguing that it carries a legal effect beyond the EU's territorial borders.[32] Although Advocate General Wathelet in the *Polisario* case rejected the applicability of the Charter outside the EU on the grounds that none of the conditions established by the European Court of Human Rights (ECtHR) for the extraterritorial application of the ECHR were met,[33] he accepted the argument that the EU was bound to consider the impact of its external actions as regards *erga omnes* and peremptory international law obligations, including the right of self-determination.

In principle, the constitutional conditions for the legality of an EU act concluding an international agreement include compliance with peremptory norms of international law.[34] The CJEU in both the *Polisario* and *Western Sahara* cases refused to interpret an EU agreement in contravention of peremptory norms of international law, despite institutional practice.[35] However the EU's (and the Member States') potential responsibility for breaches of international human rights law beyond its borders may influence policy in a less benign manner. The ruling of the ECtHR in *Hirsi Jamaa* to the effect that Italy has jurisdiction over

[30] *Opinion 1/15*, *supra* note 9, para. 70.
[31] The *ex ante* declaration of incompatibility of the proposed agreement on PNR data with Canada in *Opinion 1/15* means that the agreement will have to be revised before it can come into force: Article 218(11) TFEU. The *ex post* declaration of illegality in *Schrems*, *supra* note 9 made it necessary to renegotiate the EU-USA Safe Harbour (adequacy) arrangement.
[32] Case T-512/12, *Front populaire pour la liberation de la saguia-elhamra et du rio de oro (Front Polisario) v. Council*, ECLI:EU:T:2015:953; V. Kube, 'The EU's human rights obligations towards the wider world and the international investment regime: Making the promise enforceable' (2018) (PhD thesis on file at the EUI, Florence), chapter 1.III.
[33] Case C-104/16 P, *Council v. Front Polisario*, Opinion of AG Wathelet, (ECLI:EU:C:2016:677). For an argument that the EU Charter is not limited by the territorial principle applicable to the ECHR, see further Moreno-Lax and Costello, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model', in S. Peers *et al*. (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014).
[34] Case C-266/16, *Western Sahara* (ECLI:EU:C:2018:118), paras 47–50. As the Court points out at para. 50: 'where … the Court has received a request for a preliminary ruling concerning the validity of an international agreement concluded by the European Union, that request must be understood as relating to the EU act approving the conclusion of that international agreement'.
[35] *Front Polisario*, *supra* note 33; *Western Sahara*, *supra* note 34. See further Marise Cremona, Chapter 2 in this volume.

migrants intercepted by its vessels at sea, and that it would be unlawful to return them to Libya where this would expose them to risk of inhuman and degrading treatment, has, Ryan argues, shaped EU policy on irregular migration, putting an emphasis on preventing departure from third countries, and encouraging return to third countries which—like Turkey—are deemed safe despite concerns over compliance with the Refugee Convention.[36] This strategy is aimed not at exporting EU human rights norms, nor on promoting international human rights law, but rather at avoiding legal responsibility being placed on the EU and its Member States. Ryan questions the extent of the EU's responsibility for human rights abuses that are not attributable to EU Member States directly, but in relation to which the EU may be considered to be a secondary agent from a complicity perspective.

D. The Duty to Take into Account Third Country Interests

In some of the chapters that follow, the EU is criticized for failing to take third country interests sufficiently into account when it extends (or indeed fails to extend) the geographical reach of its laws. For example, Scott argues that the EU is not sufficiently attentive to potential negative third country consequences during the process leading to the adoption of the sustainable fishing and ship recycling regulations. Monti points to the fact that the EU does not take action against export cartels in the EU if their effects are not felt within the Union, even though these cartels may be very damaging to the developing countries in which the effects are felt. Needless to say, contrary examples can be found. In its seals regulation,[37] for example, the EU included an indigenous peoples exception which was intended to protect the fundamental economic and social interests of Inuit communities engaged in the hunting of seals as a means of ensuring their subsistence.[38]

This raises the question of whether the EU is under a legal obligation to take third country interests into account when it adopts measures that render EU law applicable in relation to foreign conduct. As a preliminary point, it is clear that WTO law permits members to design their regulations in a manner that achieves a balance between different objectives. For example, it would, in principle, be permissible for the EU to include an indigenous peoples exception in its seals regulation even where this undermines to some degree the contribution made by the measure to the attainment of its principal objective. However, it would be incumbent on the EU to explain why 'the need to protect the economic and social interests of the Inuit and other indigenous peoples necessarily implies that the European Union cannot do anything further to ensure that the welfare of seals is addressed in the context of [indigenous communities] hunts'.[39]

It is also arguable that the WTO goes one step further, by requiring members to take into account 'different conditions which may occur in the territories of … other Members'.[40] The

[36] ECtHR, *Hirsi Jamaa v. Italy*, Appl. no. 27765/09, Judgment of 23 February 2012. Decision available online at http://hudoc.echr.coe.int/.
[37] Regulation 1007/2009 of the European Parliament and of the Council on trade in seal products, OJ 2015 L 262/1.
[38] *Ibid.*, Art. 3.
[39] WT/DS401/AB/R, *European Communities—Measures Prohibiting the Importation and Marketing of* Seals, para. 5.320.
[40] WT/DS58/AB/R, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, para. 164.

Appellate Body suggested that discrimination may occur not only when countries in which the same conditions prevail are treated differently, but also when the application of a regulatory measure 'does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries'.[41] Nonetheless, the implications of this statement have not been spelt out.

Within the EU, Commission initiatives and EU legislation should be prepared on the basis of transparent, comprehensive and balanced evidence, making use of the tool of impact assessments.[42] Those preparing such assessments are assisted by guidelines that have been drawn up by the EU Commission which list the different categories of impacts that are to be identified.

Impacts that may occur within third countries feature quite prominently in the tables specifying the kinds of impacts that are to be taken into account. This includes economic impacts, such as impacts on foreign businesses and consumers and impacts on developing countries;[43] together with social and environmental impacts in third countries.[44] Among the questions to be addressed in terms of social impacts is whether the initiative will increase poverty in developing countries or have an impact on the income of the poorest populations.[45]

Even when it comes to providing guidance on 'in-depth analysis of the most significant impacts', international impacts are to be considered, including impacts on developing countries, with a view to ensuring the coherence of the initiative with the EU's development policy.[46] Moreover, the guidelines make clear that efforts are to be made to ensure that third country 'stakeholders' can participate in the consultation process.[47] However, no specific guidance is given on how to strike a balance between the EU and third country impacts.[48]

While the EU has an elaborate framework for impact assessment which has been developed and implemented over many years, some of the examples included in this volume raise questions about the extent to which negative third country impacts are even identified, let alone taken into account. Assessing the adequacy of EU impact assessments from this point of view, with a particular view to strengthening the assessment and weighting of negative impacts on developing countries and on vulnerable groups within them, emerges from this volume as an important topic for future research.

E. Proceduralisation

This then brings us back to Article 21 TEU which was highlighted above in the discussion of the role of fundamental human rights as a legal constraint. This lays down a series of principles which are to guide EU action on the international scene, including the principles of equality

[41] *Ibid*., para. 165.
[42] European Commission, *Impact Assessment Guidelines* (15 January 2009).
[43] *Ibid.*, under 'third countries and international relations', at 34.
[44] *Ibid.*, under 'social inclusion and protection of particular groups', at 35, 'social impacts in third countries', at 36 and 'international environmental impacts', at 38.
[45] *Ibid*., under 'social impacts in third countries', at 26.
[46] *Ibid*., at 42.
[47] *Ibid*., at 42.
[48] See the section on 'cost-benefit thinking through multi-criteria analysis', *ibid*., at 47–49.

and solidarity. It establishes objectives for the EU which relate to the conditions prevailing in third countries. For example, the EU is required to define and pursue common policies and actions, and work for a high degree of cooperation in all fields of international relations in order, *inter alia*, to foster the sustainable economic, social and environmental developing of developing countries, with the primary aim of reducing poverty.[49]

Such is the open-ended nature of the EU's constitutional commitments contained in Article 21 TEU, and the complexity of achieving a balance between the different elements contained within them, that they are unlikely to serve as a basis for substantive judicial review of EU measures. However, they can and should serve as a basis for courts and other actors to scrutinize the adequacy of the procedures followed by the EU institutions, particularly in relation to measures that seek to govern conduct or circumstances in third countries.

As highlighted above, both the General Court and the European Ombudsman have taken steps in this direction in so far as the EU's commitment to the protection of human rights is concerned. In *Front Polisario*,[50] the General Court found that the Council was obliged to address the question of the protection of the fundamental human rights of the population of Western Sahara before entering into an agreement with Morocco.[51] While it accepted that the EU would not be directly liable for breaches of human rights within the Western Sahara, it did consider that the EU could be complicit in such breaches were it to permit the importation of products produced in conditions that did not respect human rights into the EU.[52] The Ombudsman accepted that there was no legally binding requirement to carry out a human rights impact assessment in relation to the EU-Vietnam Free Trade Agreement; however, she considered that it would be in accordance with 'the spirit' of Article 21 TEU for the Commission to carry out an assessment of this kind and considered that the Commission's failure to provide valid reasons for refusing to carry out a human rights impact assessment constituted maladministration.[53]

In keeping with these recent developments, it is the present authors' contention that the Commission ought to be required to pay close attention to the possible impacts of EU measures on third countries, and to develop a transparent framework for assessing trade-offs between competing interests in third countries, and between interests inside and outside the EU.[54] The EU Treaties, including Article 21 TEU, can assist in identifying which types of impacts should be taken into account. The case studies included in this volume demonstrate that significant impacts can occur within third countries not only when the EU adopts measures that form part of its outwards-focused, external relations law; but also when it adopts 'domestic' measures

[49] Art. 21(2)(d) TEU.
[50] *Supra* note 32.
[51] *Ibid*., paras 223–247.
[52] *Ibid*., paras 227 and 228. For a discussion of the concept of complicity which is relevant to many of the examples discussed in this volume, see Joanne Scott, Chapter 1 in this volume.
[53] Decision in Case 1409/2014/MHZ on the European Commission's failure to carry out a prior human rights impact assessment of the EU-Vietnam free trade agreement.
[54] For an exploration of the application of administrative rules and principles to EU external administrative action, see I. Vianello, 'EU External Action and the Administrative Rule of Law: A Long-Overdue Encounter' (2016) (PhD thesis on file at the EUI, Florence) and, in the context of environmental protection, I. Hadjiyianni, *The EU as a Global Regulator for Environmental Protection: A Legitimacy Perspective* (2019).

that nonetheless necessitate a judgement about the adequacy of third country conduct or third country law.