Critical EU International Relations Law: a Research Agenda

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Abstract

The chapter reflects upon EU international relations law by drawing on critical EU studies for the future framing of EU IR law. EU IR is a highly successful subject. Yet it has increasing more subjects and objects and the EU risks becoming a victim of its own success. EU IR law has long been a highly doctrinal subject, dominated by highly court-centric views on EU integration and in need of further analytical insights to grapple with the post-Brexit era. EU IR yet appears increasingly as a highly deserving focus of the deeper and better study of EU integration. Since new post-Lisbon trade agreements explicitly and unambiguously lack direct effect, they further put into sharper focus the role of individual enforcement of EU international trade law going forward and the effectiveness of remedies. It is of major significance that EU IR law will become increasingly difficult to litigate in this new era and render the conventional court-centric narrative of EU integration somewhat difficult to place. It may also be that other areas of law enable citizens or NGOs empowerment (e.g. as to external migration or defence) in ways which ordinary individuals/ business may not achieve. Nonetheless, this new era of arguably even more subjects and objects of EU IR law puts such a successful subject as EU IR into a new spotlight. Framing critical EU IR law as a research agenda thus enables forward reflections across a range of subjects and themes.

Keywords: EU International Relations law; CJEU; global governance; court-centric; critical studies; decentering; EU actorness

1. Introduction: reframing EU IR law as an analytical space

This chapter has as its objective the re-reading of EU International Relations (IR) law by revealing insights from EU critical studies. EU IR is a field where the EU's engagement with the world, international organisations and current and future third countries has become a highly prominent symbol of the EU's capacity to survive and endure in the global legal order, however weakened internally by crisis. EU IR law has seen extraordinary successes in terms of evolution and development of trade, defence, security and other powers, arguably even becoming a victim of its own success in EU IR law increasingly.[1] There have also been dramatic advances in international relations, where the global activity of the Union is coherent, unified and active. It contrasts sharply with internal rule of law, Eurozone and migration crises perplexing the bloc.[2] As an academic field, EU IR law (or foreign affairs or external relations law to give it its multiple identities) has long been a highly doctrinal and competence-oriented subject, dominated by court-centric views on EU integration. It is a highly specific form of analytical engagement, which will be argued here to be usefully analysed through the prism of critical studies. The rules-based legal order is increasingly under attack from populism and exit from international organisations. However, the EU still supports internationalisation, multilateralism and international institutions as part of its core IR policy.[3]

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[1] See S Bardutzky and E Fahey (eds) *Framing the Subjects and Objects of EU Law: Exploring a Research Platform* (Edward Elgar 2017)

[2] See J Caporaso, 'Europe's Triple Crisis and the Uneven Role of Institutions: the Euro, Refugees and Brexit' (2018) 56 *JCMS: Journal of Common Market Studies* 1345

[3] See E Fahey (ed), Institutionalisation beyond the Nation State (Springer 2018); J Ikenberry, 'The end of liberal international order?' (2018) 94(1) *International Affairs* 7; R Brester, 'The Trump Administration and the future of the WTO' (2018) Y*ale Journal of International Law Online* 1

One of the most significant features of contemporary EU law is that while the activism of the CJEU has long been a source of study one of the most significant features of contemporary EU law is that it is not a subject that attracts much attention from those working on critical legal studies- and vice versa. The latest debates about the methods and methodology of EU law and PIL are largely data driven[4] or advocate deeper law-in-context methods or historical studies,[5] but are often heavily 'court-centric'.[6] They tend not to be oriented towards critical studies or do not engage with critical studies in general. This chapter thus attempts to explore the state of the art as to this gap. Arguably, the study of the EU as a global actor in law is predominantly institutionally-focussed and is arguably in need of a more diverse methodology to reflect organisational practice and law-making. Isolated studies of the use/ citation of PIL in EU legislation or jurisprudence arguably provide a limited snap-shot of practice and need to be pursued in a range of areas and time-periods to have meaning as a methodology. EU legal scholarship has tended to adopt a highly 'court-centric' approach to the EU and the global legal order. This is not to denigrate this approach- nor is PIL so apart- which should be clearly stated- but rather to emphasise that the EU's practices as an organisation (e.g. how the EU acts in an international organisation) *and* EU law-making look rather differently to the isolated study of international law *in* CJEU caselaw or *in* law-making alone or apart. In other words, less court-centric approaches would seem to be understudied. A new era of EU IR law appears very successful but also less oriented towards the individual- specifically as to the place of direct effect and enforcement of trade agreements. It necessitates careful reflection on how to study the field of EU IR. These issues invite further reflection at this critical juncture. What could be labelled here to be critical EU IR law? What are the subjects and objects of critical EU IR law going forward?

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[4] For example, W Alschner, J Pauwelyn and S Puig, 'The Data-Driven Future of International Economic Law' (2017) 20(2) *Journal of International Economic Law* 217

[5] See R van Gestel and H-W Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 *European Law Journal* 292, 313-316

[6] Cf M Egan, 'Toward a New History in European Law: New Wine in Old Bottles?' (2013) 28 *American University International Law Review* 1223

The chapter considers 2. The EU the Globalist, 3. Transparency in EU IR, 4. Framing Critical EU IR, 5. The Court-Centric Model of EU IR, followed by Conclusions.

2. The EU the Globalist

The EU is explicitly committed in its treaties to being a distinctive 'globalist' as a matter of law and to pursuing multilateral solutions.[7] Significant entities in the world currently wish to leave or threaten to leave or defund several international organisations (e.g. African Union from the International Criminal Court (ICC), UK from the Council of Europe and the EU, US from the WTO, NATO or UN, amongst others).[8] The EU, by contrast, has and continues to support the development of both existing and new international organisations through institutionalisation. For example, the EU has a recent history of promoting and 'nudging' institutional multilateral innovations in a range of trade and security fields, from the International Criminal Court,[9] the UN Ombudsman[10] or the Multilateral Investment Court,[11] promoting a distinctive global vision of accountability, legitimacy and the rule of law. The EU's vision of the 'global' in its policies is also ostensibly distinctive. Many leading EU policy documents across a range of policies have an explicitly global dimension and span a broad range of EU international relations, in the pre- and post-Lisbon period: e.g. European

[7] Cf Article 21 TFEU

[8] J Ikenberry, 'The end of liberal international order?' (2018) 94(1) *International Affairs* 7; K Smith, 'The European Union in an illiberal world' (2017) 116 *Current History* 83

[9] The Rome Statute of the International Criminal Court (1998)

[10] UNSC Resolution 2083 (2012)

[11] Council of the European Union, 'Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes' 12981/17

Security Strategy,[12] European Agenda on Security,[13] Action Plan on Human Rights and Democracy,[14] Trade and Investment Strategy-the Trade for All Strategy[15] or the Joint Framework on countering hybrid threats.[16] The EU's Global Strategy for EU Foreign and Security Policy launched in 2016 is the most explicit invocation of the term 'global' in the EU's policy making to date.[17] The EU's vision of the global is arguable one of the most transparent and open or participatory EU strategies ever produced because it was constructed or conceived through a process of input from a range of EU think-tanks and 50 gatherings in the EU and beyond.[18] It is an important change in action given that EU foreign policies have generally been conceived within an iterative process between the EU, national and

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[12] European Council, 'A Secure Europe in a Better World - European Security Strategy', Brussels, 12 December 2003, 15895/03

[13] See Commission, 'Communication from the Commission: The European Agenda on Security' COM (2015) 185 final

[14] Council, 'Action Plan on Human Rights and Democracy 2015 -2019 as adopted by the Council on 20 July 2015'; Council Conclusions 10897/15 Brussels, 20 July 2015

[15] See 'Trade for All: Towards a More Responsible Trade and Investment Policy' (European Commission, 14 October 2015) <http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy/> accessed 1 April 2019

[16] See 'Joint Framework on Countering Hybrid Threats: A European Union Response' JOIN (2016) 18 final

[17] The growing prominent of foreign policy is evident within EU law from the new Strategy, which is 60 pages long and reflects the enhanced foreign affairs competences of the EU post-Lisbon, multiples of its predecessors in length. See G Grevi, 'A Global Strategy for a Soul-searching European Union' (2016) *European Policy Centre* 1

[18] i.e. in Turkey, Tunisia, Norway, Japan and Australia and gatherings of the Foreign Affairs Council Development Council, Defence, COREPER, Secretary divisions and Departments of Foreign Affairs.

international legal orders- and is also distinctive internationally.[19] The EU's vision of the global is understood to tread a difficult line between 'realist' and 'normative' approaches to foreign policy, hovering between shared and common action with European values, albeit a rules-based global order with multilateralism as its key principle, thereby contrasting sharply with other contemporary administrations (e.g. in particular populist governments including those exiting against IOs).[20] However, since parts of the Strategy appear to have lost their salience since its publication, either expressly or by implication through short-term views of the global, its attempt to fashion itself as an overarching vision is perhaps disputable.[21] As a result, the EU's vision of the global can be argued to promote a certain ambiguity as to the essence of the EU's global, despite its highly distinctive character.[22]

This leads to the issue of the *practices* of EU IR and how we know and understand them. Transparency here constitutes a significant analytical 'barometer', as to clarity, certainty and access to documents in IR and is usefully reflected on as to the EU's expression of its 'globalness'.

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[19] See M Cremona, 'Values in EU Foreign Policy' in M Evans and P Koutrakos (eds), *Beyond the Established Legal Order: Policy Interconnections between the EU and the Rest of the World* (Hart 2011)

[20] See J Ikenberry, 'The end of liberal international order?' (2018) 94(1) *International Affairs* 7; K Smith, 'The European Union in an illiberal world' (2017) 116 *Current History* 83; See Global Strategy, para 3.5

[21] It was published 48 hours after the Brexit vote in June 2016, to convey 'business as usual'. See 'Editorial comments, We Perfectly Know What to Work For: The EU's Global Strategy for Foreign and Security Policy' (2016) 53 *Common Market Law Review* 1199. For example, its omission of Brexit or its inclusion of the now seemingly ill-fated TTIP.

[22] Editorial, ibid, 1203

3. Transparency shifts in EU International Relations law

The EU's international relations are increasingly conducted with higher levels of transparency, openness and participation, making a sharp break with conventional international practices. There are significant shifts by all EU institutions and major actors in their conduct of EU IR towards transparency, beyond the actual state of the current law-which puts IR law outside of its scope mainly. [23] Practice appears to be changing despite the state of the law. For instance, the Council of Ministers has begun to declassify negotiation mandates for international trade agreements only *after* individual MEPs began to illegally leak negotiation texts as part of a wave of political and local opposition toward the secrecy of the Transatlantic Trade and Investment Partnership (TTIP) and EU-Canada Economic Partnership Agreement (CETA) negotiations in particular.[24] The European Commission, along with a host of other actors (from the EP to the Ombudsman), has effectively put transparency as a lead constitutional ideal in all EU international trade negotiations, reacting

[23] See P Leino, 'Transparency, Participation and EU Institutional Practice: An Inquiry into the Limits of the Widest Possible' (2014) 3 *EUI Working Papers* 2-3, 25-26 <http://cadmus.eui.eu//handle/1814/30580> accessed 1 April 2019

[23] P Leino, 'On Knowledge as Power: The Transparency of EU Law-Making Procedures' (EU Law Analysis; 10 Jan 2016) <http://eulawanalysis.blogspot.co.uk/2016/01/on-knowledge-as-power-transparency-of.html> accessed 1 April 2019; D Curtin and A Meijer, 'Does Transparency Strengthen Legitimacy?' (2006) 11 *Information Polity* 109, 120; See M Hilldebrandt, D Curtin, and A Meijer, 'Transparency in the EU Council of Ministers: An Institutional Analysis' (2014) 20(1) *European Law Journal* 1

[24] See E Fahey, 'On the Benefits of the TTIP Negotiations for the EU Legal Order: A Legal Perspective' (2016) 43(4) *Legal Issues of Economic Integration* 327. It has recently adopted a policy of only declassifying on a case-by-case basis: Council conclusions on the negotiation and conclusion of EU trade agreements (8 May 2018) 8622/18

to political rather than legal principles.[25] The European Parliament has also increased its demands for transparency in EU international relations negotiations, year upon year post-Lisbon, using a broad methodology of inter-institutional agreements, litigation and soft power (e.g. non-binding resolutions) and has voted down agreements because of transparency issues thereafter.[26] The EP notoriously voted down the ACTA copyright agreement because of a lack of information using its newfound powers in the area of IR after the Treaty of Lisbon.[27] In a handful of cases largely taken by NGOs and individual MEPs and an academic, the Court of Justice has gradually eroded to a very considerable extent the exceptionalism surrounding international relations in litigation related to the Access to Documents Regulation in litigation against the Council and Commission in security and trade.[28] From security and data transfers to migration, the Ombudsman is increasingly putting international relations at heart of work despite being excluded in her role from the Access to Documents Regulation, e.g. as to EU-US Passenger Name Records (PNR) (i.e. security), EU-Turkey

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[25] For example, European Commission, 'Factsheet: Transparency in EU Trade negotiations' (2013) <http://trade.ec.europa.eu/doclib/docs/2013/june/tradoc_151381.pdf> accessed 1 April 2019

[26] See Case C-350/12 P *Council of the European Union v Sophie in 't Veld* ECLI:EU:C:2014:2039; See V Abazi and M Hillebrandt, 'The Legal Limits to Confidential Negotiations: Recent Case Law Developments in Council Transparency: Access Info Europe and in 't Veld' (2015) 52 *Common Market Law Review* 825; See C Herrmann, 'Transleakancy' in C Herrmann, B Simma and R Streinz (eds), *Trade Policy between Law, Diplomacy and Scholarship* (European Yearbook of International Economic Law Series 39, Springer 2015); E da Conceição-Heldt, 'Exploring the TTIP Transparency Paradox' (2019) *Comparative European Politics* 1.

[27] See D Curtin, 'Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?' (2013) 50(2) *Common Market Law Review* 423

[28] See P Leino, 'Transparency, Participation and EU Institutional Practice' (n 23)

relations (i.e. migration) or EU-Australia PNR (security):- an extraordinary array of decisions on EU international relations.[29]

4. Framing (critical) IR law

Historians, sociologists and political scientists examining the foundations of the EU legal system have developed a significant literature showing how a committed group of legal entrepreneurs worked to support the legitimacy of the CJEU's jurisprudence and establish European law as a distinct field.[30] However, it is work founded upon a body of caselaw that is studied principally relating to the internal market and its evolution rather than EU external relations. It is also a highly distinctive form of understanding integration through law. In more recent times of rising Euroscepticism, there is an emerging literature in political science/ international relations (thus apart from legal scholarship) on critical EU studies, which has sought to target the place of practice and methodology to overturn key assumptions as to EU integration.[31]A range of scholars now advocate more critical approaches to EU foreign policy through a decentring of EU actorness in their attempts to capture and reframe

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[29] See Access to documents of the institutions and decision of the European Ombudsman of 6 January 2015 closing her own initiative inquiry O1/10/2014/RA concerning the European Commission on dealing with requests for information and access to documents (Transparency)

[30] M Rasmussen, 'The Origins of a legal Revolution- the Early History of the European Court of Justice' (2008) 14 *Journal of European Integration History* 77; A Vauchez, *Brokering Europe* (Cambridge University Press 2015); D Kelemen 'The Court of Justice of the European Union' in K Alter, L Helfer and M Madsen (eds) *International Court Authority* (Oxford University Press 2018)

[31] See R Adler-Nissen, '*Towards a Practice Turn in EU Studies: The Everyday of European Integration*' (2016) 54 *JCMS: Journal of Common Market Studies* 87; E Adler and V Pouliot (2011) 'International practices' (2011) 3 *International Theory* 1; R Whitman, 'Another Theory is Possible: Dissident Voices in Theorising Europe' (2016) 54 *JCMS: Journal of Common Market Studies* 3-18

perceived 'Eurocentrism' in a variety of areas of foreign policy.[32] This accords well with pluralistic and participatory understandings of EU foreign policy. However, such an approach may not be legally sufficient as to EU IR law. It may not be legally sufficient because it may not capture the paradoxes of EU success in the world on account of its complex and multiplying subjects and objects, both inside and outside of the EU. Critical studies may afford insights to deconstruct and frame EU IR law. EU IR law is one where the EU risks becoming victim of its own success internally and externally becoming victim to significant backlashes against Eurocentrism and the complexity of decolonialisation. Developments in comparative regionalism look most unlikely to embrace its (legal) successes.[33] Critical studies may thus provide insights which capture the dynamic yet also extra-legal dimension to EU IR law constantly innovating.

Critical studies - broadly understood - is arguably a useful genre of analytical and normative theorisation to apply to the study of the EU at a moment of significant disintegration and to apply to legal developments. Here, the actors of everyday action are intensely scrutinised. Some advocate the turn to studying this 'everyday' practice as a result.[12] Such a genre, for example, seeks to bring EU studies scholars closer to the social phenomenon that they want to study and argues for the use of approaches which bring scholars closer to the people who construct, perform and resist the EU on a daily basis.[34] In doing so, it looks to disorder and order EU studies. It thus increasingly reflects critically upon the subjects and objects of the EU law-making and integration processes. As a result, it seeks to challenge the orthodoxy of

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[32] S Keukeleire and S Lecocq, 'Operationalising the decentring agenda: Analysing European foreign policy in a non-European and post-western world' (2018) 53(2) *Cooperation and Conflict* 277; I Manners, 'Another Europe is Possible: Critical Perspectives on European Union Politics' in KE Jørgensen, MA Pollack and B Rosamond (eds) *Handbook of European Union Politics* (Sage 2006); NF Onar and K Nicolaïdis, 'The Decentring Agenda: Europe as a post-colonial power' (2013) 48(2) *Cooperation and Conflict* 283

[33] See T Börzel and T Risse (eds) *The Oxford Handbook of Comparative Regionalism* (Oxford University Press 2016)

[34] Adler-Nissen, '*Towards a Practice Turn in EU Studies*' (n 31) 87-89

integration narratives but without adopting Euroscepticism as its end goals. This is argued here to be of much significant for legal scholars at this temporal juncture, analysing EU law and its many sub-fields, which range from trade, to security, to migration to international relations law.

Critical legal theory or Critical EU Studies as a methodology or genre of approach might be understood generally to exist independently without focussing upon law or EU law therein. Most standard textbooks on European Union law written in the English language medium do not have at the time of writing a chapter on Critical EU law.[35] Nor in specialist textbooks on EU IR law does such a topic exist. The era of Brexit poses a considerable challenge to EU IR law at least in theory as to its models of integration, its views on EU engagement in the world and the relationship between one of the largest Member States exiting from the bloc at a time of the evolution of its international relations powers. Arguably, the greatest controversies of EU IR law in recent times is how the EU achieved levels of development and integration in legal terms far beyond the political momentum for those powers and competences. It could be hypothesised that recent debacles in the Walloon Parliament as to the EU-Canada Comprehensive and Economic Trade Agreement (CETA) and its ratification demonstrate how Member States and their parliaments have appeared increasingly ill-prepared for the advances of the EU in international relations.

4.1 EU International Relations (IR) law: the EU as victim of its own success?

EU IR law is arguably a field where the EU's engagement with the world, international organisations and current and future third countries has become a highly prominent symbol of the EU's capacity to survive and endure in the global legal order, perhaps in contrast to internal strife.[36] While the Single Market is one of the oldest features of EU integration and

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[35] See exceptionally I Ward, *A Critical Introduction to EU Law* (Cambridge University Press 2009); A Williams, *EU Human Rights Policies: A Study in Irony* (Oxford University Press 2004)

[36] See K Smith, 'The European Union in an illiberal world' (2017) 116 *Current History* 83

the core hub of its extensive jurisprudence economic law, international relations integration is perhaps a more recent phenomena, enjoying a less extensive jurisprudence.[37] The externalisation of the EU's Single Market is increasingly studied across disciplines.[38]

The post-Lisbon era of EU IR law is objectively viewable a vibrant one, where considerable and far-reaching agreements have been negotiated by the EU with some of the leading economies of the developed world e.g. Japan, Canada, Singapore, Korea.[39] Many post-Lisbon agreements in the area of trade are reputed to be deeper and wider and to constitute a deeper form of international economic law aiming for more progressive partnerships e.g. through increasing forms of regulatory cooperation with global intent, negotiating 'deeper' partnerships, beyond mere trade free agreements. The Treaty of Lisbon was intended to be a landmark phase in international relations after the introduction of legal personality of the Union, and coherence and unity in EU international relations. This period has correspondingly seen significant democratic enhancements in order to bolster the credentials of EU International relations, including a significant role for the EP.[40] There have been important developments as to transparency and openness in this period and a more meaningful engagement with inter alia civil society, the Ombudsman, enhancing its democratised credentials. It is, in short, a significant evolution which has taken place.[41]

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[37] M Cremona and A Thies (eds) *The European Court of Justice and EU external relations law: Constitutional Challenges* (Hart 2014), 298

[38] A Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1

[39] A Semertzi**,** 'The preclusion of direct effect in the recently concluded EU free trade agreements' (2014) 51 *Common Market Law Review* 1125

16 C Eckes, 'How the European Parliament's participation in international relations affects the deep tissue of the EU's power structures' (2014) 12 *International Journal of Constitutional Law* 904; P Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making Under EU Law' (2019) 68 *International and Comparative Law Quar*terly 1

[41] See S Meunier and M Vachudova, 'Liberal Intergovernmentalism, Illiberalism and the Potential Superpower of the European Union' (2018) 56 *JCMS: Journal of Common Market Studies* 1631

Yet there are considerable challenges built in this success. They might be argued to show the EU as a victim of its own success due to the proliferation of subjects and objects, outlined next.

4.2 The proliferating subjects and objects of EU IR law

The rising number of subjects and objects of EU law have entailed that the EU frequently appears more of a victim of its own success. However, from EU animal welfare law, financial and banking legislation, EU Competition law, EU Environmental law to data protection, there is an asserted rise in the adoption of EU law beyond its borders, known as 'The Brussels Effects'.[42] There is also a perceived rise in 'EU extra-territoriality,' in a variety of forms.[43] The reach of EU law is not merely unidirectional from an economic perspective but also administrative and procedural, spanning rights and obligations for the EU and its subjects and objects as others. It has created a significant challenge for the EU: how to deal with its expansive global reach and how to process the growing public interest in its global effects, both inside and outside the EU.[44] As EU law increasingly has a broader global reach, there is arguably a broader definition of the 'global' which is less transparent and more far-reaching.[45] Similar to the expanding subjects and objects of EU law, global reach also

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[42] See J Scott, 'From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction' (2009) 57 *American Journal of Comparative Law* 897; See S Kingston, 'Territoriality in EU (Taxation) Law: A Sacred Principle, or Dépassé?' in J Englisch (ed), *International Tax Law and New Challenges from Constitutional and Legal Pluralism* (IBFD 2015)

[43] See E Fahey, *The Global Reach of EU Law* (Routledge 2016)

[44] For example, being overwhelmed by several hundred thousand responses to its proposals on a multilateral Investment Court.

45 E Fahey 'The Global Dimension of the EU's AFSJ: External Transparency versus Internal Practice' (2018) *NYU Law Jean Monnet Working Paper* 2018/4

increasingly includes similar administrative hurdles for the EU.[46] As outlined above, this is problematic given the complex place of transparency in IR, despite the explicitness and openness of the EU as a 'globalist'.

What we could call the "original" framing of the subjects, the recognition by the Court of Justice of the European Union (CJEU) in its landmark judgment in *Van Gend en Loos* that the subjects of EU law are not only the Member States but also the individuals (nationals of the Member States), carries an importance of what is usually called constitutional character.[47] By and large, the framing of subjects of EU law in *Van Gend en Loos* was a prelude to a drift of EU law away from the logic of public international law. By authoritatively framing the subjects of EU law, the CJEU extracted it from the long-standing debate concerning the dichotomy between subjects (more so than objects) in Public International law.[48] As the author and others have sought to demonstrate recently, there is a proliferation of the EU's subjects and objects as a matter of EU IR law, where more actors are subject to the scope of EU law, its reach, its territory, its procedures and its conditionality.[49] As a result, the EU constantly appears as a victim of its own increasing success in the world. In turn, the EU has developed a whole swathe of administrative and procedural provisions to enable better

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[46] For example, the extra-territorial dimensions of Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC OJ L 106, 24.4.2015, 1–13.

[47] See 'The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals' in Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* ECLI:EU:C:1963:1, [1963] ECR 1, 12; B De Witte, 'The European Union as an International Legal Experiment' in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2012) 19; B De Witte, 'EU Law: Is it International Law?' in C Barnard and S Peers (eds), *European Union Law* (Oxford University Press 2014) 174

[48] See Bardutzky and Fahey (eds) *Framing the Subjects and Objects of EU Law* (n 1)

[49] Ibid, chapter 1

participation (e.g. consultation, involvement and notice of its laws and their impacts). For example, there are broader civil society and participation requirements for third countries to engage with EU IR law.[50] EU administrative decisions are increasingly addressed to individuals or legal persons in third countries e.g. sanctions regimes, which both deepen and widen.[51] The EU increasingly also acts with significant territorial reach.[52]

There are thus a wide diversity of those alternating between subjects and objects of EU International relations law and touched by the ever-growing reach of EU law. Yet this development also serves to expose the evolving success of the EU as an international relations actor, perhaps a victim of its own success increasingly needing to engage with its expanding range of subjects and objects, where its own systems or procedures (e.g. administrative law) come under pressure to engage with its next success or latest achievement.

4.3 The individual citizen and future EU IR law: reframing the individual

Despite the growing legalisation of EU international relations, a significant shift is taking place in EU International Relations where all new post-Lisbon trade agreements lack direct effect.[53] Since new post-Lisbon trade agreements explicitly and unambiguously *lack direct effect*, they put into sharper question the role of individual enforcement of EU international

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[50] See E Korkeo-aho, 'Evolution of the Role of Third Countries in EU Law - Towards Full Legal Subjectivity?' in S Bardutzky and E Fahey (eds) *Framing the Subjects and Objects of EU Law: Exploring a Research Platform* (Edward Elgar 2017) 227

[51] For example, Article 11(3) Treaty on the European Union (TEU) provides that the Commission is obliged to consult in its rule-making with 'the parties concerned', largely understood to encompass stakeholders irrespective of their country of origin

[52] See J Scott, 'The new EU "extraterritoriality"' (2014) 51 *Common Market Law Review* 1343

[53] Opinion 1/17 ECLI:EU:C:2019:72 (AG Bot 19 January 2019)

trade law going forward and the effectiveness of remedies.[54] For example, concern increases about the regulatory cooperation provisions in new generation trade agreements- in particular, about their quasi-legislative effects.[55] Such developments suggest that the subjects and objects of EU International relations law look likely to alter significantly going forward. It will become increasingly complex for individuals to assert an entitlement to litigate where no direct effect exists in future FTAs. Yet, since there is increased regulatory cooperation with third countries in new FTAs, this may generate more opportunities for certain parties to challenge the effects of international agreements. This enforcement gap which seems likely to arise is thus of significance. The greatest politicisation of EU IR law has only recently begun to take place e.g. millions protesting against TTIP or the recognition by the General Court that democratic principles apply to the negotiation of the EU's international relations.[56] The role of the individual in EU IR law, passively or actively, is only likely to increase. It is worth noting that there is an evolving literature on sub-national structures in global societies which posits an increased voice in all areas of policy making.[57] Across the global legal order in a range of contexts, the development of the megaregional trade agreements had also spurred a new interest in transparency and participation of civil society, which is evolving across regimes.[58] This view of an enlarged voice and participation needs to be carefully engaged with as regards understanding the future place of the individual in international relations and its construction.

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[54] Semertzi**,** 'The preclusion of direct effect in the recently concluded EU free trade agreements' (n 39)

[55] E-U Petersmann, 'Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?' (2015) 18 *Journal of International Economic Law* 579

[56] Eg 'Stop TTIP': Case T-754-14 *Efler v European Commission*, ECLI:EU:T:2017:323

[57] J van Zeben, 'Local Governments as Subjects and Objects of EU Law' in E Fahey and S Bardutzky (eds), *Framing the Subjects and Objects of EU Law* (Edward Elgar 2017)

[58] See E Fahey, *Introduction to Law and Global Governance* (Edward Elgar 2019), Ch 1

5. The Court-Centric Model of EU IR law

The question of how powerful the Court is and should be- which seems like an eternal research question of EU law.[59] The CJEU does increasingly more international relations and more advocacy of its IR related caselaw outside of the Courtroom.[60] The subjects and objects of EU international relations are arguably not so well understood- and rapidly expanding. As a legal field, EU IR law has long been a doctrinal and competence-oriented subject, dominated by court-centric views on EU integration, dominating its methodology, standard textbook expositions and scholarly debates thereon. There are arguably a handful of truly 'constitutional' moments in external relations and mostly at a time predating broader constitutional moments in other fields of EU law.[61] Court-centric analyses nevertheless still lead the research agenda and methodology in this field one of the most striking features of EU law today is that it is a wholly Court-centric subject derived from the creation of its independent legal system, beyond the original source of the EU treaties agreed between the Member States in the Treaty of Rome, as an act of public international law and a treaty registered under ordinary international law procedures.

Much ink has been spilled on the interpretation by the Court of Justice of the nature of the EU legal system in its foundational decision in *Van Gend en Loos* where the Court radically altered the understanding of the individual and subjects and objects of the EU treaties. This decision has caused the Court to hold a celebration in 2013 of 50 years of its landmark decision celebrating its activism and unique interpretation of the EU treaties that would result

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[59] R Chichowski *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007)

[60] See K Lenaerts 'ECJ President On EU Integration, Public Opinion, Safe Harbor, Antitrust' *Wall Street Journal* (New York, 14 October 2015)

[61] B De Witte **'**Too Much Constitutional Law in the European Union's Foreign Relations?' in M Cremona and B De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart 2008) 3

in an extraordinary supranational system evolving therefrom.[62] The birthday celebration of this decision and its understanding have arguably radically moved from 'activism' to mainstream. However, the Court's activism would arguably result in particular in a landmark series of decisions such as Opinion 2/13 where the Court, itself becoming a party to ECHR accession in negotiations with the Council of Europe would strike down the agreement mandated for accession in the treaties by the Member States, contrary to the text of the treaties.[63] The decision is a landmark ruling on the concept of the autonomy of EU law, which the Court held would be infringed by accession. It is a neat example of the significant shift in the Court's actorness and its own evolving autonomy.

Although the Union had no single set of objectives for the Union's external policy prior to the Treaty of Lisbon, contemporary external policy objectives are 'non-teleological, non-prioritised, open-ended and concerned more with policy orientation than goal setting'[64] and that the contribution of the Court in theory has been considerably constrained in contrast with its function in the internal market. However, its extraordinary Opinion 2/13 in defiance of the spirit of the treaties, may cause one to reflect on what is meant by external objectives post-Lisbon.[65] These developments matter for other domains of EU IR, such as external migration where increasingly 'delegalisation' takes place in high-profile CJEU caselaw, leaving litigants without redress.[66] For example, the nature of jurisprudence which will likely develop on individuals' rights in international relations looks certainly likely to diminish to a degree

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[62] Court of Justice of the European Union, '50 year Celebrations in 2013' <https://curia.europa.eu/jcms/jcms/P_95693/en/> accessed 21 October 2019

[63] Opinion 2/13 ECLI:EU:C:2014:2454

[64] M Cremona, 'A reticent court? Policy objectives and the Court of Justice', in M Cremona, and A Thies (eds), *The European Court of Justice and External Relations Law* (Hart 2014) 31

[65] Opinion 2/13 ECLI:EU:C:2014:2454

[66] E Fahey, 'Between Delegalisation and hyperlegalisation: on laws, norms and principles in the external management of migration', in S Carrera, J Santos Vara and T Strik (eds), Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered' (Edward Elgar forthcoming)

in trade, at least in terms of direct enforcement. It is of significance that EU IR law is particularly difficult to litigate in this new era. The in appropriateness of the place of a court-centric subject in this new era is thus of much significance, warranting scrutiny.

6. Conclusion: A future research agenda

The chapter has scoped Critical EU IR law as a future research agenda. Critical EU Studies as a genre of approach can be understood to exist independently of the study of EU law, lacking a place in the vast majority of conventional textbooks on broader or more esoteric subjects and sub-fields of EU law today. EU law is increasingly burdened by a spiralling number of subjects and objects and its own increasingly global reach, with many advantages and also disadvantages posited therein. Yet as an academic field- or sub-discipline of the broader field of EU law- EU IR law has long been a highly doctrinal subject, dominated by highly court-centric views on EU integration and in need of further analytical insights to grapple with the post-Brexit era. EU IR yet appears increasingly as a highly deserving focus of the deeper and better study of EU integration. Since new post-Lisbon trade agreements explicitly and unambiguously lack direct effect, they further put into sharper focus the role of individual enforcement of EU international trade law going forward and the effectiveness of remedies. It is of major significance that EU IR law will become increasingly difficult to litigate in this new era and render the conventional court-centric narrative of EU integration somewhat difficult to place. It may also be that other areas of law enable citizens or NGOs empowerment (e.g. as to external migration or defence) in ways which ordinary individuals/ business may not be able to litigate. Nonetheless, this new era of arguably even more subjects and objects of EU IR law puts such a successful subject as EU IR into a new spotlight. Framing critical EU IR law as a research agenda thus enables forward reflections across a range of subjects and themes.