The Meso Level: Means of Interaction between EU and International Law

‘Good Fences Make Good Neighbors’ and Beyond . . . Two Faces of the Good Neighbourliness Principle

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I. Introduction

Good neighbourliness is one of the most important aspirations of international law relating to harmonious interstate relations, if not ‘the oldest principle of international law’¹ and one without which ‘there can be no orderly world community’.² In fact, it is the first objective of the Charter of the United Nations (UN Charter), which refers to the determination of the UN peoples ‘to practice tolerance and live together in peace with one another as good neighbours’.³ It is thus possible to classify this foundational aspiration as a ‘general principle’,⁴ accepted by all UN Member States.

Developing out of the ideas of territorial sovereignty and equality of states in international law, good neighbourliness is among the key underpinnings of the peaceful coexistence between states: the key approach to states’ living together following the denunciation of military conflict as a routine legitimate way of conducting international affairs, or, in Howard’s words, ‘the invention of peace’.⁵

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⁴ Art. 74 UN Charter.
Sovereign states, now presumed to be peaceful, are equal before the law, enjoying the same rights and having equal legal capacity in their exercise. The exercise of the state rights inherent in full sovereignty is only possible where the idea of good neighbourliness is respected in governing interstate relations. In contrast, the violation of good neighbourliness, particularly between contiguous states, can lead to tensions, if not military conflicts. The respect of the principle of good neighbourliness requires the precise definition of its legal framework to avoid its application being ‘at the mercy of those disposing of force and not under the rule of justice’.

This contribution splits into two parts. The first part clarifies the legal framework of good neighbourliness in international law, that is, its legal basis and the corresponding rights and duties of states in international law. The second part analyses good neighbourliness within the EU context. The starting point of such analysis is the acknowledgement of the new legal order of the Union, which exists autonomously from international law, but is bound by an obligation to adhere strictly to the latter’s norms and principles, and, as expressly mentioned, the UN Charter. We submit that the EU necessarily implies a much deeper analysis of state rights inherent in full sovereignty. Charles Tilly, Coercion, Capital and European States (2nd edn, London: Wiley-Blackwell, 1992).

Art. 4 Montevideo Convention on Rights and Duties of States (signed 26 December 1933, in force 26 December 1934).


Pop (n 1).


reach for the principle of good neighbourly relations compared to what can be observed in the context of classical international law owing, *inter alia*, to the reality of the interdependency—the Internal Market, a citizenship common to all the Member States, Union territory, and the Area of Freedom Security and Justice—and common values, objectives, and destiny established in the context of the Union, which exhibits strongly federal features. This interdependency emerges with a particular clarity after the entry into force of the Treaty of Lisbon, as the Union has acquired—in Joris Larik’s brilliant analysis—a ‘constitutional sense of purpose’, which goes far beyond its stated

12 Art. 3(3) TEU. See also Niamh Nic Shuibhne and Laurence W Gormley (eds), *From Single Market to Economic Union* (Oxford: Oxford University Press, 2012); Niamh Nic Shuibhne (ed.), *Regulating the Internal Market* (Chantelham: Edward Elgar, 2006).

13 According to the Preamble of the EU Treaty, the High Contracting Parties are ‘RESOLVED to establish a citizenship common to nationals of their countries’. See also Article 9 TEU; Part II TFEU. For an analysis: Dimitry Kochenov, ‘The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon’ (2013) 62(1) ICLQ, 97 (and the references, for an exhaustive list of relevant literature). See also for a meticulous analysis, Dimitry Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge: Cambridge University Press, 2017).


19 Larik (n 17).
objectives. In practice, such an advanced level of interdependency among the Member States means that their departure from the foundational goals and values of the Union, even if this happens within the sphere traditionally regarded as strictly in the sovereign realm of a Member State, can inflict negative externalities on other Member States, let alone on the Union itself, as its functioning could thereby be undermined. The principle of good neighbourly relations can thus be breached ‘at home’. In other words, there is a stark difference in the application of the good neighbourliness principle in international law and EU law, should we try to elevate this concept to such a glorified position in the context of the latter. While in the case of the former respect for ‘good fences’ may indeed make good neighbours, in the case of the latter it is not the borders, but precisely the lack thereof in a number of crucial contexts of interstate inter-connections, which is key for the proper understanding of the principle in question. EU values play a central role in the functioning of the supranational legal order, determining the framework of the good neighbourliness principle in the constitutional system of the Union.

II. Good neighbourliness in international law

Good neighbourliness in international law designates a model of interstate relations or a certain type of ties among neighbouring states, providing for peaceful coexistence, dialogue and cooperation. As key actors in the international

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21 The ones espoused, especially, in Arts 2 and 3 TEU.
24 On the general definition of good neighbourliness, see, inter alia, Edwin Glasser, ‘Buna Vecinătate’ (1972) Revista română de studii internaționale No 1(15) 30, quoted in Pop (n 1) 58, writes that ‘Good neighbourliness does not designate a geographical situation, but a model, a type of international relations, a certain kind of ties, as between good neighbours’. Pop, himself, starts the same book (n 1, p 7) by adding that coexistence and cooperation require that states do not suppress each other or affect each other significantly. These requirements form the core of the good neighbourliness principle as established in international law and are reflected through the rights and duties of states in this respect. That author, who is one of the very few scholars discussing the principle of good neighbourliness conceptually, shows this interconnection throughout his book. Finally, the dialogue between states represents a respectful mode of communication and a means of avoiding conflicts and moderating contradictions and is therefore an important characteristic of good neighbourly relations.
community, states necessarily interact with each other. Traditionally and in its strict sense, neighbourliness refers to the external ties of each state with its bordering countries, that is, states sharing common frontiers or being separated by seas. The broader understanding of neighbourliness, however, is not confined to bordering states alone, but extends to the interstate relations of countries from the same geographical region and even the relations of all states in the world.

While the first approach reflects the geographical proximity of states, the second has notably been inspired by the ever growing interconnectedness between states and explains a substantial part of the international law concerning the good neighbourliness principle. This is because the purposes of the good neighbourliness principle, providing for peaceful coexistence, dialogue, and cooperation, largely coincide with the purposes of the UN Charter and international law in general. Notwithstanding the differences between the two approaches regarding the number of states to which neighbourliness applies, both understandings converge in their view of interstate relations governed by international law. The attribute ‘good’ attached to the term ‘neighbourliness’ describes a positive relationship among neighbouring states reflecting a respectful mode of intercommunication as opposed to what by analogy may be entitled ‘bad neighbourliness’. Accordingly, good neighbourliness emerges primarily between states. As put by Andrew Hurrell, ‘International Law and the Making and Unmaking of Boundaries’, in Allen E Buchanan and Margaret Moore (eds), States, Ethics and Nations: The Ethics of Making Boundaries (Cambridge: Cambridge University Press, 2003) 277, ‘the dialogue is especially important because international law seeks both to identify, promote, and institutionalize universal values and also to mediate amongst different and often conflicting ethical traditions’.

According to Art. 6(1) Convention on the Continental Shelf (adopted 29 April 1958, in force 10 June 1964) 499 UNTS 311, ‘Where the same continental shelf is adjacent to the territories of two or more states whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary line is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured’. Some authors, eg Sun Pyo Kim, Maritime Delimitation and Interim Arrangements in North East Asia (Leiden: Martinus Nijhoff, 2004) 31, argue that the good neighbourliness principle is ‘important for the States with opposite or adjacent coasts pending final delimitation. . . because there is a high possibility of a coastal State exercising its rights or carrying out activities in the disputed areas in such a way as to impair the rights of the other coastal States’ (footnote omitted).

The Preamble of the UN Charter for instance, reflects the determination of all peoples of the UN, rather than merely peoples from immediately neighbouring states, ‘to practice tolerance and live together in peace with one another as good neighbours’. Moreover, Art. 74 UN Charter refers to the ‘general principle of good neighbourliness’ implying that the principle is of general application and not only to the relations of immediate neighbours. This stance is shared by many states in the UN: for instance, according to Germany (UN Doc A/38/336, 25), ‘[t]he concept of good neighbourliness ought to be extended beyond States sharing common borders’; Philippines (UN Doc A/C.1/37/PV.46, 36) stipulated that ‘[t]he term good-neighbourliness should not be in its narrow sense; its interpretation should not be confined to the nations that lie within a particular geographical vicinity. . . ’; Poland (UN Doc A/36/336/Add.1, 36) observed that ‘In its objective aspect, good neighbourliness is being presently applied not only to relations among States having common frontiers or separated by seas, but also to relations in a sub-region or in a supra-regional dimension’ etc.

See Section II.B, below.
from positive interactions among states governed by international law. As such it implies strict observance of international law.\textsuperscript{28}

The central role is played here by the principle of the sovereign equality of states, in particular the legal rights and obligations of states stemming from this principle. These are integrated well within the good neighbourliness framework. The principle of the sovereign equality of states is articulated in the ‘Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the UN Charter’ of the UN General Assembly.\textsuperscript{29} It is embodied in a declaratory resolution of the UN General Assembly—that is, a non-binding document which nevertheless represents ‘an important link in the continuing process of development and formulation of new principles of international law’.\textsuperscript{30} The Declaration on Friendly Relations stipulates that all states enjoy sovereign equality,\textsuperscript{31} which presupposes their:

- judicial equality;
- rights inherent in full sovereignty;
- duty to respect the personality of other states;
- inviolability of territorial integrity and political independence of the state;
- right to freely choose and develop their political, social, economic, and cultural systems; and
- duty to comply fully and in good faith with their international obligations and to live in peace with other states.\textsuperscript{32}

These reflect the rights and obligations of states resulting from their two generally recognized attributes: sovereignty and equality. Sovereignty is a widely-recognized quality of states as international persons denoting their independent course of action. The concept of territorial sovereignty grants all states a maximum of freedom in dealing with their internal and external affairs. Internally, it denotes the territorial integrity of states, that is, their exclusive authority within

\textsuperscript{28} The strict observance of international law as a primary condition for the fulfilment of the good neighbourliness principle has been most perceptibly confirmed by the resolutions of the UN General Assembly establishing the principle’s legal basis—see Section II.B, below.

\textsuperscript{29} Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the UN Charter, UNGA Res 2625 (XXV) (24 October 1970) (Declaration on Friendly Relations).


\textsuperscript{31} Art. 2(1) UN Charter stipulates that the ‘Organisation is based on the principle of the sovereign equality of its Members’. For the early ideas on sovereign equality of states, see in particular Hugo Grotius, On the Law of War and Peace (repr. by Kitchener: Batoche Books, 2001); Emmerich de Vattel, Le droit des gens, ou, principes de la loinaturelle: appliqués à la conduite et aux affaires des nations souveraines (Geneva: Slatkine Reprints, Henry Dunant Institute, 1983).

\textsuperscript{32} Declaration on Friendly Relations (n 29).
the territorial limits of national jurisdiction; while externally it refers to the political independence or independent conduct of states in their international relations.33

At first glance, internal and external sovereignty seem to have conflicting natures, providing opportunities for clashes between rights and obligations for ‘which ultimately the same legal justification, namely territorial sovereignty, can be invoked’34 by two or more states. While internal sovereignty empowers states to exclude the actions of other states on their territories, external sovereignty gives them freedom of choice and action.35 They should nevertheless not be considered different types of sovereignty ‘but rather [its] complementary, always coexisting, aspects’ reflecting the rights and duties of states under international law.36 The compromise between internal and external sovereignty is most appropriately perceived through the obligation of states to respect each others’ territorial sovereignty in their international relations.37 The power of states to exclude the actions of any other state or entity in exercising their state functions creates a duty for states to abstain from exercising their powers in the territory of other states, unless there is a permissive rule to the contrary deriving from international law.38


35 In Island of Palmas (Netherlands v USA) (1928) 2 RIAA 829, 838, the Arbitrator Judge Max Huber emphasized that ‘[i]ndependence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations’.


37 In the ICJ, Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) (Merits) [1949] ICJ Rep 4 the ICJ emphasized that ‘between independent states respect for territorial sovereignty is an essential foundation of international relations’.

38 The obligation of states in international law to refrain from exercising their powers in the territories of other states in the absence of a permissive rule to the contrary was expressed by the PCIJ in Case of the S.S. ‘Lotus’ (France v Turkey) [1927] PCIJ Rep Series A No 10 (para. 45). One year later in Island of Palmas (n 35) 839, this stance was reaffirmed by the Arbitrator Judge Max Huber who emphasized that territorial sovereignty ‘involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfill this duty. Territorial sovereignty cannot limit itself to its negative side, ie to excluding the activities of other
Sovereignty is directly connected with the principle of equality of states, which is a corollary of the coexistence of sovereign states. Obviously, the principle of equality does not refer to the unequal position of states in terms of their economic, political, or military power. Similarly, equality is not affected by the differentiation among states in terms of the selective conferral of certain rights, such as permanent membership of the UN Security Council. Instead, the principle refers to the equal application of the law ‘in conformity with the law’. Thus, it implies the equal treatment of states before the law, rather than in the law addressing judicial bodies and not the rights of states. As such, the principle of legal equality is preserved primarily by the equal observance of the duties and rights of all sovereign states as provided by international law. Accordingly, the greater factual powers of certain states or their legal privileges within the UN should by no means serve the purposes of avoiding duties that equally oblige all sovereign states, and any attempt to abuse these powers breach the principle of the legal equality of states. Equality emanates from state sovereignty and ‘by virtue of the latter it is impossible to place States in a kind of hierarchy vis-à-vis each other’. The importance of such equality in the light of the good neighbourliness principle results not only from the rules of international law, but also from the nature of interstate relations. The establishment of good neighbourly relations implies friendship between states rather than enmity. As Maunier puts it:

[equality in friendship means] community of interests and feelings, social ties both material and spiritual, solidarity, co-operation and if possible unanimity. . . . Solidarity and reciprocity are needed. For what creates partnership and equality is the position by both parties of bilateral rights and duties: not rights existing on one side only, not rights of a superior over an inferior, as in the case of domination of master over states; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian’. The obligation is also expressly provided for in Art. 2(4) UN Charter, stipulating that ‘[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’.


40 Kelsen (n 33), 155.

41 Ibid.

subject, or even of a father over his children, but bilateral powers, bilateral rights on both sides, exercised reciprocally in both directions.43

The existence of good neighbourly relations thus requires symmetric relations between states.44 Unlike enmity, which ‘implies the negation of Other’, good neighbourliness ‘implies mutual and shared responsibility for Self and Other’.45 The inequality of states before the law, if not in the law, potentially impedes good neighbourly relations or even makes them impossible where conflicts of interests arise.46

A. The legal nature of the principle of good neighbourliness in international law

The principle of the sovereign equality of states has inspired the emergence of many other principles and legal rules reifying the rights and duties of states under international law. One of these principles, guiding the external policies of states and underlying the formulation of international jurisprudence, is the principle of good neighbourliness. Key legal minds perceive of good neighbourliness as a principle of international law. Thus, for Kelsen, good neighbourliness is a principle which should have been included within the first Chapter of the UN Charter, enumerating the purposes and principles of the organization.47 Verdross considers good neighbourliness a ‘gradually emerging principle . . . which has now been solemnly anchored to the Preamble of the Charter of the UN’.48 Fitzmaurice and Elias see the good neighbourliness principle as ‘fundamental in the law governing the use of shared resources’.49 Jenks regards the good neighbourliness principle as ‘a potential source of specific legal obligations’.50 According to Goldie, ‘good neighbourliness is

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50 Jenks (n 2), 92.
an emerging principle of international law with many transnational law qualities’.51

Apart from its general acceptance,52 the crystallization of the good neighbourliness principle in international law has also aroused different doctrinal approaches. The core question which divides scholars concerns the legal nature of the good neighbourliness principle. While the majority of authors see the basis of the principle of good neighbourliness in customary international law,53 a smaller group of authors argue that it is a general principle of international law in the sense of Article 38(1)(c) of the Statute of the International Court of Justice.54 Disagreements among scholars over the legal nature of good neighbourliness can be explained by the broad scope of the principle, which complicates its exclusive association with the rules of customary law or with general principles of law. Another reason is the absence of a sharp distinction in international law between the two, except for the conclusion that general principles of law are vaguer than customary rules and their establishment does not require constant practice by states since they emerge at the moment of recognition by states.55 More important is the fact that customary international law has the upper hand in comparison to general principles of law in the informal


52 Some authors, however, take a different approach. For instance, Friedrich J Berber, Rivers in International Law (London: Stevens and Sons, 1959) 223, draws parallels between municipal and international law in this respect. Although finding such a principle to be recognized in municipal water law, the author concludes that ‘[t]he existence of a general principle of good neighbourliness cannot be demonstrated from the arrangements to be found in municipal law systems (which) differ from country to country both in principle as well as in details’. Berbers recognizes, however, that ‘[e]very far-reaching analogy between municipal law and international law restrictions derived from neighbourship relations must be avoided, as the former imply a restriction on property, and the later on sovereignty’. Cf. Klaus Dintelmann, Die Verunreinigung Internationaler Binnengewässer, Insbesondere in Westeuropa aus der Sicht des Völkerrechts (Cologne: Heymann, 1965) 144–6. Kelsen (n 47), 11–12.


54 George T Hacket, ‘Space Debris and the Corpus Iuris Spatialis’ (1994) 2 Forum for Air and Space Law, 147; less precise in this respect is Friedrich August von der Heydte, ‘Das Prinzip der guten Nachbarschaft im völkerrecht’ in Friedrich August von der Heydte and others, Völkerrecht und rechtliches Weltbild: Festschrift für Alfred Verdross (Vienna: Springer Verlag, 1960) 133, who speaks of general principles of law in the sense of Art. 38(1)(c)—which may be found in every legal system—and of specific principles of law—which are characteristic of some legal systems—without saying where the principle of good neighbourliness belongs. According to Lammers (n 48), 566, von der Heydte probably considers good neighbourliness a general principle of law in the sense of Art. 38(1)(c), as he states that the principle sic utere tuo ut alienum non laedas is at its heart.

55 Alfred Verdross, Les principes généraux de droit dans le système des sources du droit international in Recueil d’études de droit international en hommage à Paul Guggenheim (Genève: Faculté de droit de l’Université de Genève, 1968) 521, 526.
hierarchy of sources of international law.\(^{56}\) In a strict sense, this implies that if classified as a general principle of law, the good neighbourliness principle may be overridden by customary rules of international law. This is, however, not as simple as it appears, since the actual implementation of general principles can transform these sources over time into customary rules of international law, in which case general principles ‘do not disappear, but are hidden by customary rules with the same content’.\(^{57}\)

This may also be true of the good neighbourliness principle, which can be considered a general principle of law and also a customary international rule observed repeatedly by the overwhelming majority of states in a multitude of circumstances and thus having been accepted as law by states.\(^{58}\) While recognizing the possibility of overlaps, a detailed analysis of the two different sources of good neighbourliness in international law is beyond the scope of this work, which is confined to the principle’s substance and fields of application.

The UN Charter spells out good neighbourliness as a ‘general principle’ accepted by all member states as a basis of their policies with respect to the non-self-governing territories ‘due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters’.\(^{59}\) Although referring to the protection of the non-self-governing territories, that provision explains the view of the UN and its Member States of the principle of good neighbourliness.\(^{60}\) The principle is also implied in the Preamble to the UN Charter, which highlights the determination of all the peoples of the UN ‘to practise tolerance and live together in peace with one another as good neighbours’ in order to achieve the objectives of the UN in preventing war, promoting respect for human rights and international law, as well as promoting social progress and better living conditions.\(^{61}\) Apart from these two references, however, the Charter does not provide any further explanation of the meaning and


\(^{57}\) Nguyen Quoc Dinc and others, Droit International Public (5th edn, Paris: LGDJ, 1994) 304.

\(^{58}\) In Nicaragua case (Nicaragua v USA) (Merits) [1986] ICJ Rep. 98, para. 207, the ICJ has confirmed that custom is constituted by two elements: an objective element implying that the acts concerned should amount to a ‘settled practice’ and a subjective element according to which the practice should be accompanied by opinio juris sive necessitatis, ie ‘either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’.

\(^{59}\) Art. 74 UN Charter.

\(^{60}\) See for instance Kelsen (n 33), who stipulates in his analysis of Article 74 UN Charter that the relevant provision concerning good neighbourliness is binding upon all contracting parties rather than Members administering territories, as much as the other obligations imposed by the Treaty upon all Members.

\(^{61}\) See also in this respect the Resolution on the ‘Development and strengthening of good-neighbourliness’, UNGA Res 46/62 (9 December 1991) UN Doc/A/Res/46/62, where the General Assembly stresses that ‘living together in peace with one another as good neighbours is one of the means by which the ends of the United Nations are to be achieved’ and also that ‘by acting as good neighbours, States can help to ensure that the ends for which the United Nations was established are achieved’.
substance of the good neighbourliness principle. In his dissenting opinion regarding the *Legality of the Threat or Use of Nuclear Weapons* under international law, Judge Weeramantry explains the nature and the meaning of the good neighbourliness principle as follows:

[The principle of good neighbourliness] is one of the bases of modern international law, which has seen the demise of the principle that sovereign states could pursue their own interests in splendid isolation from each other. ... The Charter’s express recognition of such a general duty of good neighbourliness makes this an essential part of international law.62

The classification of good neighbourliness as a general principle of law, but also as being of customary nature, requires further clarification of its substance and application. This necessity results from the vagueness of the principles of international law which, although being precious policy making tools as such, are usually insufficiently precise and requiring of specification by other norms of international law—imposing rights and duties on states—in order to be operational.63

The principle of good neighbourliness is no exception in this regard. Its pursuit in the international courts can be more clearly perceived if the concrete rights and duties of states on which the principle is based are invoked. As argued by Goldie in one of his early works, although the principle of good neighbourliness can be identified in case law, ‘in many situations [it] becomes a formal category’.64 In other words, the principle of good neighbourliness ‘requires to be supplied with meaning and application by means of subsidiary rules which give...

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63 There are a variety of interpretations with respect to the substance and content of the general principles of law: Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford: Oxford University Press, 2008) 16–19, distinguishes between general principles of law as referred to in Art. 38(1)(c) ICJ Statute and general principles of international law, which may cover rules of customary law, general principles of law referred in the abovementioned Art. 38(1)(c), or to logical propositions which result from judicial reasoning based on international law and municipal analogies. Peter Malanczuk and Michael B Akehurst, *Akehurst’s Modern Introduction to International Law* (7th edn, London/New York: Routledge, 1997) 48–50, observe that both general principles of national law and general principles of international law can fall under the category referred to in Art. 38(1)(c) ICJ Statute, recognizing that the role of general principles of law is to fill gaps in treaty law and customary law. Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003) 124, distinguishes four categories of general principles of law: necessary principles, ie rules of law with ‘inherent and necessary validity, in whose absence no system of law can exist or be originated’, legal principles derived from municipal laws ‘which can be validly transposed to international law’, legal principles produced through a process of induction from other rules of international law and principles of legal logic. That author recognizes that the subsidiary nature of general principles of law is based on their broad character and their nature as *lex generalis*, which leaves room for their specification by other norms in international law. For extensive analyses of the general principles of law in general, see Vladimir D Degan, *Sources of International Law* (The Hague: Kluwer Law, 1997) 14–142.

it a content reflecting the standards, needs and capabilities of the time and place'.\textsuperscript{65} The resolutions of the UN General Assembly and the related discussions within the organization are helpful to gaining a better understanding of the content of the good neighbourliness principle.

B. The clarification of the principle of good neighbourliness within the UN

The clarification of the content of the good neighbourliness principle within the UN started almost as early as the formation of the organization itself. The most intensive work on this question, however, took place in the period 1979–1988, when the UN made significant efforts to clarify the legal basis and elements of the good neighbourliness principle, adopting a number of resolutions on the 'Development and strengthening of good neighbourliness between states'.\textsuperscript{66} Next came a period of lull until 1991, when the General Assembly adopted its final resolution dropping the question of good neighbourliness and the strengthening of good neighbourliness. It can, however, be concluded from the text of the Resolution, providing that 'the question of development of good-neighbourliness between States... could be considered in the future', that the item was not entirely removed from the agenda, but rather postponed by the General Assembly to a later time.\textsuperscript{67}

Recalling its previous resolutions on the subject from 1957\textsuperscript{68} and 1958,\textsuperscript{69} the General Assembly first emphasized in its resolution of 1979 the importance of promoting good neighbourliness for peace, security, and the friendly cooperation between states. The General Assembly further indicated that good neighbourliness is not a static principle, but needs constant development in line with political, economic, social, scientific, and technological changes. Finally, it considered that 'the generalisation of the long practice and certain norms of good neighbourliness may strengthen friendly relations and co-operation among states, in accordance with the Charter'.\textsuperscript{70} Although not enumerating any specific norms, it clearly pointed to the foundational basis of good neighbourliness. After calling upon all states to promote good neighbourliness in the interest of maintaining peace and security, the General Assembly affirmed that good

\textsuperscript{65} Ibid.


\textsuperscript{67} UN Doc/A/Res/46/62 (n 61).

\textsuperscript{68} UNGA Res 1236 (XII) (14 December 1957) UN Doc/A/Res/1236(XII).

\textsuperscript{69} UNGA Res 1301 (XIII) (10 December 1958) UN Doc/A/Res/1301(XIII).

\textsuperscript{70} UNGA Res 34/99 (14 December 1979) UN Doc/A/Res/34/99.
neighbourliness conforms with the purposes of the United Nations and is founded upon the strict observance of the principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, as well as the rejection of any acts seeking to establish zones of influence and domination. 71

Thus, the General Assembly ensured that the foundational basis of good neighbourliness coincided with the principles embodied in the UN Charter, but also in the Declaration on Friendly Relations. The principles on which the good neighbourliness principle is founded are not merely moralistic expressions, but legally binding rules constraining the independent actions of states in the light of the principle of good neighbourliness. Accordingly, these foundational principles form the main legal basis of the good neighbourliness principle. The principles in question are embodied in Article 2 of the UN Charter. The legal value of these principles emanates from the binding character of the UN Charter in which they are embodied. They are also largely reiterated in the Declaration on Friendly Relations, 72 which extends the application of the principles to all states rather than just UN Members. This document, however, does not have the same legal force as the Charter. 73 Therefore, the principles contained in the Declaration on Friendly Relations have legally binding effect on the force of the UN Charter rather than on the Declaration itself. 74 Apart from this, the adoption of the named principles as the legal basis of good neighbourliness has been widely confirmed by states 75 and firmly incorporated in their

71 Ibid (footnote omitted).
72 The Declaration on Friendly Relations (n 29), enumerates the following principles: (a) the obligation of states to refrain in their international relations from the threat or use of force against the territorial or political independence of any state; (b) peaceful settlement of international disputes by states; (c) non-intervention in matters within the domestic jurisdiction of one state; (d) co-operation among states in accordance with the Charter; (e) equal rights and self-determination of peoples; (f) sovereign equality of states; (g) duty of states to fulfil in good faith the obligations assumed in accordance with the Charter.
73 See Friedmann (n 30).
74 Gaetano Arangio-Ruiz, The UN Declaration on Friendly Relations and the System of the Sources of International Law (Alphen aan den Rijn: Sijthoff and Noordhoff, 1979) 96, emphasizes that the principles of the UN Charter embodied in the Declaration on Friendly Relations are only ‘valid as part of the Charter and by virtue of the Charter alone’, while the Declaration ‘only adds a hortatory element to those principles which are and remain binding on the strength of the Charter’ (emphasis in original). He further notes that other principles ‘expressed or implied’ in the UN Charter, as well as principles, rules or Treaty law outside the Charter ‘are legal on their own strength’, ie either as being embodied in treaties or being part of general international law. For an extensive summary on the opinions of states regarding the legal value of the Declaration on Friendly Relations see RM Witten, ‘The Declaration on Friendly Relations’ (1971) 12 Harvard International Law Journal, 509, 517–19.
75 A significant number of statements especially at the UN show that the official positions of states coincide with the Resolutions of the UN General Assembly confirming international principles of the UN Charter and the Declaration on Friendly Relations as the legal basis of good neighbourliness. For an overview of some of the positions of states in this respect see Pop (n 1) 20–2.
bilateral and multilateral treaties on friendship, based on the fundamental principles of international law, and reaffirming their binding legal effect.\textsuperscript{76}

The legal basis of the good neighbourliness principle in international law is of pivotal importance to the legitimacy of states’ foreign policies towards their neighbours. It further determines the developmental framework of various of the specific norms of the good neighbourliness principle and their correct application in the on-going disputes among neighbouring states. In other words, the specific norms and external policies of states, which disregard its legal basis, are deemed to violate the good neighbourliness principle itself.

C. Rights and duties of states under the principle of good neighbourliness

Since its first resolution, debates on the development and strengthening of good neighbourliness within the General Assembly have been held almost every year, and although a firm attempt has been made to ‘clarify the elements of good neighbourliness as part of a process of elaborating, at an appropriate time, a suitable international document on the subject’,\textsuperscript{77} no codification has been achieved yet. Nevertheless, the primary initiative of the General Assembly to clarify the content of good neighbourliness as a way of enhancing

\textsuperscript{76} The ‘Declaration on the promotion of world peace and co-operation’ adopted at the Conference of Asian and African Nations at Bandung of 1955, adds three additional principles next to the seven UN Charter principles: Recognition of the equality of all races and of the equality of all nations large and small; Respect for the right of each nation to defend itself singly or collectively, in conformity with the Charter of the United Nations; and (a) Abstention from the use of arrangements of collective defence to serve the particular interests of any of the big powers and (b) Abstention by any country from exerting pressures on other countries. The text of the ‘Declaration on the promotion of world peace and co-operation’ is available in the Final Communique of the Asian–African conference of Bandung (14 April 1955), <http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf> last accessed 14 June 2016. Some authors, eg Sompong Sucharitkul, ‘The Principles of Good-Neighbourliness in International Law’ (1996) Publications Paper 13–17, insist that the three additional principles of the ‘Declaration on the promotion of world peace and co-operation’ must be also taken into account and considered foundational principles (ie legal bases) of good neighbourliness. Other important instruments reaffirming the basis of the good neighbourliness principle can be found in Art. 3 Charter of the Organisation of African Unity of 25 May 1963 (disbanded 9 July 2002); Art. 3 Charter of the Organisation of American States of 1 December 1951; Bangkok Declaration creating the Association of Southeast Asian Nations of 8 August 1967; Article 4 Treaty establishing the Economic Community of West African States of 28 May 1975; Article 2.1 Charter of the South Asian Association for Regional Cooperation of 8 December 1985.

\textsuperscript{77} The determination of the General Assembly to codify the elements of good neighbourliness was first expressed in the Resolution on the Development and strengthening of good neighbourliness between States UNGA Res 37/117 (16 December 1982) A/Res/37/117.
the effectiveness of the principle has been more successful. At the insistence of the then ten EEC states, the question was transferred from the Political to the Legal Committee of the UN, which decided at its 40th session to establish a Sub-Committee on good neighbourliness, mandated to identify the elements of good neighbourliness. In the ensuing period, the Sub-Committee held a series of meetings to discuss the elements of good neighbourliness, issuing four reports. While no general agreement has been achieved in this respect, the Sub-Committee was successful in reaffirming the legal basis of the good neighbourliness principle and underlining the rights and duties of states in this respect.

As observed by the Sub-Committee, the rights and duties of states in the light of the good neighbourliness principle include:

- the duty of states to refrain from domestic activities which can clearly have harmful effects on the territory of neighbouring states;
- the duty of states to take measures to eliminate or minimize the effects of some domestic activities on neighbouring states or on states of the same area;
- the duty of states to inform and consult each other (or exchange information) on activities and events on their own territories, which can clearly affect neighbouring states;
- the duty of mutual tolerance or expectation of states to tolerate insignificant damage resulting from interferences caused by various state actions;
- the duties of states to refrain from actions which could aggravate a conflict situation or a dispute between neighbouring states and to take measures to attenuate gradually such situations resulting from the states’ obligation to peacefully settle disputes; and
- the duty of states to take measures to improve and develop friendly relations.

All the above duties produce corresponding rights for states which stem from the good neighbourliness principle. By summarizing the main rights and duties of states in the light of the good neighbourliness principle, the Sub-Committee confirmed their acceptance by the majority of states, providing a solid basis for the consistent interpretation and application of the principle in interstate relations. However, the list of duties and corresponding rights of states is not exhaustive and could develop further within the ambit of the principle’s legal basis.

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78 UNGA Res 34/99 (n 70).
79 UN Doc A/137/PV.45.
80 UN Doc A/C.6/40/L.28.
82 This formulation was used in the two last reports of the Sub-Committee, namely: A/C.6/42/L.6; and A/C.6/43/L.11.
There is also no restriction with regard to the good neighbourliness principle’s fields of application. While primarily developed in the field of environmental protection, the principle can be applied in any field where the rights and

83 The principle of good neighbourliness has been primarily articulated in international environmental law through the obligation of states to ‘[abstain] from hostile actions, including the use or permitting the use by a State of its own territory against neighbours or other States’ (Pop (n 1) 25–38). See also similar lines the dissenting opinion of Judge Weeramantry in the Legality of the Threat or Use of Nuclear Weapons case above (p 27). In this sense, the restriction on states is well established in many international legal instruments and most notably in principle 21 of the ‘Declaration of the UN Conference on the Human Environment’ (Declaration of the UN Conference on the Human Environment (Stockholm Declaration) (16 June 1972) UN Doc. A/CONF.48/14/Rev.1) and in the second principle of the ‘Rio Declaration on Environment and Development’ (Rio Declaration on Environment and Development (14 June 1992) UN Doc. A/CONF.151/5/Rev/1). The relevant provisions of the two instruments stipulate in an almost identical way that: ‘[s]tates have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental (and developmental) policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction’ (the term in parenthesis is contained only in the second principle of the Rio Declaration and not in Principle 21 of the Stockholm Declaration). The duty is also affirmed in the international environmental case law. The most commonly quoted case on the good neighbourliness principle, the Trail Smelter (United States v Canada) (1938 and 1941) 3 UNRtAA, 1905, 1965) case, formulated the obligation of states in the following terms: ‘under the principles of international law...no state has the right to use or permit the use of its territory in such a manner as to cause injury...in or to the territory of another or the properties and persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence’. In the same, environmental context, the ICJ upheld ‘the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control (as) part of the corpus of international law relating to the environment’ (Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 241, para. 29. The ICJ recalled the same rule in Gabčíkovo–Nagymaros Project (Hungary v Slovakia) (Judgment) [1997] ICJ Rep 41, para. 53). Also, the great majority of scholars analysing the good neighbourliness principle associate the restrictions imposed on states with the international environmental protection at the level of states. Some examples from the more recent literature include: Philippe Sands, ‘Environmental Protection in the Twenty First Century: Sustainable Development and International Law’ in Richard L Revesz, Philippe Sands, and Richard Stewart (eds), Environmental Law, the Economy and the Sustainable Development (Cambridge: Cambridge University Press, 2004) 374, according to whom the good neighbourliness principle ‘applies particularly where activities carried out in one state might have adverse effects on the environment of another states or in areas beyond national jurisdiction’. See also: Philippe Sands, ‘Environmental Protection in the Twenty First Century: Sustainable Development and International Law’ in Norman J Vig and Regina S Axelrod (eds), The Global Environment: Institutions, Law and Policy (London: Earthscan, 1999) 127–8; Philippe Sands, Principles of International Environmental Law (Cambridge: Cambridge University Press, 2003) 235–46; Philippe Sands, ‘International Law in the Field of Sustainable Development’ (1994) British Yearbook of International Law, 303; Wendy E Scattergood, ‘The Social Justice Implications on Global Warming’ in Tom Conner and Ikuko Torimoto, Globalisation Redux: New Name, Same Game (Lanham: University Press of America, 2004) 85–6, clarifying the meaning of the good neighbourliness principle in terms prohibiting states from using their environment to infringe another state; Lotta Viikari, The Environmental Element in Space Law: Assessing the Present and Charting the Future (Leiden: Martinus Nijhoff, 2008) 150–7; Nancy K Kubasek and Gary S Silverman, Environmental Law (4th edn, Upper Saddle River, NJ: Prentice Hall, 2002) 325–7; Austen L Parrish, ‘Sovereignty’s Continuing Importance?: Traces of Trail Smelter in the International Law Governing Hazardous Waste Transport’ in Rebecca Bratspies and Russell Miller (eds), Transboundary Harms in International Law: Lessons from the Trail Smelter Arbitration (Cambridge: Cambridge
duties of states manifest themselves. The identified ways and means of developing and strengthening good neighbourliness include: diplomatic and consular relations; contacts and visits; agreements and declarations; programmes of cooperation and projects of mutual interest; negotiations and consultations; harmonization of technical norms and standards between neighbouring countries. The actions of international organizations—in particular regional and sub-regional ones—along the same lines, include: utilization of the possibilities and capabilities of the United Nations, its specialized agencies and existing

University Press, 2006) 185–6; Helmut Breitmeier, The Legitimacy of International Regimes (London: Ashgate, 2008) 161–3, etc. The profound development of the specific legal obligations under the principle of good neighbourliness in the field of international environmental law reflects the geographic proximity of neighbouring states, which are first to perceive most directly the detrimental effects of any transboundary environmental pollution.

Indeed, the duty of states to refrain from domestic activities, which may have harmful effects on the territory of a neighbouring state, is not limited to transboundary environmental impact. In fact, there is no limitation or uniform definition of the various harmful acts, which may affect the territory of a neighbouring state. As clearly explained by the Council of the League of Nations in relation to one of the disputes concerning the demarcation of a border among neighbouring states, specifically between the (then) Serb-Croat-Slovene state and Albania: ‘the assurance given by the representatives of the two States that they intend to live as neighbours maintaining good relations with each other, which implies that neither shall take, either directly or indirectly, any action to provoke or encourage any movement which might disturb the internal peace of its neighbour’ (minutes of the fifteenth session of the Council of the League of Nations, LNOJ, 2nd year, Nos. 10–12 (1921), 1193). Other fields included. Other examples of the possible application of the good neighbourliness principle include the field of immigration and asylum. Kay Hailbronner, ‘Readmission Agreements and the Obligation of States under Public International Law to Readmit Their Own and Foreign Nationals’ (1997) 57 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 31, for instance, argues that the obligation to readmit third-country nationals (TCNs) which forms a part of the readmission agreements is rooted ‘in the principle of neighbourliness and the responsibility of a state for those impairments to other states emanating from its territory’. This duty is enforced through contractual agreements between states, although it should not be excluded off-hand that the same could not be realized in future through the good neighbourliness principle directly (see also Kay Hailbronner, ibid 35). Some suggestions regarding to the application of the good neighbourliness principle have been made within the Ad hoc Committee of Legal Experts on Legal Aspects of Territorial Asylum of the Council of Europe (CoE) in the context of asylum law. These entail that the good neighbourliness principle imposes an obligation on states not to take actions which would increase a burden on other states and also to ensure that persons to whom they grant transit visas can legally enter the country of destination. Furthermore, as argued by Agnès G Hurwitz, The Collective Responsibility of States to Protect Refugees (New York: Oxford University Press, 2009), additionally suggests that the principle of good neighbourliness could ‘provide useful arguments against the unilateral application of safe third country practices’ (p 170). In particular, it could be argued, according to that author, that the good neighbourliness principle is infringed in cases where asylum seekers are returned to a state through which they transited despite this state not having agreed to examine their claims. In this respect, see also Kay Hailbronner ‘The Concept of “Safe Country” and Expeditious Asylum Procedures: A Western European Perspective’ (1993) 5 International Journal of Refugee Law, 31, 41. Lastly, Hurwitz notes that the good neighbourliness principle could apply to the arrangements appropriate for the identification of refugees in the states through which they travel and for ascertaining the itineraries of refugees and asylum seekers (p 170). Similar parallels can be drawn for other fields where the duties and rights of states under the good neighbourliness principle apply analogously. Nevertheless, the successful implementation of the principle will depend on the level of state compliance with international law in general and with the treaties regulating states’ rights and duties in particular.

intergovernmental and non-governmental organizations in the political, economic, humanitarian, scientific, cultural and other fields; promotion of common objectives and programmes; and implementation of regional and sub-regional projects, in particular in developing countries.86

III. Good neighbourliness principle in EU law

EU law displays some properties stemming from the supranational nature of the organization which are not found in traditional international law. The supranational legal framework has created a new and advanced context for the development of good neighbourly relations by changing the structure and the rules of interstate relations. It has fundamentally changed the essence and the very function of state borders, dramatically altering the overall perception of territorial sovereignty around which the good neighbourliness principle in traditional international law initially developed. The sensitive borderline separating the internal from the external realm in the context of good neighbourliness in the EU thus simply disappears. In this sense, EU law fundamentally differs from international law. It is not surprising then that the Union is ready to protect its constitutional core87—which does not merely overlap with the acquis88—both from recalcitrant Member States deviating from the spirit and the letter of Article 2 of the Treaty of European Union (TEU)89 and from the unwanted norms of international law, which the ECJ does not regard as being consistent with that provision.90 The extreme side of this trend is the ECJ’s firm determination to structurally protect the EU legal system even from

88 That acquis is not about the elaboration of Article 2 TEU values became clear in the context of the pre-accession process. For a contemporary analysis, see Kochenov (n 16).
89 As Article 7 TEU requires. Given the difficulties surrounding Article 7 TEU’s successful application to this effect, further steps have been discussed to ensure compliance: European Commission, ‘A New EU Framework to Strengthen the Rule of Law’, Strasbourg, 11 March 2014, COM(2014) 158 final. For the discussion of some academic proposals, see Closa and Kochenov (n 22).
the Council of Europe and its human rights protection legacy. This stance, clearly contradicting an express will of the Herren der Verträge, is among the most problematic later moves made in the name of EU law’s ‘autonomy’, as other contributions to this Special Issue highlight. Virtually anything EU Member States do in deviation from Article 2 TEU can lead to negative externalities for their Union partners, leading to a potential breach, inter alia, of the principle of good neighbourly relations. Unlike the protection of the EU from the structural effects of the Council of Europe’s human rights protection system, however, as exemplified in Opinion 2/13, the institutions of the Union have been remarkably ineffective in instilling the observance of the values of Article 2 TEU among the recalcitrant Member States of the Union, such as Hungary and Poland, where democracy and the Rule of Law are being dismantled. A number of fundamental questions arise in this respect, from the interrelation between the EU duty of loyalty and the principle of good neighbourly relations, to the Union’s own role in the context of this principle.

A. The EU’s specificity and the struggle for values

The option to choose a destiny which deviates from the EU’s foundational values set out in Article 2 TEU is foreclosed in the context of Member State constitutionalism by EU law. The special interrelationship between the EU and its Member States on the one hand and, simultaneously, between the Member States of the EU on the other, is such that EU values officially play a central role in the functioning of the legal organism of the Union. This is certainly the case, even notwithstanding the fact that such values do not find their automatic elaboration and expression in the acquis, which remains a tool

94 See the papers included in the 2016 Symposium of the Journal of Common Market Studies co-edited by Dimitry Kochenov, Amichai Magen, and Laurent Pech.
95 Indeed, a provision allowing withdrawal from the Union is designed precisely for the states not willing to comply with Art. 2 TEU values. For analyses, see Phedon Nicolaides, ‘Withdrawal from the European Union: A Typology of Effects’ (2013) 20 Municipal Journal, 209; Adam Łazowski, ‘Withdrawal from the European Union and Alternatives to Membership’ (2012) 37(5) EL Rev, 523.
96 Kochenov (n 88).
with a clearly decipherable market bias, suffering from many a lacuna when approached from the standpoint of the very values the Treaties profess.

Although the acquis on values and the values’ enforcement does not (yet) spread far beyond Article 7 TEU, the Union came to generate legitimate expectations that its values will be defended and enforced. The outcome of such enforcement should necessarily be the restoration of a situation where each of the Member States of the Union fully adheres to the specific type of constitutionalism, based on democracy, the rule of law, human rights protection and other key principles, such as proportionality and loyal cooperation, and also demonstrates full adherence to the acquis. Having even one Member State among the twenty-eight which does not meet these criteria can be argued to necessarily result in a breach, inter alia, of the principle of good neighbourly relations due to the Union’s very organization. This is an additional perspective on non-compliance with the values which come in addition to the classical understanding of the duty of loyalty. Indeed, from an EU law-centred perspective, an equally strong argument can be made that any deviant Member State will also be in violation of the duty of loyalty—even though its exact scope is debatable. The need to defend Article 2 TEU values makes the Union’s involvement indispensable.

In other words, the principle of good neighbourly relations here necessarily overlaps with the duty of loyalty, even though it is seemingly easy to draw a conceptual distinction between the two: while good neighbourly relations, by definition, concerns relations between states, the EU duty of loyalty necessarily adds an acquis element to it, including the respect for the goals of integration. While a breach of the duty of loyalty causing negative externalities for other

100 Jan-Werner Müller, ‘The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within the Member States’ (2014) Revista de Estudios Políticos, 141.
101 The Legal Service of the Council concluded the following: ‘[T]he new EU framework for the Rule of Law as set out in the Commission’s communication is not compatible with the principle of conferral which governs the competences of the institutions of the Union’: Council of the European Union, Opinion of the Legal Service 10296/14, of 14 May 2014, para. 28.
Member States will obviously also be a breach of the principle of good neighbourly relations, the reverse would not be true: the scope of the duty of loyalty should be construed more narrowly than the principle of good neighbourly relations in the context of breaches. One should thus not be misled by the (potentially, at least) similar operation of the two, when their scopes overlap.

B. Key normative arguments for the EU’s involvement

Both the considerations of good neighbourliness and of loyalty, when applied to the EU, are bound to rest on the understanding of the climate of interdependency that the Union has created for its Member States. Joining Carlos Closa, at least three key normative arguments for the Union’s involvement have been now identified.103 These concern, first, the effects of Article 2 TEU violations by a single Member State on the whole of the Union, both at the citizen and the Member State level; secondly, these concern the supranational understanding of the Union as a federal legal-political organism, requiring it to intervene in defence of the rights and freedoms, which it directly endows to its citizens;104 and, thirdly, the argument building on the EU’s congruence with its own proclaimed values and policies, especially acute once the external realm of the EU’s activities is taken into account: we cannot expect, say, Azerbaijan to take the EU’s attempts to promote the rule of law and other values105 seriously, if the EU’s own internal affairs demonstrate lacunae precisely in these fields.106 While the first argument of the three clearly implies the possibility of approaching the EU’s problems with its values’ from the perspective of the principle of good neighbourly relations, the second of the three adds to this perspective, turning the Union as such into an active agent of good neighbourly relations in a legal-political context which is no longer two-dimensional, as the vertical division of competences between the EU and the Member States plays a crucial role here.

The normative argument on the universal effects of the departure of individual Member States from the values of the Union as a whole starts with the all-pervading principle, related to the deep inter-penetration and the mutual

106 External promotion of values, especially democracy, the rule of law and human rights is one of the main lines of the EU’s foreign policy: Marise Cremona, ‘Values in EU Foreign Policy’ in Malcolm Evans and Panos Koutrakos (eds), Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World (Oxford: Hart, 2011) 275.
interdependency between the Member States of the Union at the current stage of European integration.\textsuperscript{107} This works at two levels. First, every European citizen has an interest in not being confronted with an illiberal Member State in the EU, since that state will take decisions in the European Council and the Council of Ministers and at least indirectly participate in governing the lives of all the citizens of Europe. If one or more Member States change their standards regarding the Rule of Law or democracy, this necessarily and automatically affects decisions in and by other Member States as well. Secondly, every EU Member State is equally interested in ensuring that none of the others get a free ride, undermining the genuine nature of the Union and the internal market. Legally speaking, the interdependency between the Member States now works in such a way that the EU obliges the Member States to presume that each of them is at least as good as any other in terms of standards of governance, democracy, and the Rule of Law. Mutual trust, which is essential to the working of the EU and the market itself, depends precisely on holding true to this presumption.\textsuperscript{108} Failures to accept other Member State court decisions, European arrest warrants, newly-issued nationalities, or the quality of phytosanitary measures—you name it—are generally prohibited by EU law: the Member States decide for each other every day. Thus, disrespect for the Rule of Law and democracy in one particular Member State can have negative externalities on third (EU, but also non-EU) parties. This principle assumes that the EU is already a coherent legal-political entity based on mutual trust and respect, and works at both the level of citizens and at the level of the Member States: this is unquestionably a fair description of reality, occasional issues with concrete implementation notwithstanding.

The federal analogy builds on the inter-dependency argument, but moves it one step further: the EU is recognized—in keeping with the functioning of its law in some domains—as a supranational federation. Such recognition provides an additional normative argument for its involvement in cases where the Member States disregard the Rule of Law, as the Union is \textit{per se} also conceived of as a bearer of an important stake in the functioning of the system and the effectiveness of the rights it grants. As an important bearer of duties vis-à-vis the citizens and, also, the Member States, the EU as such is viewed as a responsible actor. This vision cannot emerge merely out of a crude story of interdependence between EU citizens or between the EU Member States. Once the EU’s supranational nature is fully taken into account, it acquires a role in protecting its citizens, which is independent of the Member States. Playing such a role pertains to the key recent jurisprudence of the Court of Justice of the European

\textsuperscript{107} Jan-Werner M"{u}ller, ‘The Copenhagen Commission’, in Closa and Kochenov (n 22).

The debate on how far the federal analogies—particularly those related to the renewed importance of EU citizenship—can be stretched is ongoing. The independent ability of the Union, observable in the EU every day, to affect the legal-political situation in the Member States in the most direct way, necessarily permits strong claims that the EU emerges as a ‘neighbour’ in its own right, when approached in light of the good neighbourliness principle. This is not only a matter of horizontal relations with non-EU states, but also, again, a matter of vertical relationships with its own constituent parts. The added value of bringing good neighbourly relations into the picture becomes clear in the context of the necessary limitations of the EU’s own duty of loyalty principle. Good neighbourly relations, potentially enjoying broader scope—its much more basic and intuitive nature notwithstanding—could theoretically be deployed alongside the duty of loyalty.

The third normative argument refers to the principle of congruence and has an internal and an external dimension. Externally, the argument based on this principle points to the kind of requirements that the Union usually sets for engaging in cooperation with third parties. The protection of fundamental rights, the Rule of Law and democracy together or individually are good cases in point. Indeed, the EU even attempts to shape international law to its liking, using its own fundamental values and principles as a basis for this. Should the EU establish oversight mechanisms, then it would clearly also reinforce its credibility in the wider world. This is crucial, in particular given that the EU sets high standards for the candidate countries in the course of the pre-accession process, which contrasts sharply with what is required of Member States which are already ‘in’. Internally, the congruence principle means that respect for democracy and the Rule of Law should not only be viewed as a prerequisite for accession but also for continued membership. In short, when taken seriously, the congruence argument enhances the EU’s credibility in safeguarding and defending its fundamental values. The three arguments combined provide a sound normative foundation for the intensification of the EU’s involvement with the outstanding issues on the disregard of the fundamental values by the Member States, enriching the possible understanding of good neighbourly


111 Cremona (n 106); Leino and Petrov (n 105).

relations in the internal context of the EU, as the principle acquires potentially new vistas of development and meaning.

The struggle for the continued observance of Article 2 TEU values in the EU is on-going—arguably, it is now much more acute than ever before.\textsuperscript{113} Following the growing number of serious discussions on what to do with Hungary, given more recent developments there,\textsuperscript{114} and in light of the special features of the mounting problems, it seems high time to return to the very basic question on the reasons behind having a Union in Europe. The question of Europe’s \textit{raison d’être} is as acute now, more than half a century into the project, as ever and is under active debate for good reason.\textsuperscript{115} Answering this question is crucial—not only because the answer provides better legitimization\textsuperscript{116}—if not justification\textsuperscript{117}—of the integration project already in existence, but also, since it is likely to shed light on how to resolve some of the outstanding problems which the Member States and the Union are facing. In particular, this concerns the Union’s role in dealing with values/Rule of Law crises in the Member States—issues which are as indispensable for the Union’s survival as they are potentially outside the clear-cut scope of Union law.

Indeed, the overwhelmingly fragility of the supranational authority—notori-ously famous for its democratic deficit and criticized for the missing underlying idea of the good to go beyond the Internal Market\textsuperscript{118}—must be taken into account. Setting aside the clear weakness of the EU’s powers, how can a Union which could legitimately be presented as antithetical to justice\textsuperscript{119} and democracy,\textsuperscript{120} reshape the essential constitutional fundamentals of the \textit{Herren der


\textsuperscript{115} Jürgen Neyer, \textit{The Justification of Europe: A Political Theory of Supranational Integration} (Oxford: Oxford University Press, 2012); Gráinne de Búrca, ‘Europe’s \textit{raison d’être},’ in Kochenov and Amtenbrink (n 90); Kochenov, de Búrca, and Williams (n 98).

\textsuperscript{116} Anthony Arnulf and Daniel Wincott (eds), \textit{Accountability and Legitimacy in the European Union} (Oxford: Oxford University Press, 2002).

\textsuperscript{117} Neyer (n 115); Glyn Morgan, ‘European Political Integration’ (2007) 14(3) \textit{Constellations}, 332; Beate Sissenich, ‘Justification and Identity in European Integration’ (2007) 14(3) \textit{Constellations}, 347 (for posing this issue and some important attempts).


\textsuperscript{119} Kochenov, de Búrca, and Williams (n 98); Williams, \textit{The Ethos of Europe} (n 98).

Verträge unfaithful to the values of Article 2 TEU? Will it be necessary to reinvent the integration construct first, before this is can be made possible? Clearly, such a reinvention, presumably requiring explicit assent from all the Member States, is nothing short of impossible, precisely because some of the Member States are at the heart of the problem. At the same time, will the Union be able to function—or at least pretend to function—successfully, if nothing is done, given the disruptive potential of the three essential features of the ongoing crisis as outlined above? There are currently more questions than there are answers.

Given the present level of interdependence between the Member States in the Union, each and every other Member State is significantly harmed by such Hungaries. This, therefore, necessarily points in the direction of the Union’s raison d’être: is the Union about solving the constitutional conundrums of its Member States? The responsibilities which the Union now discharges, coupled with the full reliance of the Member States on the Union and also on each other in the context of the profound interdependence described above, make the deployment of the duty of loyalty, possibly backed by good neighbourliness considerations, indispensable.

IV. Conclusion

The principle of good neighbourly relations is not context-free. While in international law it sets rights and duties of states stemming from the sovereign equality of states, in the EU it boasts vertical and horizontal dimensions, necessarily including the Union—and with it the whole of the integration project—among the actors to be considered when assessing the operation of the principle. In addition to the actorhood of the Union, which is not a state, the operation of the principle permits a somewhat broader view of the day-to-day operation of the duty of loyalty, as the principle of good neighbourly relations then functions to demand that the Member States ensure that no negative externalities are created by their lawful actions within their own sphere of competence for the other Member States and the Union as a whole. The very reality of European integration, implying that all the Member States fully embrace the values of the Union and a particular type of constitutionalism, is then what the principle protects.

High expectations notwithstanding, the EU is not yet a militant democracy (or, rather, a militant Rule of Law system), bound to disappoint those who see it as an all-purpose umbrella against bad weather in national politics.

122 Müller (n 100).
The close interrelation between the duty of loyalty—which is rooted in EU law—and the principle of good neighbourly relations—which is not necessarily "acquis"-bound, not even in the EU—pose serious questions on the role to be played by the EU as a sovereign actor in the context of the operation of the principle of good neighbourly relations. In particular, the EU’s involvement in assisting the Member States to become the particular type of state and to embrace the specific type of constitutionalism implied in Article 2 TEU—but not necessarily specified by the "acquis" as such—is of key importance here. Given that the "acquis’ scope in a strictly legal sense cannot permit the EU’s unlimited intrusions into matters of Member State sovereignty within the scope of their own constitutional autonomy, we hypothesize that the principle of good neighbourly relations—understood in the broad EU-specific sense, where the very nature of a Member State can have negative externalities on the rest of the Union—could also be employed alongside the duty of loyalty in dealing with problematic Member States.

Failing to take the EU reality into account is unquestionably the easiest way to violate the principle of good neighbourly relations in Europe.