

FACULTY OF LAW
University of Belgrade

MASTER in European Intergration



International Relations of the EU

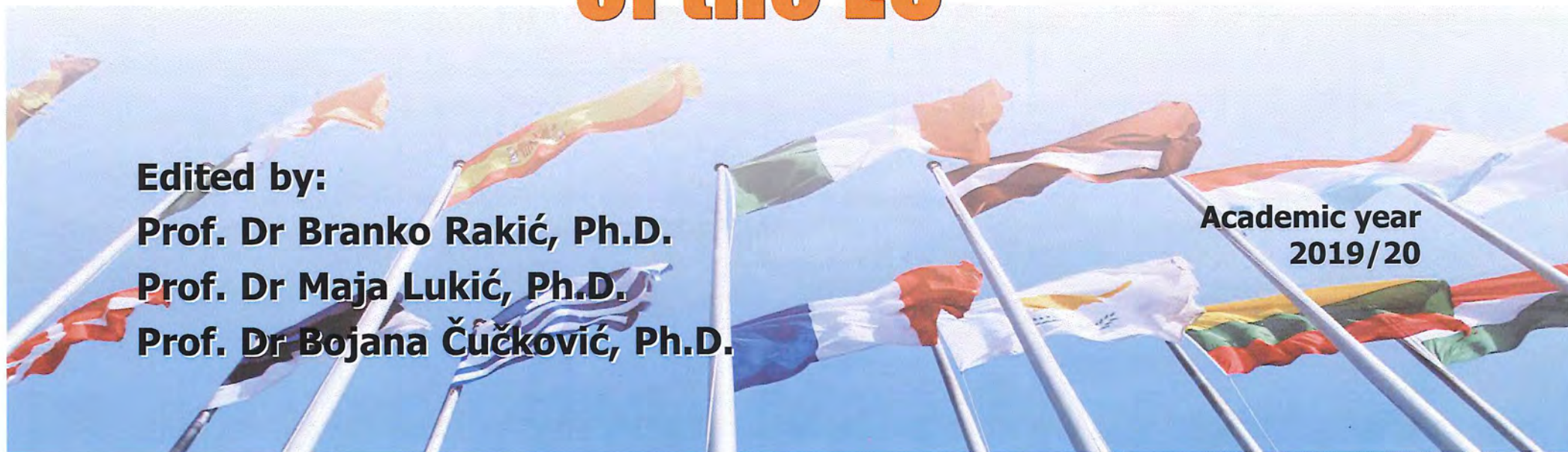
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EU INTERNATIONAL RELATIONS LAW

1 CENTRAL ISSUES

- i. The EU for some years has been preoccupied with strengthening and highlighting its international role and identity. Until recently, the complex and fragmented three-pillar framework governing EU international relations significantly hindered this endeavour. One of the core objectives of the Lisbon Treaty, following the mandate of the Laeken Declaration, was to bring about greater consistency and coherence in EU external relations and to strengthen the EU as a global actor.
- ii. The entry into force of the Lisbon Treaty brought several important changes in the field of EU international relations. *First*, Article 47 TEU declares that the EU has legal personality, giving formal status to the EU's practice over a number of years of entering into international agreements. *Secondly*, the three-pillar structure has been formally dissolved, although the Common Foreign and Security Policy (CFSP) remains separate and distinct from the rest of the EU's powers and competences, governed by the terms of the TEU rather than the TFEU. *Thirdly*, the former third pillar of police and judicial cooperation in criminal matters (PJCC), including its significant external dimension, is integrated into the same framework as all other EU policies, apart from the CFSP. *Fourthly*, the office of High Representative of the Union for Foreign Affairs and Security Policy was created. *Fifthly*, an EU external action service (an EU diplomatic corps) was created, integrating civil servants and diplomats from the Commission, Council, and Member States. *Sixthly*, the scope of the EU's exclusive common commercial (external trade) policy has been widened. *Seventhly*, EU international action is now based on a common set of values, principles, and objectives. *Finally*, the Treaty attempts to codify parts of the ECJ's complex case law on implied external powers.
- iii. The law governing the EU's external competence originated in a complicated body of case law which was developed over many years by the ECJ. While the express Treaty-based external powers of the former Community were few, the Court early on gave a wide interpretation of the EC's implied powers, sowing the seeds for what became known as the principle of parallelism of internal and external powers.
- iv. The two important questions dominating this legal doctrine are (a) whether a given external power exists and (b) whether it is exclusive to the EU (formerly the EC) or shared with the Member States. The ECJ consistently answered the first question in very broad terms, but it grew more cautious in relation to the second. Since *Opinion 1/94* on the WTO agreements, the ECJ has interpreted many of the EU's external powers as being shared with the Member States, and has given a less expansive reading to the scope of the EU's common commercial policy (CCP). It remains

to be seen whether the express widening of the CCP by the Lisbon Treaty will change the Court's approach in this respect or not.

- v. The existence of so many shared competences has led to the phenomenon of 'mixed agreements', involving the participation of both sets of actors in the negotiation, conclusion, and implementation of agreements. While this has problematic consequences in terms of efficiency and visibility for international partners, it has been praised as a unique feature of the EU's federalism, and an important source of practical cooperation between the EU and the Member States.
- vi. Unlike the rest of EU law and policy, the CFSP remains governed by a separate set of rules and principles, and is largely excluded from judicial review. However, given the overlaps in subject matter between the CFSP and other domains of EU external competence, as seen in cases concerning anti-terrorist sanctions or programmes to reduce the incidence of small weapons, some difficult legal issues arise. These include the appropriate legal basis for action, the proper delimitation of the scope of each field of action, and the organization of cooperation across these fields.
- vii. The ECJ has played an active role in EU international relations, especially in determining the existence, scope, and nature of the EU's competences over the years. It has treated international agreements (including mixed agreements) as acts of the EU which are subject to its jurisdiction. It has ruled that international agreements are a binding and integral part of the EU legal order, and that they may, in principle, have direct effect. However, it has consistently ruled that provisions of the WTO Agreements may not be invoked before EU Courts, and recent rulings suggest it may extend this reasoning to other categories of international agreement.

2 INTRODUCTION: THE EU AS AN INTERNATIONAL ACTOR AND THE GENERAL PRINCIPLES OF EU EXTERNAL ACTION

(A) THE EU AS AN INTERNATIONAL ACTOR

The European Union is seeking to develop a role for itself as a significant actor on the global stage. While it enjoys substantially more influence in some fields (such as trade) than others, in general the EU has developed a substantial network of relations through which it acts to influence international affairs. The EU is the world's largest trading power and a major donor of development aid and humanitarian assistance. It has been described variously as a civilian,¹ normative,² or structural power.³ These terms reflect the fact that the means the EU deploys are—of necessity, given its lack of significant military capacity—economic, diplomatic, structural, and political rather than strongly coercive in nature. The EU relies primarily on its 'soft power' on the global stage.⁴ The Lisbon Treaty did not alter the character of the EU in this respect, although it strengthened the institutional basis for the development of a Common Security and Defence Policy.⁵

The EU plays many different roles at the same time. In positive terms it can be described as flexible and multifaceted; in negative terms as fractured and confused. Cremona has identified at least five different roles played by the EU as a global actor: (i) a laboratory and model for other regions,

¹ F Duchêne, 'Europe's Role in a World Peace' in R Mayne (ed), *Europe Tomorrow: Sixteen Europeans Look Ahead* (Fontana, 1972).

² J Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 JCMS 235.

³ S Koukdebre and J MacNaughtan, *The Foreign Policy of the European Union* (Palgrave, Macmillan).

⁴ J Nye, *Soft Power, The Means to Success in World Politics* (Public Affairs, 2004).

⁵ Art 42 TEU.

(ii) a market player defending and promoting its own economic interests, (iii) a rule-generator and exporter of norms, operating through a network of agreements with other states and regions, (iv) a force for stabilization, within the EU and beyond, and (v) a magnet and neighbour using the incentive of membership.⁶

(b) THE CONSTITUTIONAL FRAMEWORK AND GENERAL PRINCIPLES OF EU EXTERNAL ACTION

The constitutional structure of EU international relations law prior to the Lisbon Treaty was complex, fragmented, and dominated by ECJ case law. While it remains complex and to some extent still fragmented, the Lisbon Treaty introduced a range of provisions designed to underscore the role of the EU as a global actor⁷ and to strengthen the coherence of its international relations system.⁸ Article 3(5) TEU highlights the role of values in EU international relations by declaring that:

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Article 205 TFEU, which forms a kind of 'chapeau' to the part of the Treaty (Part V of the TFEU) dealing with EU external relations other than CFSP, declares that:

The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.

Chapter 1 of Title V TEU begins with Article 21, which for the first time gathers together, summarizes, and articulates the core objectives of all EU external policies, including the CFSP. As can be seen below, these provisions are intended to contribute to the establishment of an integrated framework and to articulate—alongside the values set out in Article 3(5) TEU—a common, overarching set of principles and objectives for EU international relations:

Article 21 TEU

3. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms,

⁶ M Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 41 CMLRev 553.

⁷ Whether or not the Lisbon Treaty innovations will in fact strengthen the EU as a global actor remains to be seen, as much will depend—as always—on the political will of the Member States. B Donnelly, 'Europe in the World: All Change or No Change in EU Foreign Policy After Lisbon?' (2010) 45 International Spectator 17; F Bindi (ed), *The Foreign Policy of the EU: Assessing Europe's Role in the World* (Brookings Institute Press, 2010).

⁸ M Cremona, 'Coherence through Law: What Difference Will the Treaty of Lisbon Make?' (2008) 3 Hamburg Review of Social Sciences 11; P Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency' (2010) 47 CMLRev 987.

respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

- (a) safeguard its values, fundamental interests, security, independence and integrity;
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
- (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
- (g) assist populations, countries and regions confronting natural or man-made disasters; and
- (h) promote an international system based on stronger multilateral cooperation and good global governance.

3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

(c) THE NEW INSTITUTIONS OF EU INTERNATIONAL ACTION

Following the statement of the principles and goals of EU foreign policy in Article 21 TEU, Article 22 describes the role of some of the key institutional actors in the shaping of EU external action, in particular the European Council and the newly established High Representative for Foreign Affairs and Security Policy:

1. On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union.

Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.

The European Council shall act unanimously on a recommendation from the Council, adopted by the latter under the arrangements laid down for each area. Decisions of the European Council shall be implemented in accordance with the procedures provided for in the Treaties.

2. The High Representative of the Union for Foreign Affairs and Security Policy for the area of common foreign and security policy, and the Commission for other areas of external action, may submit joint proposals to the Council.

While the European Council is far from being a new actor in EU international relations, the Lisbon Treaty amendments have strengthened and highlighted its role in this respect, giving it an express mandate to develop the EU's overall foreign policy strategy and the power to adopt binding decisions as well as non-binding frameworks and strategies across the whole field of external relations. The role of the 'semi-permanent' President of the European Council is described in Chapter 2, Section 4(B).

The two important new institutional players introduced by the Lisbon Treaty in the field of external relations are the High Representative for Foreign Affairs and Security Policy ('Foreign Minister' under the abandoned Constitutional Treaty), and the European External Action Service. The office and role of the High Representative are set out and described in Chapter 2, Section 5. As we have seen, the role is complicated by the fact that the holder is simultaneously a member (Vice-President) of the European Commission and Chair of the Foreign Affairs Council, thus serving two rather different masters. The first High Representative, appointed in 2010, was Baroness Catherine Ashton. Reviews of the role and performance of the High Representative have so far been mixed, with media reaction being particularly critical,⁹ although it remains to be seen to what extent this is a reflection on the performance of the post-holder or on the multiple constraints and responsibilities of the new position. The institutional potential of the position of High Representative has however been favourably compared with that of the President of the European Council, given that (i) the High Representative's position is not limited in time, (ii) the High Representative is given a more independent field of activity in conducting the CFSP and CSDP under Article 18(2) TEU, and explicit powers of initiative such as those in Article 22(2) TEU above, and (iii) the High Representative has the new European External Action Service (EEAS) at her disposal.¹⁰

The EEAS was formally established in 2010.¹¹ The description of its function in Article 27(3) TEU is minimal, specifying only that it is to assist the High Representative in fulfilling his or her mandate, and that it shall work 'in cooperation with' the diplomatic services of Member States.¹² However, the new EU diplomatic service is likely to become an important component of EU foreign policy over time, even if its establishment has been accompanied by institutional wrangling over its composition, and in particular over the balance between national diplomats and EU civil servants, and by the traditional debates over supranational versus intergovernmental influences on the trajectory of the EU. In the words of one MEP, 'It is not yet certain whether, in practice, the European External Action Service will actually develop its full potential and deliver real added-value, or whether it will simply become Europe's twenty-eighth foreign ministry'.¹³

⁹ See, eg. 'Ashton Tries to Rebut Criticism', Financial Times, 5 Mar 2010; 'The EU's Foreign Policy: The Test for Ashton and Europe', The Economist, 1 Feb 2011; 'Europe's Foreign Policy Chief Struggling for Mandate', New York Times, 10 Feb 2011.

¹⁰ C Tomuschat 'Calling Europe by Phone', Guest Editorial (2010) 47 CMLRev 3.

¹¹ Council Dec 2010/427/EU of 26 July 2010 [2010] OJ L201/30. For details of the EEAS see http://eeas.europa.eu/background/index_en.htm.

¹² For discussion of the many academic and institutional background papers and policy proposals for the establishment and functioning of the EEAS in the years leading up to the eventual adoption of the Lisbon Treaty see S Vanhoonaeker and N Reslow, 'The European External Action Service: Living Forwards by Understanding Backwards' (2010) 15 *EEAR* 1.

¹³ F Brantzen, 'Europe's New Diplomats', available at www.boell.eu/downloads/Europe_a_New_Diplomats_EN.pdf.

3 EXTERNAL CAPACITY AND EU COMPETENCE

(A) INTERNATIONAL LEGAL PERSONALITY

According to Article 47 TEU, the Union 'shall have legal personality'.¹⁴ We saw in Chapter 9 that the counterpart of this provision in the former EC Treaty (Article 181 EC) was central to the ECJ's argument for the autonomy and supremacy of the Community legal system in the 1960s.¹⁵ Article 47 TEU is extremely brief, but Article 335 TFEU elaborates somewhat:

In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.

Notably there is no mention of *international* personality in either provision. In this sense the TEU and TFEU differ from both the former Coal and Steel Treaty and the Euratom Treaty, each of which made express reference to international legal capacity.¹⁶ This makes it all the more striking that the ECJ in the early ERTA case (or *ABTR*, to use the French acronym) nonetheless interpreted what was then Article 281 EC as granting the Community international legal personality.¹⁷ The ECJ in *ERTA* extrapolated from the statement of legal personality to conclude that the Community's, now the Union's, external capacity covers the 'whole extent of the field of the objectives' defined in the first part of the Treaty. However, it distinguished the broad notion of capacity from actual legal authority or competence to enter into an international agreement in a given circumstance. Capacity means that there is the potential for the EU to act, whereas legal authority must be found in the specific conferral of power in another provision of the Treaty.¹⁸

Under international law, as an organization the international legal personality of which is recognized, the EU enjoys the right to be represented and to receive the representatives of third states and organizations, the right to conclude treaties, the right to submit claims or to act before an international court or judge, the right to become party to international conventions, and the right to enjoy immunities. It is also subject to legal obligations and responsibility under international law.

(B) THE NEED FOR A LEGAL BASIS AND THE LIMITS OF EXTERNAL EU COMPETENCE

Being founded on the principle of conferred powers, the EU may act only when there is a legal basis for action provided in the Treaties.¹⁹ The choice of legal basis determines the procedures by which

¹⁴ This provision ended the debate, which had taken place since the adoption of the Maastricht Treaty, over whether the European Union, as opposed to the European Community, enjoyed international legal personality.

¹⁵ Case 6/64 *Costa v ENEL* [1964] ECR 585.

¹⁶ Art 6(2) ECSC Treaty had provided 'In international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives'. The Euratom Treaty provides in Art 101(1) that 'The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organization or a national of a third State'.

¹⁷ Case 22/70 *Commission v Council (ABTR/ERTA)* [1971] ECR 263.

¹⁸ The relevance of this distinction can be seen recently in Declaration No 24 which was annexed to the EU Treaties by the Lisbon Treaty and which states that 'the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties'.

¹⁹ Ch 3.

secondary measures are adopted and the participation of the EU institutions in decision-making.²⁰ The importance of choosing the correct legal base and the consequences of not doing so were highlighted in *Opinion 2/00*, which concerned the then Community's signature of the Cartagena Protocol to the Convention on Biological Diversity. The ECJ declared that the use of an incorrect legal basis was liable to invalidate the EU act concluding the agreement, thereby vitiating the EU's consent to be bound and creating complications both for the EU and at international level.²¹ Referring to its case law on the 'objective' choice of legal basis, which specifies that where a measure has more than one purpose and where one purpose is incidental and the other predominant, it should be based on a single legal basis rather than two, the ECJ added here that where the objectives were inseparably linked, more than one legal basis could be used.²²

The ECJ has even declared invalid an EU legislative act which established a position to be taken on an international agreement, on the ground that it did not clearly refer, either explicitly or implicitly, to the specific legal basis for the measure.²³ However, in order to protect third parties and to comply with the Vienna Convention on the Law of Treaties, the ECJ ruled in *France v Commission* that such agreements are nonetheless to be binding on the EU.²⁴ Assuming that it does indeed have competence under another provision of the Treaty to conclude the agreement, the EU is required to act again, using the correct legal basis this time.²⁵

The issue arose in the *Passenger Name Records (PNR)* case in which the Parliament challenged the Council's conclusion of an agreement with the US on the processing and transfer of PNR data, and a Decision of the Commission determining that the US Bureau of Customs and Border Protection provided an adequate level of protection of PNR data under the Data Protection Directive.²⁶ The PNR Agreement was concluded on the basis of an internal market provision, Article 95 EC (now Article 114 TFEU), which was also the legal basis for the Data Protection Directive. The Court ruled that although the data would be initially collected by airlines in the course of a normal commercial activity the further use of the data would be for the purpose of safeguarding public security in combating terrorism, and since this use was expressly excluded from the scope of the Directive, the two acts fell outside the scope of EC competence at the time.²⁷ As a result, the EU was required to denounce the agreement within a specific period of time, and in accordance with the relevant rules of international law.²⁸

(c) EXPRESS AND IMPLIED COMPETENCE

The two original Treaty provisions which, since 1957, have expressly provided for the conduct of EU international relations are Article 207 TFEU (ex Article 133 EC) on the common commercial policy (CCP) and Article 217 TFEU (ex Article 310 EC) on the conclusion of agreements 'establishing an association' with the EU. The original Communities were also empowered to maintain relations with other international organizations, in particular the Council of Europe, the OECD, and the organs and specialized agencies of the UN. Further express treaty-making powers were added in 1987 by the

²⁰ On external relations and legal basis see D Chalmers, 'Legal Base and the External Relations of the European Community' in N Emiliou and D O'Keefe (eds), *The European Union and World Trade Law after the GATT Uruguay Round* (Wiley, 1996); P Koutrakos, 'Legal Basis and Delimitation of Competence' in M Cremona and B de Witte (eds), *EU Foreign Relations Law—Constitutional Fundamentals* (Hart, 2008) 171.

²¹ *Opinion 2/00 on the Cartagena Protocol* [2001] ECR I-9713.

²² *Ibid* [23].

²³ Case C-370/07 *Commission v Council (CITES Convention)* [2009] ECR I-8917.

²⁴ Case C-327/91 *France v Commission (re EC-US anti-trust agreement)* [1994] ECR I-3641, [25].

²⁵ Case C-94/03 *Commission v Council (Rotterdam Convention)* [2006] ECR I-1.

²⁶ Dir 95/46/EC [1995] OJ L281/31.

²⁷ The Dir also does not apply to processing operations concerning public security, defence, state security, and the activities of the state in areas of criminal law.

²⁸ Cases C-317 and 318/04 *European Parliament v Council (PNR)* [2006] ECR I-4721.

Single European Act in the fields of research, technological development, and the environment, and subsequently by the Maastricht Treaty in 1993 in the fields of development cooperation and economic and monetary policy.

However, from the early 1960s on, the ECJ apparently took the view that the Community would not be able to develop a sufficiently strong international presence on the basis of its express powers alone. This seems to be the logic underpinning its ruling in *ERTA*, where the Court sought to avoid the prospect of uncoordinated external representation of the EC by its Member States in fields in which they had adopted common internal policies. As we will see below, the Lisbon Treaty attempts to codify the long-standing case law of the ECJ on implied powers. Finally, while the discussion below refers to the competence of the EC, this case law is applicable to the EU now that the EC no longer exists as a separate entity but has been absorbed into the EU.

Case 22/70 *Commission v Council (AETR/ERTA)* [1971] ECR 263

[Note Lisbon Treaty renumbering: Art 113 EC is now 207 TFEU, Art 114 EC has been repealed, Art 238 EC is now Art 217 TFEU, and Arts 74 and 75 EC are now Arts 90 and 91 TFEU]

Five out of six Member States of the then EEC and a number of other European states which were not EEC members signed a 1962 European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR), but it did not enter into force and negotiations were resumed in 1987. Similar work undertaken at EC level had resulted in the adoption of Council Regulation 543/69 standardizing driving and rest periods of drivers. A year after the adoption of this Regulation, the Member States together concluded the negotiations on a new European Agreement (AETR) with other states. The Commission brought an action for the annulment before the ECJ of all legal consequences of the Council proceedings which had led to the Member States adopting the AETR. The ECJ considered whether the Community had competence to sign the AETR Agreement.

THE ECJ

16. Such authority arises not only from an express conferment by the Treaty—as is the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements—but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.

23. According to Article 74, the objectives of the Treaty in matters of transport are to be pursued within the framework of a common policy.

24. With this in view, Article 75 (1) directs the Council to lay down common rules and, in addition, 'any other appropriate provisions'.

25. By the terms of subparagraph (a) of the same provision, those common rules are applicable 'to international transport to or from the territory of a Member State or passing across the territory of one or more Member States'.

26. This provision is equally concerned with transport from or to third countries, as regards that part of the journey which takes place on Community territory.

27. It thus assumes that the powers of the Community extend to relationships arising from international law, and hence involve the need in the sphere in question for agreements with the third countries concerned.

28. Although it is true that Articles 74 and 75 do not expressly confer on the Community authority to enter into international agreements, nevertheless the bringing into force, on 25 March 1969, of Regulation No 543/69 of the Council on the harmonization of certain social legislation relating to road transport (OJ L 77, p. 49) necessarily vested in the Community power to enter into any agreements with third countries relating to the subject-matter governed by that regulation.

29. This grant of power is moreover expressly recognized by Article 3 of the said regulation which prescribes that: 'The Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this regulation'.

30. Since the subject-matter of the AETR falls within the scope of Regulation No 543/69, the Community has been empowered to negotiate and conclude the agreement in question since the entry into force of the said regulation.

According to the Court, the fact that by the time the contested decision was taken by the Council on the international road transport agreement a common policy on social aspects of road transport had already been adopted by the EC made it possible to imply external powers on the part of the Community. Conversely, the Court ruled that until the internal rules had been adopted those powers remained vested in the Member States.²⁹

In the subsequent *Kramer* case concerning fisheries conservation, the ECJ reiterated this dimension of the *ERTA* judgment. It ruled that external legal authority 'arises not only from an express conferment by the Treaty, but may equally flow implicitly from other provisions of the Treaty, from the Act of Accession and from measures adopted, within the framework of those provisions, by the Community institutions'.³⁰ In the context of *Kramer*, the ECJ ruled that given the EC's internal power to take any measure for the conservation of the biological resources of the sea, the only way to ensure an effective and equitable conservation was by a system including also non-member countries. Thus, 'it follows from the very duties and powers which Community law has established and assigned to the institutions of the Community on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea'.³¹

The subtle difference between the *Kramer* and the *ERTA* rulings is that the *ERTA* principle is based on the actual adoption of internal rules. In *Kramer*, however, the Court ruled that the Treaty provisions which explicitly conferred competence on the internal level in this field must, on the grounds of equity and effectiveness, be read as implicitly conferring treaty-making power. This has been described as a 'principle of complementarity' since the external competence of the Community is viewed as necessary to complement its internal competence.³²

Even after *Kramer*, however, doubts persisted whether international competence existed in the absence of either express conferral of external powers or the actual adoption of common internal rules. *Opinion 1/76* was the final ambitious step in this expansive articulation of the implied powers doctrine.

Opinion 1/76 (European Laying-up Fund for Inland Waterway Vessels)
[1977] ECR 741

The subject of this Opinion was the legal competence of the EC to sign an International Agreement establishing a European laying-up fund for inland waterway vessels. The aim of the proposed scheme was to eliminate disturbances arising from surplus carrying capacity for goods by inland waterway in

²⁹ Case 22/70 *ERTA* [1971] ECR 263, [32].

³⁰ Cases 3, 4 & 6/76 *Kramer* [1976] ECR 1279, [19]–[20].

³¹ *Ibid* [30].

³² A Dashwood, 'The Classic Authorities Revisited' in A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (Sweet & Maxwell, 2000).

the Rhine and Moselle basins. This objective could not have been fully achieved by the establishment of common EC transport rules under Article 71 EC, because of the traditional participation of Swiss vessels; therefore Switzerland was brought into the scheme by means of the international agreement. The Court elaborated further on the scope of the implied treaty-making powers of the Community.

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3. [A]uthority to enter into international commitments may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provisions. The Court has concluded *inter alia* that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection.

4. This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies, it is, however, not limited to that eventuality. Although the internal Community measures are only adopted when the international agreement is concluded and made enforceable, as is envisaged in the present case by the proposal for a regulation to be submitted to the Council by the Commission, the power to bind the Community vis-à-vis third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the Community.

This case has been described as endorsing the principle of parallelism, according to which EU external competence mirrors its internal competence.³³ The upshot is that the EU has competence to enter into an international agreement in a given domain, provided that (i) the Treaty confers internal competence on the EU in that domain for the purpose of attaining a specific objective, and (ii) participation of the EU in the agreement in question is necessary for the attainment of that objective. In other words, for the EU to have external competence in a certain field it is not necessary for it to have exercised its internal competence in that field. The very existence of such internal competence is sufficient.

Finally, we shall also see in Chapter 11 how the Court in *Opinion 2/94* on accession of the EC to the ECHR indicated that there are other limits to the implied external competence of the EU.³⁴ The Court in that case ruled, in relation to the subject of human rights protection, that where entry into an international agreement would have fundamental institutional implications for the EU and would modify its own system of protection, it would fall outside EU external competence and would require a Treaty amendment.

(b) EXCLUSIVE EU COMPETENCE

Once the existence of EU competence is established, the next important question is whether it is exclusive competence, or whether it is shared with the Member States. Exclusivity means that the competence has been completely transferred by Member States to the EU and that there is no concurrent Member State competence.³⁵

The ECJ established the exclusive nature of EU competence as regards the common commercial policy in *Opinion 1/75* as far as the conclusion of international agreements is concerned,³⁶ and

³³ T Tridimas and F Beckhouth, 'The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism' (1994) 14 YBEL 143.

³⁴ *Opinion 2/94 on Accession by the Community to the ECHR* [1996] ECR I-1759; see Ch 11, section 7(c).

³⁵ D O'Keefe, 'Exclusive, Concurrent and Shared Competence' in Dashwood and Hillion (n 32).

³⁶ *Opinion 1/75 (Understanding on a Local Cost Standard)* [1975] ECR 1355.

similarly in *Donckerwolcke* as far as the adoption of autonomous or unilateral legislative acts is concerned.³⁷

The Court based its assertion of exclusivity on two main factors. The first was the threat which concurrent powers would pose to mutual trust within the EU and thus to the coherence and effectiveness of the defence of EU commercial interests vis-à-vis non-member countries. The second was the risk of distortion of competition within a single market brought about by different commercial and trading policies, given the varying degrees of economic strength of the different Member States. Its reasoning here has been described as 'a characteristic mixture of pragmatism and (again) the link between external and internal trade policy'.³⁸ The same reasoning was echoed in the Court's judgment on the establishment of the common fisheries policy.³⁹ It follows from this case law that if a particular issue is deemed to fall within the scope of these policies, CCP or fisheries, the EU's competence will be exclusive.

We see that in the early case law the claim of exclusivity of external competence was linked by the ECJ to the autonomy of the EU legal order vis-à-vis the Member State. The very existence of implied powers in these cases is closely tied by the Court to their exclusive nature.⁴⁰ At the same time, the doctrine of pre-emption was developed, according to which once the EU had exercised its powers either internally or externally, and the field was thus 'occupied', the Member States were precluded from acting. The rationale was that unilateral action by individual Member States would be incompatible with the unity of the market and the uniform application of EU law. Although the ECJ has since moved away from the strength of its early position on exclusivity, the Lisbon Treaty recently expanded the scope of external exclusive EU competence, even while also adding new non-exclusive and non-pre-emptive external competences.

It is necessary, in order to understand this complicated area of EU law, to trace the journey taken by the Court over time.

Case 22/70 *Commission v Council* (AETR/ERTA)
[1971] ECR 263

[Note Lisbon Treaty renumbering: Art 5 EC is now Art 4(3) TEU]

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17. In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.

18. As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.

³⁷ Case 41/76 *Donckerwolcke* [1976] ECR 1921.

³⁸ M. Cremona, 'External Relations and External Competence of the European Union. The Emergence of an Integrated Policy' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2nd edn, 2011) ch 9.

³⁹ Case 804/79 *Commission v UK* (sea fisheries conservation) [1981] ECR 1045, [17]–[18]. This case in fact established exclusivity with regard to Art 102 of the Act of Accession.

⁴⁰ Cremona (n 38), who argues that this is a stage during which the 'classic' form of pre-emption theory was developed by the Court. External competence was seen as either exclusive or concurrent. Concurrent competence at that stage meant 'distinct, discrete compartments for the EC and the Member States' and did not include the concept of complementary action by both in the same field, unless the Member States were acting under a form of authorization from the EU.

19. With regard to the implementation of the provisions of the Treaty the system of internal Community measures may not therefore be separated from that of external relations.

20. Under Article 3(a), the adoption of a common policy in the sphere of transport is specially mentioned amongst the objectives of the Community.

21. Under Article 5, the Member States are required on the one hand to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions and; on the other hand, to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty.

22. If these two provisions are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.

31 These Community powers exclude the possibility of concurrent powers on the part of Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law.

Following *ERTA*, the ECJ indicated that there were a number of other contexts in which Community competence would be exclusive.

The first, a now very limited example, was where internal powers could only be effectively exercised at the same time as external powers. The Court ruled in *Opinion 1/76* that exclusive external powers could arise at the moment of being exercised, even without there having been any prior exercise of internal powers, so long as internal competence could be effectively exercised only at the same time as external competence,⁴¹ and so long as the conclusion of the international agreement was necessary in order to attain objectives of the Treaty that could not be attained by unilateral rules.⁴² This rather convoluted instance has effectively been restricted to the facts of *Opinion 1/76*.⁴³ In later cases, the ECJ has reverted to the stance that the adoption of internal legislation is generally a prerequisite for the exclusivity of implied powers.⁴⁴

The second context articulated by the ECJ was where the agreement falls into an area which is already largely covered by EU rules. The Court ruled that external EU competence will be exclusive where rules have been adopted in other areas of EU law (apart from common policies such as transport policy in *ERTA*), and particularly in areas where harmonizing legislation has been adopted.⁴⁵ The Court relied in making this argument on the ubiquitous principle of loyal cooperation in Article 4(3) TEU (ex Article 10 EC) which it has used extensively in other fields to promote the effectiveness of EU law.⁴⁶ Thus in *Opinion 2/91* on ILO Convention No 170, which *inter alia* regulated safety in the use of chemicals at work, the Court ruled that even though there was no actual contradiction between the rules of the ILO Convention and the provisions of EU directives in the same field, the general area covered by the Convention was one which to a large extent had been covered by progressive EU rules, such that Member States could not undertake commitments in this field outside the EU context. The

⁴¹ *Opinion 1/76* (*European Laying-up Fund for Inland Waterway Vessels*) [1977] ECR 741, [4], [7]; *Opinion 1/94* (*WTO Agreement: GATS and TRIPS*) [1994] ECR I-5267, [85].

⁴² See, in particular, in the series of open skies cases Case C-467/98 *Commission v Denmark* (*Open Skies*) [2002] ECR I-9519, [57]; *Opinion 1/94* (n 41) [89].

⁴³ The case—on the laying-up fund for inland waterway vessels—allegedly involved a situation in which the achievement of the Treaty objective required the prior conclusion of an international agreement and could not be attained by adopting internal rules: *Opinion 1/94* (WTO) (n 41) [85]. See also *Opinion 1/03* on the *Lugano Convention* [2006] ECR I-1145, [115].

⁴⁴ *Opinion 1/94* (WTO) (n 41) [88]–[89].

⁴⁵ *Opinion 2/91* on the *ILO Convention* [1993] ECR I-1061, [10]–[11].

⁴⁶ *Opinion 2/91* (n 45) [10]; *Opinion 1/03* on the *Lugano Convention* (n 43) [119].

mere existence of EU rules on broadly the same subject matter was sufficient without the need for any conflict. The Court however drew back in part from this extensive holding on the facts of the case, by ruling that competence was not actually exclusive in the given context, since both the EU rules and the ILO Convention laid down *minimum standards* only, so that there was nothing to prevent Member States from fully complying with EU law.⁴⁷

The ECJ has continued to expand the arena in which Member States are prevented from acting even in the absence of an actual conflict. In the *Greek Maritime Monitoring* case, the Commission brought infringement proceedings against Greece before the ECJ for submitting a proposal on monitoring compliance with the SOLAS Convention to the International Maritime Organization (IMO), within a field of exclusive EU competence.⁴⁸ The ECJ ruled that although the proposal submitted by Greece was not itself a binding measure, it could have led to the adoption of new rules by the IMO which in turn could have affected the existing EU regulation implementing the SOLAS Convention. While the Court accepted that the EU's exclusive competence need not preclude the Member States from actively participating in the IMO, it held that the positions adopted by states within the IMO would first have to be coordinated at EU level, and no state could individually assume obligations likely to affect existing EU rules.⁴⁹

The third and fourth possible examples of exclusive competence respectively were referred to in the ECJ's *Opinion 1/94* on the competence of the EU to conclude the General Agreement on Trade in Services (GATS) and the Agreement on Trade-related Intellectual Property Rights (TRIPS).⁵⁰ These were, in the context of services, the treatment of nationals of non-EU countries, and issue areas which have been completely internally harmonized. Yet despite articulating these two additional grounds for exclusive competence,⁵¹ the Court in *Opinion 1/94* also ruled that the risk that bilateral agreements would lead to distortions in the flow of services in the internal market would not provide grounds for exclusive EU competence.⁵² The Court ultimately ruled that competence to conclude the GATS was shared between the EU and the Member States.⁵³

Opinion 1/94 represented the first high-profile shift by the Court away from its expansive case law on the exclusive nature of the EC's implied external competence. The line of case law from *ERTA*, including *Kramer* and *Opinions 1/75*, *1/76*, and *2/91*, had been in the direction of widening the sphere of external EU competence and extending its exclusive nature. *Opinion 2/92*, which followed shortly after *Opinion 1/94*, also adopted a more measured tone in relation to exclusivity.

Opinion 2/92 (OECD Decision on National Treatment)

[1995] ECR I-521

31. In that regard, the Court has consistently held, most recently in *Opinion 1/94*..., that the Community's exclusive external competence does not automatically flow from its power to lay down rules at internal level. As the Court pointed out in the *AETR* judgment..., the Member States whether acting individually or collectively, only lose their right to enter into obligations with non-member countries as and when there are common rules which could be affected by such obligations.

⁴⁷ *Opinion 2/91* (n 45) [18].

⁴⁸ Case C-47/07 *Commission v Greece* [2009] ECR I-701.

⁴⁹ *Ibid* [27]–[29].

⁵⁰ *Opinion 1/94 on the WTO Agreements (GATS and TRIPS)* [1994] ECR I-5267.

⁵¹ Case C-467/98 *Commission v Denmark* (n 42) [83]–[84]; *Opinion 1/03* (n 43) [122].

⁵² *Opinion 1/94* (n 41) [78]–[79]; Case C-467/98 *Commission v Denmark* (n 42) [85]–[86]; *Opinion 1/03* (n 43) [123].

⁵³ *Opinion 1/94* (n 41) [95]–[96].

In keeping with the highly complex and technical tone of the case law, it is evident that the determination of whether a given field has been completely or exhaustively occupied is far from clear, and requires a definition of the relevant 'field'. In *Opinion 2/92* (OECD) itself, for example, the Court ruled that the internal measures adopted by the EU had not covered all the fields of activity to which the OECD decision was related, and that the EU enjoyed exclusive competence only in areas where internal common rules had been adopted.

In *Opinion 1/94* and, more recently in its *Open Skies* rulings,⁵⁴ the ECJ purported to summarize the various situations set out above in which the EU has so far been held to have exclusive competence. Apart from the lack of clarity in their scope and the debate they have generated, these situations are, according to the Court in *Opinion 1/03* on the Lugano Convention, 'only examples, formulated in the light of the particular contexts with which the Court was concerned'.⁵⁵ Having restated its previous case law, however, the ECJ went on to set out more general guidelines on how to determine whether EU competence in a given instance is exclusive.

Opinion 1/03 (Lugano Convention)

[2006] ECR I-1145

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124. It should be noted in that context that the Community enjoys only conferred powers and that, accordingly, any competence, especially where it is exclusive and not expressly conferred by the Treaty, must have its basis in conclusions drawn from a specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules.

125. In certain cases, analysis and comparison of the areas covered both by the Community rules and by the agreement envisaged suffice to rule out any effect on the former (see *Opinion 1/94*..., *Opinion 2/92*..., and *Opinion 2/00*...).

126. However, it is not necessary for the areas covered by the international agreement and the Community legislation to coincide fully. Where the test of 'an area which is already covered to a large extent by Community rules' (*Opinion 2/91*...) is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis (see, to that effect, *Opinion 2/91*...).

127. That that assessment must include not only the extent of the area covered but also the nature and content of the Community rules is also clear from the Court's case-law referred to in paragraph 123 of the present opinion, stating that the fact that both the Community rules and the international agreement lay down minimum standards may justify the conclusion that the Community rules are not affected, even if the Community rules and the provisions of the agreement cover the same area.

133. It follows from all the foregoing that a comprehensive and detailed analysis must be carried out to determine whether the Community has the competence to conclude an international agreement and whether that competence is exclusive. In doing so, account must be taken not only of the area covered

⁵⁴ Case C-468/98 *Commission v United Kingdom* [2002] ECR I-9427; Case C-467/98 (n 42); Case C-468/98 *Commission v Sweden* [2002] ECR I-9575; Case C-469/98 *Commission v Finland* [2002] ECR I-9627; Case C-471/98 *Commission v Belgium* [2002] ECR I-9681; Case C-472/98 *Commission v Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission v Austria* [2002] ECR I-9797.

⁵⁵ *Opinion 1/03* (n 43) [121].

by the Community rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish.

The Court here sets out a relatively nuanced and context-specific set of guidelines as to the circumstances in which EU competence would be exclusive on the ground that the internal rules adopted by the EU might be adversely affected by an international agreement.

With the apparent intention of codifying the rules on exclusive competences developed in the case law above by the ECJ, the Lisbon Treaty introduced Article 3 TFEU.

1. The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

The second paragraph of this provision on exclusive external competence, however, seems to be at best an over-simplified translation of the principles set out by the ECJ in *Opinion 1/03*, and it seems extremely likely that further clarification will be required and sought from the ECJ in future case law.⁵⁶

Finally, Article 207 TFEU broadens the scope of the exclusive competence of the EU in the field of the common commercial policy, which now covers all aspects of trade in services except transport, the commercial aspects of intellectual property, as well as foreign direct investment.

(E) SHARED COMPETENCE

Despite the extensive and doctrinally intricate case law on the scope of exclusive competence, and despite the expansion of the scope of the important and extensive common commercial policy by the Lisbon Treaty, a substantial part of the EU's external competence remains joint or shared in nature. We have seen that the main fields of EU external and internal competence, apart from CFSP and also economic and employment policy coordination, are now categorized and listed in Article 2 TFEU as including (i) exclusive (ii) shared, as well as (iii) supplementary and supporting competences. Article 4 TFEU elaborates on the category of 'shared competence' by indicating that the EU shall share competence with the Member States in fields which are not covered by the exclusive competences mentioned in Article 3, including the ill-formulated Article 3(2), and it goes on to list a range of fields including the environment, transport, and the area of freedom, security, and justice.

⁵⁶ For criticism of the formulation of this attempt to codify the case law on exclusive external competence, which appeared in the same form in the predecessor Constitutional Treaty, see B de Witte, 'The Constitutional Law of External Relations' in I Pernice and M Polakiewicz (eds), *A Constitution for the European Union: First Comments on the 2003 Draft of the European Convention* (Nomos, 2004).

In an analysis fifteen years ago which remains useful even after the Lisbon Treaty, MacLeod, Hendry, and Hyett identified five situations of joint or shared external competence.⁵⁷ The first is where this is expressly determined by the Treaty Article conferring power on the EU. Examples include agreements within the framework of the EMU, development cooperation, and technical cooperation, where Member States have explicitly retained their competence to negotiate in international bodies and to conclude international agreements.⁵⁸ The ECJ has ruled that this means that Member States may enter commitments *vis-à-vis* non-Member States either collectively or individually, or jointly with the EU.⁵⁹ They may exercise their retained powers either 'collectively in the Council or outside it', and where they act collectively they may adopt acts 'not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States'.⁶⁰

The second situation is where the EU has a power to adopt common internal rules which has not yet been exercised. An example was the case of the common fisheries policy during the transitional period, or the field of patent law at present.⁶¹

The third is where an agreement covers both matters falling within EU competence and matters within Member States competence. The Court ruled to this effect in *Opinion 1/78 (Natural Rubber Agreement)* when it decided that although the field covered by the agreement in question was within the exclusive (common commercial policy) competence of the EU, the financing of this area remained within the competence of the Member States.⁶² Since this was a central element of the agreement and the participation of the Member States was required, competence was deemed to be shared.⁶³

The fourth situation is where EU competence derives from the existence of internal 'minimum rules' where Member States are entitled to maintain higher standards which will not 'affect' the scope of the internal EU rules, as we saw in the case of *Opinion 2/91* on ILO Convention No 170. The fifth situation includes certain fields where EU and Member State competence can co-exist without either displacing the other. An example can be found in the field of intellectual property, when the nature of the rights created at the EU level, such as the EU trade mark, is such that they do not necessarily replace national-level intellectual property rights.

We have seen above that some categories of shared competence can become exclusive through pre-emption by the adoption of EU action in accordance with the Lugano Opinion guidelines and with Article 3(2) TFEU, while other categories of shared competence, such as development cooperation and humanitarian aid, as well as research, technological development, and space, are explicitly deemed by the Treaty to be non-pre-emptive.⁶⁴ Similarly, environmental policy competence is listed as being shared in Article 4(2) TFEU, but Article 191(4) indicates that EU external competence in this field is not to be pre-emptive, and shall be 'without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements'. There are also other areas of EU policy competence, such as culture, education, vocational training, public health, sport, and others, which cannot become exclusive or pre-emptive through exercise in the external domain, because they are expressly categorized as 'supplementary and coordinating competence' in Article 6 TFEU, as well in the specific Treaty provision which outlines the details of the EU's powers in that field.

⁵⁷ I MacLeod, I Hendry, and S Hyett, *The External Relations of the European Communities* (Clarendon Press, 1996) 63–64.

⁵⁸ Arts 219(4), 191(4), and 211 TFEU.

⁵⁹ See, eg, Case C-316/91 *European Parliament v Council (EDF)* [1994] ECR I-625, on the Lomé Convention.

⁶⁰ Cases C-181 and 248/91 *European Parliament v Council and Commission (Bangladesh)* [1993] ECR I-3685, [12].

⁶¹ Case C-431/05 *Marck Génériques—Produtos Farmacêuticos Lda v Merck & Co* [2007] ECR I-7001, [39]–[47].

⁶² *Opinion 1/78 (International Agreement on Natural Rubber)* [1979] ECR 2871.

⁶³ See for similar reasoning in relation to the GATS, prior to the adoption of the Lisbon Treaty, *Opinion 1/08 on the Schedules of Specific Commitments annexed to the GATS Agreement* [2009] ECR I-21129.

⁶⁴ Art 4(3) and (4), governing humanitarian aid, cooperation, and research and development, provides that 'the exercise of that competence shall not result in Member States being prevented from exercising theirs'.

In other words, the category of shared external competence is a broad and differentiated one, and the exact type of shared competence in any given field may be affected by the case law of the ECJ on the subject, by the Treaty's classification of the competence, and by the terms of the legal basis in the Treaty which outlines the detail of the EU's competence in that field. However, in any case where competence is shared between the Member States and the EU, each is under a duty to cooperate closely due to the requirement of unity in the international representation of the EU.⁶⁵

(f) SUMMARY

- i. It is evident from the discussion above that the constitutional core of EU international relations law has been shaped over time by the ECJ, and that it centres on the notions of (a) capacity: whether the EU has the capacity to enter international agreements; (b) competence: whether the EU has external competence, either by express grant under the Treaty or as implied from the existence of internal rules or competence; and (c) exclusivity: whether the external competence of the EU in a given field is exclusively held by the EU or is shared with the Member States.
- ii. It is a highly complex, difficult, and detailed case law which does little to assist the clarity and comprehensibility of the EU's international role either for other actors on the global stage, or indeed for students! Nonetheless, the basic foundations of the doctrine laid down in ERTA in 1971 remain in place, as is evident from the more recent *Opinion 1/03* on the Lugano Convention.
- iii. The Treaty of Lisbon set out to codify this case law by describing the various categories of competences (both internal and external)—exclusive, shared, supplementary and coordinating, and others—conferred upon the EU and setting out a list of the fields they cover. While this brings a certain superficial degree of clarification, many questions remain to be answered about the relationship between the new Treaty provisions and the Court's case law, in particular in relation to the provision concerning implied exclusive competence in Article 3(2) TFEU.
- iv. Further, the exact scope and nature of external EU competence cannot be determined from the classification in Articles 3–6 alone, but depend also on the precise terms of Treaty provisions which confer power in a given field, and on the prior legislative activity of the EU in particular fields.

4 A SURVEY OF THE FIELDS OF EU EXTERNAL ACTION UNDER THE TREATIES

Following the overview above of the general constitutional principles underpinning external EU action, we turn now to the foundations in the Treaties, the TEU and the TFEU, of some of the most important external policies. Below, four broad fields of EU external action will briefly be surveyed, before we move on to the special field of the Common Foreign and Security Policy. The four fields are (i) the common commercial policy, (ii) association, partnership, cooperation, and neighbourhood policy, (iii) development, technical cooperation, and humanitarian aid, and (iv) the external dimension of other internal policies.

⁶⁵ *Opinion 1/94* (n 42) [108]; *Opinion 1/08* (n 63) [136]; see also the discussion of mixed agreements below.

EU international action is now governed by Part V of the TFEU, entitled 'The Union's External Action'. This Part begins with a 'chapeau clause' in Article 205 TFEU on the principles guiding EU international action,⁶⁶ and ends with a solidarity clause in Article 222 governing relations between Member States and the EU in the event of a terrorist attack or natural or man-made disaster. Notably, the CRSP is not included within Part V of the TFEU, but is dealt with separately within the TEU.⁶⁷

The list of fields of action in Part V of the TFEU does not reflect the full breadth or scope of EU external action. We have seen above how external EU power has been implied, according to a kind of principle of parallelism, from internal EU powers and rules. The case law has now been loosely codified⁶⁸ in Article 216(1) TFEU:

The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

In other words, every policy of the EU has a potential external dimension, including fields such as social policy, environmental policy, and the area of freedom, security, and justice. Notably, Article 216 TFEU reproduces the textual formula of Article 3(2) TFEU on EU exclusive implied powers, although in the context of Article 216 it seems to refer only to the existence of external EU competence rather than to its exclusive nature.

(A) THE COMMON COMMERCIAL POLICY (CCP)

The Lisbon Treaty brought significant changes to the Common Commercial Policy. For many years the scope of the CCP was determined primarily by the rulings of the ECJ, but in recent decades it has been shaped by a kind of dialogue between ECJ rulings and Treaty amendments following a series of Intergovernmental Conferences.

Five important results of the Lisbon Treaty in this field can be noted. *First*, the distinctions previously drawn between various types of trade in services has disappeared, and the CCP now covers trade in services as a whole, meaning a broader scope for the EU's exclusive external competence in this field. *Secondly*, the same is true for the commercial aspects of intellectual property and foreign direct investment.⁶⁹ *Thirdly*, transport policy, which is a competence shared between the EU and the Member States under Article 4(2)(g) TFEU, remains outside the scope of the CCP.⁷⁰ *Fourthly*, despite the fact that trade in services is now an exclusive EU competence, Article 207(4)(3) TFEU provides exceptionally for unanimity in the field of trade in cultural, audiovisual, social, educational, and

⁶⁶ See above at Section 2(b).

⁶⁷ See Title V, Ch 2, Arts 23–46 TEU.

⁶⁸ For criticism of the codification as establishing a potentially wider basis for implied external powers than before see Cremona (n 38).

⁶⁹ The transition from shared to exclusive EU competence in the sphere of foreign direct investment is likely to create difficulties given the large network of existing bilateral investment treaties (BITs) between Member States and third countries. Recent case law has also contributed to the complexity, since the ECJ ruled in *Case C-205/06 Commission v Austria* [2009] ECR I-1301; *Case C-249/06 Commission v Sweden* [2009] I-1335; *Case C-118/07 Commission v Finland* [2009] ECR I-889 that Member States had infringed Art 351 TFEU (ex Art 307 EC) by not taking the necessary steps to ensure the compliance of their BITs with EU law. Following the Court's suggestion to the Commission in these cases 'to take any steps which may facilitate mutual assistance between the Member States concerned and their adoption of a common attitude', the Commission proposed the adoption of a reg establishing transitional arrangements for bilateral investment agreements between Member States and third countries, COM(2010)344 final.

⁷⁰ Art 207(5) TFEU.

health services. Fifthly, the European Parliament is finally accorded a full legislative role in the CCP. Article 206 TFEU now sets out the aims of the CCP:

By establishing a customs union... the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment; and the lowering of customs and other barriers.

Article 207(1) TFEU goes on to describe the measures to be adopted within the framework of the CCP:

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements related to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

Following the Lisbon Treaty, Article 207(1) TFEU now contains a sentence that apparently gave rise to some anxiety on the part of the Commission that the Council or the EEAS might seek greater involvement in or control over the CCP, which hitherto has been significantly shaped by the Commission:

[T]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

The institutional framework of the CCP, which used to be quite distinctive, has also been aligned broadly with other EU decision-making processes. The ordinary legislative procedure now applies to the adoption of measures which define the framework for implementing the CCP.⁷¹ This means that, for the first time, the European Parliament acts as a co-legislator within the CCP. Similarly, the consent of the European Parliament is now required for the conclusion of an international agreement of the CCP.⁷²

The CCP covers both unilateral EU measures, for example anti-dumping instruments, and conventional measures negotiated with third countries and international organizations, such as trade agreements. The Court in an early case ruled that the proper functioning of the customs union justified a wide interpretation of the powers which the Treaty conferred in this field.⁷³ The link between the CCP and the original project of founding the EEC's common market may explain many of the developments in this field, including the Commission's and the ECJ's determination to establish and expand exclusive EU competence in the early years.⁷⁴

In *Opinion 1/75*, the Court defined the scope of the CCP very broadly by reference to the external trade policy of a state,⁷⁵ declaring that it was a field which developed progressively, through a combination of internal and external measures, without any priority of one kind over the other.⁷⁶ The Court ruled further that the defence of the Community's common interest, the need to

⁷¹ Art 207(2) TFEU.

⁷² Art 218(6) TFEU.

⁷³ Case 8/73 *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH* [1973] ECR 897, [4].

⁷⁴ M. Cremona, 'EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders' in JHH Weiler (ed), *Towards a Common Law of International Trade: The EU, the WTO and the NAFTA* (Oxford University Press, 2000).

⁷⁵ P Koutrakos, *EU International Relations Law* (Hart, 2006) 34, to the effect that this comparison makes the EC's trade policy competence appear potentially unlimited.

⁷⁶ *Opinion 1/75 (Understanding on a Local Cost Standard)* [1975] ECR 1355.

prevent distortions of competition, and the principle of Member State loyalty to the EC meant that competence must be exclusive.⁷⁷ However, although the ECJ continued to confirm the exclusivity of EU competence in the CCP, it did not interpret this exclusivity strictly. Some scope was left for gradual implementation of the CCP, during which period the Member States were not precluded from acting, provided their activities were regulated by EU law. In *Donckerwolcke* the ECJ ruled that the Member States could deviate from CCP rules, albeit only under 'specific authorization' by the EU.⁷⁸

The Court's dynamic construction of the scope of the CCP was significant in the 1970s when there was a tendency towards a more regulatory and less liberalizing approach to international trade. This move involved also taking the concerns of developing countries more seriously into account. In *Opinion 1/78 (Natural Rubber Agreement)*, the ECJ emphasized the complex objectives of commodities agreements of this kind, and ruled that the EU must be able to avail itself of 'more elaborate means' to further the development of international trade.⁷⁹ Thus the CCP could not be restricted only to the traditional aspects of external trade, and 'the Treaty... does not form a barrier to the possibility of the Community's developing a commercial policy aiming at a regulation of the world market for certain products rather than at a mere liberalization of trade'.⁸⁰ Ultimately the Court ruled that the EU had exclusive competence in substantive terms to enter into the agreement, but that the role of the Member States in financing the agreement meant that their involvement was also required. This approach towards trade agreements pursuing developmental aims was confirmed in the *General System of Preference (GSP)* judgment.⁸¹

The international trade policy picture changed again after 1986 with the Uruguay Round of trade negotiations, which included coverage of trade in services, trade-related aspects of intellectual property rights, and trade-related investment measures. These issues were brought together with the former GATT in the agreements establishing the World Trade Organization (WTO) in 1994. Since the Commission considered that the Community had exclusive competence to sign the final WTO agreement, but the Member States did not wish to give up their powers in this respect, the Court was asked for its opinion. In *Opinion 1/94*, the ECJ decided that all WTO agreements on trade in goods fell within the EU's CCP. Trade in services could not, as a matter of principle, be excluded from the scope of what was then Article 133 EC (now Article 207 TFEU),⁸² but the ECJ ruled that it must take into account the definition of trade in services in the GATS. The Court's conclusion was that competence over cross-border services was exclusive, but that the Member States in principle retained their competence over other modes of supplying services.⁸³ Transport services did not fall within the CCP but remained implied powers under the EC Treaty chapter on transport, and therefore were shared between the EU and the Member States.⁸⁴ The Court ruled to the same effect for much of the TRIPS Agreement. Consequently, since the EU and the Member States were jointly competent to conclude both GATS and TRIPS, the whole WTO Agreement was concluded as a 'mixed agreement'.

Opinion 1/94 was an important opinion which marked the end of the expansion of EU competence under the CCP, as well as the end of the period of judicial activism with regard to exclusive

⁷⁷ For a critique of some of these arguments see P Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations* (Oxford University Press, 2004) 15.

⁷⁸ Case 41/76 *Donckerwolcke* (n 37) [32].

⁷⁹ *Opinion 1/78* (n 62).

⁸⁰ *Ibid* [43]–[53].

⁸¹ Case 45/86 *Commission v Council (first GSP case)* [1987] ECR 1493.

⁸² *Opinion 1/94 (WTO Agreement: GATS and TRIPS)* [1994] ECR I-5267, [36]–[41].

⁸³ For a critique of the Court's reasoning in relation to the movement of persons see Eeckhout (n 77) 30.

⁸⁴ These powers could become exclusive under the conditions set in Case 22/70 *ERTA* (n 29).

EU competence.⁸⁵ Subsequent cases confirmed this and indicated that trade measures would not necessarily always be perceived as trade or commercial policy measures if they pursued other objectives such as environmental policy.⁸⁶

The Treaties of Amsterdam and Nice made further changes, extending the scope of the CCP further and eventually including agreements relating to services and intellectual property while ruling out exclusive competence in this respect, and providing exceptions for other sensitive areas of shared competence.⁸⁷ The lack of clarity resulting from the Nice Treaty amendments to the CCP gave rise to the ruling of the ECJ in *Opinion 1/08* on the division of competence between EU and Member States in the conclusion of 'horizontal' transport agreements.⁸⁸

As we have seen above, the Lisbon Treaty wrought important further changes to the development of the CCP. EU competence no longer depends on a distinction between various categories of trade in services, but the CCP covers trade in services as a whole as well as the commercial aspects of intellectual property and foreign direct investment, thus expanding significantly the exclusive external competence of the EU. Transport however remains outside the CCP⁸⁹ and is a shared competence,⁹⁰ which is likely to mean that trade agreements containing significant provisions on transport will continue to be 'mixed' agreements.⁹¹

Finally, joint involvement of Member States and the EU in the making of agreements may well also remain in certain sensitive spheres due to the new provisions governing trade in cultural and audiovisual services, and in social, education, and health services which, by way of derogation from the majority voting applicable under the ordinary legislative procedure, preserve Council unanimity where the agreements being negotiated risk 'prejudicing the Union's cultural and linguistic diversity' or 'disturbing the national organization' of social, educational, and health services or prejudicing the responsibility of Member States to deliver them.⁹²

Last but not least, the European Parliament is finally accorded full legislative power alongside the Council in the field of the CCP. It is up to the Parliament and the Council, adopting regulations in accordance with the ordinary legislative procedure, to define the framework for implementing the common commercial policy.⁹³ A second significant change is the required consent of the European Parliament for the conclusion of international trade agreements.⁹⁴ While the Parliament is likely to develop new modalities for exercising this new power, and to bring democratic and human rights concerns to bear more on the goals of EU trade policies, the Council is clearly concerned about the impact of growing parliamentary involvement in external relations.⁹⁵

⁸⁵ See also *Opinion 2/92 (Third Revised Decision of the OECD on National Treatment)* [1995] ECR I-521 in which the ECJ confirmed its reasoning in *Opinion 1/94* above.

⁸⁶ *Opinion 2/00* (n 21).

⁸⁷ For an analysis of this stage of development of the CCP see M. Cremona, 'A Policy of Bits and Pieces! The Common Commercial Policy After Nice' (2002) 4 CYELS 61.

⁸⁸ These are agreements negotiated by the Commission on behalf of the Member States to bring existing transport agreements between Member States and third countries into line with EU law, and which in this case concerned commitments entered into under the GATS. See *Opinion 1/08* (n 63), and also Case C-13/07 *Commission v Council*, (*Accession of Vietnam to the WTO*), order of 10 June 2010, which was withdrawn by the Commission following *Opinion 1/98*.

⁸⁹ Art 207(5) TFEU.

⁹⁰ Art 4(2)(g) TFEU.

⁹¹ See *Opinion 1/08* (n 63) [152]–[173], distinguishing the EU's exclusive commercial policy competence from its shared transport policy competence; S. Adam and N. Lavranos, Note (2010) 47 CMLRev 1523; 1536–1538.

⁹² Art 207(4), clause 3, (a)–(b).

⁹³ Art 207(2) TFEU.

⁹⁴ Art 218(6)(b) TFEU.

⁹⁵ The Council took the unusual step of publishing an adverse opinion by its legal service on the revised Framework Agreement on relations between the European Parliament and the Commission for the legislative period 2009–2014, [2010] OJ L304/47, citing the provisions on international agreements as being of particular concern, <http://register.consilium.europa.eu/pdf/en/10/st13/st13018.en10.pdf>.

(B) ASSOCIATION, PARTNERSHIP, COOPERATION, AND NEIGHBOURHOOD RELATIONS

Article 217 TFEU provides:

The Union may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

The power to conclude Association Agreements was, apart from the CCP, the only express external relations power of the EU until the Single European Act in 1987. The first Association Agreements were concluded with Greece and Turkey, and with the African, Caribbean, and Pacific (ACP) countries under the Yaoundé Convention, a few years after the entry into force of the EEC Treaty.⁹⁶ Many others have followed since. The Association Agreements concluded with the states of central and eastern Europe were known as 'Europe Agreements', and took account of the fact that these states were likely soon to become EU members. These agreements were extensively invoked before the Court, which ruled consistently that, like other international agreements, they form an integral part of the EU legal order and that the ECJ enjoys broad jurisdiction over their provisions.⁹⁷

The Treaty itself provides no indication of what an association should involve apart from the skeletal provisions of Article 217 TFEU. The initial Association Agreements in fact included measures covering the entire subject matter of the Treaty.⁹⁸ Amongst the most important of the Association Agreements currently in force are the agreements with the ACP countries, most recently the revised Cotonou Agreement. Other important Association Agreements include the European Economic Area (EEA) agreement, the stabilization and Association Agreements with some of the Western Balkans, and the Euro-Mediterranean Agreements.

The EU also concludes other agreements which are similar to Association Agreements but provide for less intensive forms of integration or a narrower range of fields. Examples are the cooperation and partnership agreements concluded with the countries of the ex-Soviet Union, now members of the Commonwealth of Independent States (CIS), and interregional cooperation agreements with the countries of the Latin American, South-East Asian, and Arab states.

The Lisbon Treaty provided a new legal basis for the EU to conclude specific agreements with neighbouring countries, establishing a 'special relationship' with the latter and 'aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterized by close and peaceful relations based on cooperation'.⁹⁹ Article 8(1) TEU thus gives Treaty recognition to the policy introduced by the EU in 2004 and known as the European Neighbourhood Policy.¹⁰⁰ Neighbourhood agreements may contain 'reciprocal rights and obligations' as well as the possibility of undertaking activities jointly.¹⁰¹ Considering the position of

⁹⁶ [1963] OJ L26/296; [1964] OJ L27/3685; [1964] OJ L93/1430.

⁹⁷ Case C-63/99 *Glozzek* [2001] ECR I-6369; Case C-235/99 *Kondova* [2001] ECR I-6427; Case C-257/99 *Barkoci and Malik* [2001] ECR I-6557; Case C-268/99 *Jany* [2001] ECR I-8615; Case C-162/00 *Land Nordrhein-Westfalen v Pokrzeptowicz-Meyer* [2002] ECR I-1049.

⁹⁸ See for more detailed analysis S. Peers, 'EC Frameworks of International Relations: Co-operation, Partnership and Association' in Dashwood and Hillion (n 32); K. Lenaerts and B. De Smijter, 'The European Community's Treaty Making Competence' (1996) 16 YBEL 1.

⁹⁹ Art 8(1) TEU.

¹⁰⁰ The ENP has been described as 'a particularly developed expression of a policy designed to meet the challenge of ensuring coherence between the three EU pillars': M. Cremona and C. Hillion, 'L'Union fait la force! Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy', EUI Working Paper 2006/39.

¹⁰¹ Art 8(2) TEU.

this new legal basis in the Treaties, outside the title of the TFEU devoted to EU external action, and given the absence of any specific procedure, neighbourhood agreements do not seem to be linked with any particular one of the categories of agreements described above. The introduction of this provision may be politically explained in the light of the successive enlargements of the past decade. If the EU considers itself to be coming closer to its outer geographical limits, it may be creating a new framework for those neighbouring countries that may not be eligible for membership.

(c) DEVELOPMENT POLICY, TECHNICAL COOPERATION, AND HUMANITARIAN AID

Prior to the adoption of the Maastricht Treaty in 1993, there was no explicit EU Treaty basis for these three fields. Instead, they had been developed on the basis of other external policies including commercial policy and association, as well by using the residual powers provision in Article 352 TFEU (ex Article 308 EC, and before that Article 235 EEC).

We saw in *Opinion 1/78* that the ECJ accepted the use of trade instruments with a development dimension, although it ruled that the provision of financing by Member States would result in an agreement of the kind at issue being 'mixed'.¹⁰² Following that case, the association and trade legal bases of the Treaty were used for many agreements concluded with developing countries. The Court in the *Bangladesh* case ruled that the Community did not have exclusive competence in the field of humanitarian aid, and that Member States were not precluded from exercising their competence collectively within the Council or outside it.¹⁰³ The *Parliament v Council (Lomé IV)* ruling established that EU competence in the field of development was not exclusive, that Member States were entitled to enter into commitments themselves, and that competence to implement the EU's financial assistance was shared by the EU and its Member States.¹⁰⁴

The Maastricht Treaty subsequently inserted an independent Treaty basis for development policy, which is now to be found in Article 208 TFEU, and the Nice Treaty later provided a legal basis for 'economic, financial and technical cooperation' with third states, now to be found in Article 212 TFEU. In both of these areas, EU policy is expressly required to contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.

In *Parliament v Council (European Investment Bank Guarantee)*, the ECJ clarified the relationship between these fields.¹⁰⁵ The Court ruled that it cannot be inferred from the reference to 'third countries' in Article 212 TFEU (ex Article 181a EC) that all economic, financial, and technical cooperation with developing states may be undertaken on the sole basis of this provision. Otherwise, there would be a risk of this provision being used to circumvent the specific objectives of development cooperation set out in Article 208 TFEU (ex Article 177 EC). Insofar as a measure pursues specific development objectives, it must therefore be based on Article 208 TFEU. Since the entry into force of the Lisbon Treaty, the existing joint legislative powers of the European Parliament are extended beyond the field of development cooperation to include also the field of economic, financial, and technical cooperation.

(d) EXTERNAL DIMENSIONS OF OTHER INTERNAL POLICIES

While the external dimension of many internal policies was initially developed on the basis of the implied powers doctrine and the residual power clause of Article 352, later Treaty amendments provided a range of express external powers.

One of the most important such fields of external EU action is environmental policy. This is a good example of a field in which internal and external activities are often so closely linked that EU internal competence would be limited in effect without its external counterpart.¹⁰⁶ As soon as an explicit environmental policy title was inserted into the EEC Treaty by the Single European Act, provision was also made for external competence in Article 191(4) TFEU (ex Article 174(4) EC). The Lisbon Treaty has added a new express external power for the EU to combat climate change in Article 191(1). External competence in the environmental field is shared with the Member States.¹⁰⁷

Other areas of EU external policy include education,¹⁰⁸ vocational training,¹⁰⁹ culture,¹¹⁰ public health,¹¹¹ in which the EU is explicitly required to foster cooperation with third countries and international organizations. These areas are now categorized by Article 6 TFEU on competences as supporting, supplementary, or coordinating competences. Other areas providing for cooperation with third countries are trans-European networks under Article 171(3) TFEU and research, technological development, and space under Article 186 TFEU.

In the area of social policy, Article 153 TFEU (ex Article 118 EC) was held to confer competence to conclude international agreements, even though the EU's internal legislative competence in the field was defined in rather subsidiary terms. Such external competence, as we have seen from *Opinion 2/91*¹¹² and now from Article 3(2) TFEU, becomes exclusive where there is EU legislation which could be affected by the provisions of the international agreement.

The operation of the single currency and of monetary union also requires international cooperation. Article 219 TFEU provides for the conclusion of international agreements on an exchange-rate system for the Euro in relation to non-EU currencies.¹¹³

The field of energy policy was given an express legal basis in Article 194 TFEU by the Lisbon Treaty, and although external competence is not explicitly mentioned, the EU has exercised implied external competence in the field for some time.¹¹⁴ This competence is shared between the EU and the Member States.¹¹⁵

With regard to policies concerning 'Border checks, asylum and immigration', which are part of new Title V of Part III of the TFEU (the Area of Freedom, Security, and Justice, AFSJ), there is clearly, on the basis of ERTA reasoning and Article 3(2) TFEU, competence to conclude agreements over the

¹⁰⁶ D Thiele, 'European Community External Relations in the Field of the Environment' (2001) 10 European Environmental Law Review 252.

¹⁰⁷ Art 4(2)(e) TFEU. Art 191(4) TFEU also provides: 'within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.'

¹⁰⁸ Art 165(3) TFEU.

¹⁰⁹ Art 166(3) TFEU.

¹¹⁰ Art 167(3) TFEU.

¹¹¹ Art 168(3) TFEU.

¹¹² *Opinion 2/91* (n 45).

¹¹³ For controversy over whether the EU or the ECB (with its own separate legal personality) has external competence in this field see C Zilioli and M Selmayr, 'The External Relations of the Euro Area: Legal Aspects' (1999) 36 CMLR 273; C Herrmann, 'Monetary Sovereignty over the Euro and External Relations of the Euro Area: Competences, Procedures and Practice' (2002) 7 EEA Rev 1, 23.

¹¹⁴ For a brief overview of EU activity in the field see the European Council document 'The External Dimension of European Union Energy Policy', available at www.european-council.europa.eu/media/171260/ec04.02.2011-external-dimension-factsheetfinal.en.pdf

¹¹⁵ Art 4(2)(f) TFEU.

¹⁰² *Opinion 1/78* (n 62).

¹⁰³ Cases C-181 and 248/91 (n 60) [14]–[16].

¹⁰⁴ Case C-316/91 *European Parliament v Council* (n 59).

¹⁰⁵ Case C-155/07 *European Parliament v Council* [2008] ECR I-8193.

whole area.¹¹⁶ Although the EU had already concluded such agreements,¹¹⁷ the Lisbon Treaty added an express external competence for the EU to conclude readmission agreements with third countries in relation to third-country nationals who do not fulfil the conditions required by one of the Member States.¹¹⁸ More generally, migration issues have been integrated into the EU's overall relations with third countries. Finally, the ECJ held in *Opinion 1/03* held that the EU had exclusive competence to conclude the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, a subject covered by Title V of Part III of the TFEU.¹¹⁹

Since the entry into force of the Lisbon Treaty, the former third Pillar of the EU governing Police and Judicial Cooperation in Criminal matters (PJCC) has, subject to a transitional period,¹²⁰ been integrated into Title V of Part 3 of the TFEU on the AFSJ. Even though the AFSJ legal regime maintains certain specificities in comparison with other fields of EU competence,¹²¹ it is subject to the general rules and principles governing EU international action. The objectives of this policy field include international cooperation in criminal matters, facilitating mutual recognition of judgments, police and judicial cooperation in criminal matters having a cross-border dimension, and perhaps the conclusion of international agreements in fields where common EU rules are established concerning the definition of serious cross-border criminal offences and sanctions.¹²²

The EU has recently concluded an agreement with the US on the processing and transfer of Financial Messaging Data for the purposes of the Terrorist Finance Tracking Programme, using Articles 87 and 88 TFEU on police cooperation as a legal basis.¹²³ Even before the entry into force of the Lisbon Treaty, the Union had already negotiated and concluded international agreements with third countries or international organizations in the field of PJCC.¹²⁴

Finally, it should be noted that some of the important agencies set up on the basis of former Title VI TEU, in particular Europol and Eurojust, have been vested with their own powers to conclude agreements with third countries and international organizations.¹²⁵

5 THE COMMON FOREIGN AND SECURITY POLICY

The emergence of the EU's Common Foreign and Security Policy, formerly the Second Pillar, has been examined briefly in Chapter 1. The focus of the present section is on the status of the CFSP within the new institutional framework, which was a matter of significant disagreement amongst the negotiators of the Constitutional Treaty and the Lisbon Treaty. Ultimately, despite the single legal personality of

the EU, the CFSP remains apart from the other fields of EU action and is governed by a different set of institutional and procedural rules.

The key differences, reflected in the terms of Article 24(1) paragraph 2 TEU, are that (i) the institutions which have the primary role in shaping the CFSP are the European Council and the Council, (ii) the Commission's role is very much secondary and the Parliament is restricted to a mainly consultative role, (iii) no 'legislative acts' can be adopted, but only the range of special CFSP instruments described below, (iv) the CFSP is to be implemented and carried out by the High Representative and by the Member States, and (v) the ECJ has no jurisdiction over the provisions of the CFSP, except for the boundary-policing provision of Article 40 TEU and in relation to challenges against individual sanctions in accordance with Article 275 TFEU.

(A) THE SCOPE OF THE CFSP

The Treaty itself refers to the scope of the CFSP in very wide terms, as covering 'all areas of foreign policy and all questions relating to the Union's security'.¹²⁶ Two apparent aims of the Treaty provisions which articulate the relationship between the CFSP and the rest of the EU's action on the international scene are to ensure consistency and a significant degree of autonomy for the CFSP. Article 23 TEU declares:

The Union's action on the international scene [in the field of CFSP] shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with the general provisions [governing EU external action as a whole].

As we have seen above, the objectives listed in Article 21 TEU governing EU external action as a whole include support for democracy, the rule of law, human rights and international law, preservation of peace and security in accordance with the UN Charter, the aims of the Helsinki Final Act, and the Paris Charter. At the same time, other Treaty provisions demonstrate the importance of the CFSP within the overall aims of the EU and other external policies. Article 22(1) TEU, paragraph 2 declares that:

Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union.

The maintenance and reinforcement of the distinctiveness of the CFSP even within the newly integrated EU with its single legal personality are further underscored by the amended clause governing the relationship between the CFSP and other parts of EU policy. While before the adoption of the Lisbon Treaty priority was given to what was then the Community pillar over the CFSP,¹²⁷ Article 40 TEU now sets the CFSP on an equal footing with all other EU policies and provides that neither shall affect the other:

The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

¹²⁶ Art 24 TEU.

¹²⁷ Former Art 47 TEU had provided that 'nothing in this Treaty [the TEU] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them'. The ECJ reinforced this priority in its case law: see, eg, Case C-91/05 *Commission v Council (ECOWAS)* [2008] ECR I-3651.

¹¹⁶ M Cremona, J Monar, and S Poll (eds), *External Dimensions of the Area of Freedom, Security and Justice* (Peter Lang-PIS, 2011); M Cremona, 'EU External Action in the JHA Domain: A Legal Perspective', EUI Working Paper in Law 24/2008.

¹¹⁷ See, eg, the re-admission agreements with Hong Kong, Sri Lanka, Macao, Albania, and Moldova: respectively SEC(2003)255, [2004] OJ L143/97, COM(2004)92, [2007] OJ L334/149.

¹¹⁸ Art 79(3) TFEU.

¹¹⁹ *Opinion 1/03* (n 43).

¹²⁰ Lisbon Treaty Protocol No 36, Arts 9 and 10.

¹²¹ Ch 25.

¹²² Arts 82 and 83 TFEU. These areas of criminal activity are: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. See also the agreement signed between the EU and Japan on mutual legal assistance in criminal matters, [2010] OJ L39/20.

¹²³ [2010] OJ L195/5.

¹²⁴ The EU began to exercise its contractual powers in this field in 2003 by concluding three agreements: two with the US on extradition and mutual legal assistance respectively, and one with Iceland and Norway on the application of certain provisions of the EU Convention on Mutual Assistance in Criminal Matters of 2000.

¹²⁵ Europol has already concluded a wide range of bilateral operational or strategic agreements with other states and international organizations: Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office [2009] OJ L121/37, Art 23.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

Article 24 TEU provides that the CFSP is to include all questions relating to the security of the Union, including the progressive framing of a common defence policy, which may lead to a common defence.

The scope of the CFSP is thus potentially extremely broad,¹²⁸ and is described both in terms of its objectives and of the instruments supplied to achieve those objectives. These instruments include general guidelines adopted by the European Council, decisions adopted by the Council defining specific operational action by the Union where it is deemed to be required, positions adopted by the Council, which define the approach of the Union to a particular matter of a geographical or thematic nature, and arrangements for the implementation of the two latter categories of decisions.¹²⁹ Amongst the other instruments mentioned which contribute to building the CFSP are information and consultation on any matter of foreign and security policy of general interest and international agreements.

There is clearly an overlap of competence between the CFSP and other external policies of the EU.¹³⁰ Given that it covers 'all areas of foreign policy and all questions relating to the Union's security', economic matters may clearly be implicated. Yet since the differences between the procedures, the powers of the institutions, and the guarantees for individuals such as judicial oversight are so important, the question of the borderline between the CFSP and other areas of EU powers is crucial.

The limits of Member State powers when acting outside the scope of what was then the Community were initially addressed by the Court in cases pre-dating the creation of the CFSP, when the conduct by Member States of their foreign policies was subject to 'European political cooperation' (EPC) regulated by the SEA. In *Centro-Com*, concerning action by the Member States pursuant to a UN Sanctions Regulation against Serbia and Montenegro, the ECJ ruled that the Member States' powers 'must be exercised in a manner consistent with Community law'.¹³¹ Even if they pursued foreign and security objectives, measures the effect of which was to restrict the export of products could not be treated as falling outside the scope of the CCP, but had to respect the provisions of the CCP. Applied to the CFSP context, this implies that even when acting within the scope of the CFSP the Member States must respect other aspects of EU (formerly EC) law. Secondly, the ECJ ruled that although the CFSP applies in principle to all areas of foreign and security policy, it does not necessarily cover areas where there is another competence such as the CCP.¹³²

This approach was confirmed and clarified by the ECJ in its *Ecovas* judgment.¹³³ The Council adopted a joint action (CFSP) on combating the spread of small arms and light weapons. Amongst the measures covered by the joint decision to achieve these goals was the provision of assistance to third countries. In December 2004, the Council adopted a decision which implemented the contested

joint action to enable the EU to make a financial contribution to the Economic Community of West African States (ECOWAS) which had adopted a Moratorium on Small Arms and Light Weapons. The Commission criticized the choice of the second (CFSP) pillar as a legal basis for this decision, arguing that it impinged upon EC competences in the area of development cooperation and infringed former Article 47 EU.¹³⁴ The ECJ endorsed the Commission's view and ruled that a measure having legal effects adopted under the CFSP 'affected' the provisions of what was then the EC Treaty within the meaning of Article 47 EU 'whenever it could have been adopted on the basis of the EC Treaty, it being unnecessary to examine whether the measure prevents or limits the exercise by the Community of its competences'. The ECJ rejected the argument that, by comparison with the objectives of the disputed measure to preserve peace and strengthen international security, its concern to assist the development of the countries concerned was purely incidental, and the measure was annulled.¹³⁵

Article 47 TEU, which was central to the Court's ruling in *ECOWAS*, has now been replaced by Article 40 TEU, which no longer subordinates the CFSP to other EU policies, but stipulates instead that neither field shall affect the application of the procedures or the extent of exercise of the powers of the other. This change was part of the bargain amongst Lisbon Treaty negotiators, within which the *quid pro quo* for the full integration of the PJCC within the general EU framework was the enhancement and upgrading of the status of the CFSP as an autonomous policy field with its own set of norms, particularly in its relationship to the rest of the EU law and policy framework. Each field now stands on an equal footing, which is likely to create significant complexity when a legal measure touching on both CFSP and other EU policy fields is to be adopted, and there are incompatible procedures to be followed within each field.¹³⁶ This issue will undoubtedly return to the ECJ again before too long.¹³⁷

The famous *Kadi* case concerning the legality of EU 'smart sanctions' (regulations imposing anti-terrorist sanctions on individuals) also dealt with the question of overlapping competences, this time as between provisions of the former TEU and several former provisions of the EC Treaty.¹³⁸ The ECJ gave a convoluted ruling on the relationship between CFSP objectives and the various EC Treaty provisions which ultimately upheld the use of the legal bases in question, but most of the judgment on this question has now been rendered redundant by the new provision inserted by the Lisbon Treaty in Article 75 TFEU permitting the adoption of restrictive measures against individuals.¹³⁹ One part of the ruling on this issue which may however retain its relevance was the Court's rejection of any direct connection between the EU flexibility clause (now Article 352 TFEU) and the objectives of the CFSP.¹⁴⁰ This suggests that the ECJ is likely to be protective of the CFSP and to protect it from encroachment by the exercise of other EU competences, in particular in the light of the new provision in Article 40 TEU.

(B) THE CONSTITUTIONAL NATURE OF THE CFSP

We have seen in Chapter 1 how the CFSP initially emerged from a history of intergovernmental cooperation between the states on foreign policy matters, known as EPC, and was enshrined in the TEU by

¹²⁸ For an overview of activities see R. Dover, 'The EU's Foreign, Security, and Defence Policies' in M. Cini (ed), *European Union Politics* (Oxford University Press, 2007).

¹²⁹ Art 25 TEU.

¹³⁰ R. Baratta, 'Overlaps Between European Community Competence and European Union Foreign Policy Activity' in E. Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer, 2002).

¹³¹ Case C-124/95 *R v HM Treasury and Bank of England, ex parte Centro-Com* [1997] ECR I-81, [25].

¹³² The later *Airport Transit Visas* case suggested that this was so not only in relation to exclusive competence such as the CCP, but also in other fields such as immigration and visa policy; Case C-170/96 *Commission v Council (Airport Transit Visas)* [1998] ECR I-2763. Although this case concerned the delimitation between the First and the Third Pillars, the reasoning is applicable by analogy to the relationship between other EU policies and the CFSP.

¹³³ Case C-91/05 (n 127); B. Van Vooren, 'The Small Arms Judgment in an Age of Constitutional Turmoil' (2009) 14 *EFAR* 231; C. Hillion and R. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness' (2009) 46 *CMLRev* 551; J. Heliöskoski, 'Small Arms and Light Weapons within the Union's Pillar Structure' (2008) 33 *ELRev* 898.

¹³⁴ For the text of former Art 47 TEU see (n 127).

¹³⁵ Case C-91/05 (n 127) [96].

¹³⁶ For proposals as to how to approach this dilemma see P. Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency' (2010) 47 *CMLRev* 987.

¹³⁷ For a pending but pre-Lisbon Treaty competences case see Case C-130/10 *European Parliament v Council* on the legal basis for Reg 1286/2009 imposing anti-terrorist sanctions.

¹³⁸ Cases C-402 and 415/05 *P. Kadi & Al Barakat International Foundation v Council and Commission* [2008] ECR I-6351.

¹³⁹ Art 215(2) TFEU.

¹⁴⁰ Cases C-402 and 415/05 (n 138) [197].

the Maastricht Treaty. However, the CFSP has since developed and deviated significantly from EPC practice at that time.

The TEU provided that the Member States were under an obligation to support the Union's external and security policy actively and unreservedly, in a spirit of loyalty and mutual solidarity. They were henceforth required to work together to enhance and develop their mutual political solidarity and to refrain from any action contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. All of these duties are laid down in the EU Treaties as binding legal obligations.

While some of the failures of the CFSP and the discord between Member States on high-profile situations like the Iraq war and, more recently, the conflict in Libya suggest a mixed record, in fact the CFSP system has enabled a reasonable amount of progress to be made towards the coordination of national foreign policies on a range of issues. This is despite the fact that no formal mechanism of supranational enforcement of the various obligations of solidarity and loyalty has been established, even under the Lisbon Treaty.

As we have seen above, a sharp separation of the CFSP from the rest of the EU legal system is impossible. Following the logic of the ECJ in its *Pupino* ruling,¹⁴¹ for example, the principle of sincere cooperation as now enshrined in Article 4(3) TEU applies also to the Member States when they act within the scope of the CFSP.

From a constitutional point of view, CFSP instruments are undoubtedly legal in nature, but their legal nature is somewhat different from that of the other legislative instruments adopted by the EU. Article 25 TEU stipulates that the EU shall conduct the CFSP by defining general guidelines, adopting decisions which define actions and positions to be undertaken by the EU, or adopting decisions defining arrangements for the implementation of such decisions.¹⁴² It has been argued that CFSP instruments are best understood as 'international law decisions', which bear a close affinity to EU law in that they are binding upon both Member States and the EU institutions, and are adopted by the Council as the primary decision-making body.¹⁴³ Finally, although this characterization may be disputed by some, it has been suggested that the core features of supranational EU law, primacy, direct effect, and the ERTA principles, are not entirely absent from the law of the CFSP.¹⁴⁴

(C) INTERACTIONS BETWEEN THE CFSP AND THE ECONOMIC DIMENSIONS OF SECURITY

Under the previous pillar structure, EU external relations law seemed more preoccupied with preventing interaction between the different pillars than promoting their harmonious coexistence.¹⁴⁵ Yet foreign policies based on the CFSP and on other EU policies necessarily overlap, and conflicts over the proper legal basis arise. The European Security Strategy of 2003 marked an important shift in the attempt to make strategic use of all the external policies of the EU, and influenced the mainstreaming of security concerns into other foreign policy activities including development cooperation and Association Agreements.¹⁴⁶ Nonetheless, this approach also raises some of the legal questions addressed above in the discussion of the interaction between the CCP and national foreign policies in the case of economic sanctions.¹⁴⁷

¹⁴¹ Case C-105/03 *Pupino* [2005] ECR I-5285.

¹⁴² Art 25 TEU.

¹⁴³ R Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 CMLRev 337, 378.

¹⁴⁴ *Ibid.*

¹⁴⁵ See in particular former Art 47 TEU (n 127).

¹⁴⁶ European Security Strategy: A Secure Europe in a Better World, Annex to the Presidency conclusions of Dec 2003.

¹⁴⁷ (N 131).

Dual-use goods are products which can be used for both civil and military purposes, and they are regulated by two different sets of constitutional rules: the general EU rules apply in relation to their civil use, and Member States' rules apply with regard to questions of national security.¹⁴⁸ They fall within the scope of the 'public security' exception in Article 36 TFEU which, according to the ECJ in the *Aimé Richardt* case, covers both a Member State's internal and external security.¹⁴⁹ Initially, the EU regime for export control was based on both the CFSP and the EC pillars with the main emphasis on the former, but in the *Werner* and *Leifer* cases the ECJ ruled that measures the effect of which was to restrict the export of certain products could not be treated as falling outside the scope of the CCP on the ground that they had foreign policy and security objectives.¹⁵⁰ Since the CCP is a field of exclusive EU competence, Member States could act only on the basis of a specific authorization. Following these rulings the EU approach to dual-use goods changed and now operates solely on the basis of a regulation, and national measures regarding export controls must operate within the limits set by this regulation.¹⁵¹

The imposition of economic sanctions by the EU, however, was differently organized. Even before the Treaty provided for a specific mechanism, the EU proceeded by following an EPC decision on the appropriateness of particular sanctions, while the relevant substantive rules were contained in a regulation adopted under the former Article 133 EC.¹⁵² The Maastricht Treaty then established an inter-pillar mechanism, and the EU adopted a range of economic sanctions, including trade embargoes, financial sanctions, and other prohibitions on lending or investment.¹⁵³ The Lisbon Treaty has adapted this system in light of the new institutional structure of the EU, but without fundamentally changing the two-prong mechanism. Article 215 TFEU provides:

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

3. The acts referred to in this Article shall include necessary provisions on legal safeguards.

In other words, a decision adopted under the CFSP decision-making process is necessary as a first step, and it is then implemented according to the TFEU procedure outlined above.¹⁵⁴

¹⁴⁸ Art 346(1)(b) TFEU provides that any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions, and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

¹⁴⁹ Case C-367/89 *Criminal proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC* [1991] ECR I-4621.

¹⁵⁰ Case C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany* [1995] ECR I-3189; Case C-83/94 *Criminal proceedings against Peter Leifer and Others* [1995] ECR I-3231.

¹⁵¹ Reg 428/2009 [2009] OJ L134/1.

¹⁵² Before the EPC emerged in the 1980s, Member States adopted sanctions following the so-called 'Rhodesia doctrine' on the basis of Art 297 EC, which provides for Member States to consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by the necessity to adopt such measures.

¹⁵³ P Koutrakos, *Trade, Foreign Policy & Defence in EU Constitutional Law* (Hart, 2001) 69.

¹⁵⁴ A different procedure (with joint legislative power for the European Parliament) applies when the EU adopts restrictive measures in the area of freedom, security, and justice, to prevent and combat terrorism and related activities (Arts 75 and 76 TFEU).

Chapter 11 of this book describes a number of challenges to the compatibility of such sanctions with the EU's fundamental rights regime. In the *Bosphorus* case, the ECJ upheld the compatibility of sanctions imposed by a regulation implementing a UN Security Council resolution with the right to property and the freedom to pursue a commercial activity, and its approach was broadly upheld in a later challenge before the European Court of Human Rights.¹⁵⁵ In a series of subsequent cases concerning 'smart sanctions' directed against particular persons and organizations, the ECJ ruled that the fact that these sanctions were mandated by the Security Council did not prevent the ECJ from reviewing their compatibility with fundamental rights, and the Court proceeded to annul several such measures for violation of the right to a fair hearing and access to a judicial remedy.¹⁵⁶

It is clear from the discussion above of the overlap between EU security and economic powers and policies that the EU is now attempting to manage this overlap more harmoniously through the use of legislation (the Dual-use Goods Regulation) and Treaty provisions (Article 215 TFEU) which expressly coordinate their interaction.

6 THE CONCLUSION OF INTERNATIONAL AGREEMENTS BY THE EU AND OTHER FORMS OF EU INTERNATIONAL PRACTICE

International agreements are probably the most important form of external lawmaking by the EU. The Lisbon Treaty has partly unified the procedure for the conclusion of such agreements, ending the former distinction between EC and EU procedures.¹⁵⁷ The international practice of the EU also includes participation in international organizations. Both forms of international activity have important ramifications internally, as well as internationally through the creation of obligations which may entail international responsibility.

(A) EU PROCEDURES FOR CONCLUDING INTERNATIONAL AGREEMENTS

Article 218 TFEU establishes a general procedure for the exercise of treaty-making powers. This provision stipulates the division of tasks between the institutions and the various voting procedures. While the procedure is largely uniform for all international agreements, there are important exceptions for agreements touching on the CFSP. Article 218(2)–(4) provides:

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy, where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the

¹⁵⁵ Case C-84/95 *Bosphorus Hava Yolları Turizm ve Ticaret AS v Minister for Transport, Energy and Communications* [1996] ECR I-3953, and subsequently App No 45036/98 *Bosphorus v Ireland*, judgment of the ECtHR of 30 June 2005. See Ch 11.

¹⁵⁶ Cases C-402/05 and 415/05 *P Kadi* (n 138); Cases C-399 and 403/06 *P Hassan and Ayadi v Council and Commission* [2009] ECR I-11393; Case T-318/01 *Othman v Council and Commission* [2009] ECR II-1627; Case T-135-138/06 *Al-Faqih et al v Council*, 29 Sept 2010.

¹⁵⁷ While EC agreements were concluded under former Art 300 EC, CFSP agreements were concluded under Art 24 EU, and agreements in the field of PJCC under former Art 38 EU.

opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

The first step of the procedure is thus the *negotiation* of an agreement, which is, in principle, the task of the Commission. The Commission generally initiates the whole process, albeit under the political leadership of the European Council. The directives which form the basis for the Commission's actions are informally known as 'negotiating mandates'. These tend to be rather general in nature, although the Council sometimes specifies the result which is sought and the margins of the concessions which the Commission is permitted to make. Following the Lisbon Treaty, however, in the case of an agreement which relates exclusively or principally to the CFSP, we see above that it is the High Representative who has exclusive power to recommend the opening of negotiations. The Treaty gives little guidance to the Council in designating the negotiator, indicating only that it 'depends on the subject' of the agreement envisaged. While negotiations are normally conducted by the Commission,¹⁵⁸ the Presidency or even the High Representative can be designated as negotiator or head of the negotiating team where an agreement touches on the CFSP.

The second stage of the procedure is the signature and the conclusion of the agreement. In accordance with the terms of Article 218 TFEU the Council exercises this power in conjunction, in most cases, with the European Parliament,¹⁵⁹ as will be outlined further below. Qualified majority in the Council is required for the signing and conclusion of an agreement, just as it is for the opening of the negotiations.¹⁶⁰ However, for both stages there are four exceptional cases in which unanimity is required. The first is when the agreement covers a field for which unanimity is required for the adoption of internal rules. The second is when it concerns an association agreement referred to in Article 217. The third case is where a cooperation agreement is concluded with a country which is officially a candidate for the accession. The fourth is in the case of agreement on accession of the EU to the European Convention on Human Rights, which will enter into force only after it has been approved by the Member States in accordance with their respective constitutional requirements.¹⁶¹ The significant broadening of the powers of the European Parliament in external relations is, as we shall see below, one of the important features of the Lisbon Treaty changes.

In the case of an agreement which is part of the Common Commercial Policy, the procedure is further modified by Article 207(3) TFEU and involves a specialized Council-appointed committee to assist the Commission in conducting negotiations. Similar committees may be appointed to assist the Commission in the negotiation of other types of agreement.¹⁶² These committees are evidently intended to ensure control by Member States over the direction of the negotiations.

The institutional procedures may also be varied in the case of agreements concerning monetary or foreign exchange regime matters. According to Article 219(3) TFEU the Council decides, by qualified majority on a recommendation from the Commission and after consulting the ECB, on the

¹⁵⁸ The most recent Framework Agreement between the European Parliament and the Commission requires the Commission to facilitate a delegation of Members of Parliament as observers within EU delegations, although the Council has challenged this aspect of the Framework Agreement (n 95).

¹⁵⁹ The Council may however decide to delegate the concluding power to the Commission, but only for enacting modifications to an existing agreement and where the latter provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorization: Art 218(7).

¹⁶⁰ All of these acts take the form of decisions or sometimes regulations.

¹⁶¹ Art 218(8) TFEU.

¹⁶² These committees, including the Article 207 Committee, are purely advisory and are limited to giving assistance in the negotiation of agreements: Case C-61/94 *Commission v Germany* (*International Dairy Arrangement*) [1996] ECR I-3989, [14].

arrangements for the negotiation and conclusion of agreements. The Commission is to be 'fully associated with the negotiations'.

Although Article 218 TFEU refers to 'agreements', the ECJ ruled in *Opinion 1/75* that this notion is to be construed broadly as referring to 'any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation'.¹⁶³ The intention of the parties to give the document binding force will be decisive. In *France v Commission*, concerning the EU-US antitrust agreement on the application of competition laws, the Court made clear that the Commission could not adopt a binding document of this kind together with another international actor, outside the procedure provided for in Article 218 TFEU.¹⁶⁴ However, where it is clear throughout negotiations that the intention of the parties is not to enter into legally binding commitments, the adoption by the Commission together with an international partner of 'Guidelines' is not precluded by Article 218.¹⁶⁵

The Council may, on a proposal from the Commission or the High Representative, adopt a decision suspending an international agreement concluded by the EU, or establishing the positions to be adopted on the EU's behalf in a body set up by an agreement, when that body may adopt acts having legal effects.¹⁶⁶ Although not explicitly mentioned, a similar procedure applies in relation to the termination of an international agreement. The provisions governing suspension and termination are invoked only in exceptional circumstances, and they tend to serve as instruments of political pressure on third countries.¹⁶⁷

(B) MIXED AGREEMENTS

Mixed agreements are a very common EU phenomenon, and will remain an integral part of the legal landscape so long as both the EU and the Member States retain treaty-making capacity.¹⁶⁸ Mixed agreements are agreements to which both the EU and the Member States are contracting parties on the basis that their joint participation is required, because not all matters covered by the agreement fall exclusively within EU competence or exclusively within Member State competence. A mixed agreement will also be used in a case where competence over the subject matter of the agreement is shared between the Member States and the EU. Mixed agreements form an integral part of EU law and are binding on both the EU institutions and the Member States.

Discussions of mixity, as with many aspects of EU external relations, are often intricate and confusing. Rosas proposed a detailed typology of mixed agreements on the basis of the nature of the competence involved.¹⁶⁹ He distinguishes between parallel and shared competence. On his account, parallel competence implies that the EU's participation in an agreement is just like that of

any other contracting party and has no direct effect on the rights and obligations of Member States. Shared competence on the other hand entails some division of rights and obligations contained in the agreement.¹⁷⁰ Rosas subdivides shared competence into (i) coexistent competence, where an agreement contains some provisions falling under the exclusive competence of either the EU or the Member States, so that the agreement can be divided into separate parts; and (ii) concurrent competence, where the agreement in question forms a whole which cannot be divided into separate parts.¹⁷¹ Rosas also proposes a distinction between obligatory and optional mixity, although the distinction is difficult to apply in practice. Indeed, it has been suggested that any attempt to classify mixed agreements risks over-simplifying the phenomenon, since the practice is extremely complicated and involves the interaction of a range of external EU powers and a variety of international agreements.¹⁷²

The ECJ has not generally attempted any detailed delineation of areas of competence in the context of mixed agreements. Once exclusive competence is ruled out, the Court generally turns its attention to how best to organize the joint participation of the EU and the Member States. One additional reason for its unwillingness to address the exact scope of the respective competences of states and the EU has been the dynamic and evolving nature of EU competence.¹⁷³ In its ruling on the compatibility with the Euratom Treaty of Member State participation in the Convention on the Physical Protection of Nuclear Materials, the ECJ held that the division of competence with regard to implementation of the agreement was to be resolved on the basis of the same principles that govern the division of powers concerning the negotiation and conclusion of agreements.¹⁷⁴ The Court emphasized that the duty of cooperation must be observed in all in three stages of external action: in the negotiation, conclusion, and execution of mixed agreements.¹⁷⁵ Responsibility for the performance of mixed agreements also follows the respective competences.¹⁷⁶ According to the ECJ, Member States are subject to special duties of action and abstention as soon as a 'concerted common strategy' exists at the level of the EU.¹⁷⁷ The Court has also ruled that whatever difficulties there may be in managing mixed agreements, these difficulties do not provide a reason for altering the classification of competence, or for arguing that it should be exclusive.¹⁷⁸

As far as negotiation is concerned, the division of competence under a mixed agreement does not, generally, influence participation in negotiations. While the practice is decided on a case-by-case basis, it is generally accepted that the Commission may act as a sole negotiator for the whole agreement according to the mandate given to it by the Council, as occurred in the case of the WTO Agreement. In general, the 'common statement' is agreed by consensus and the Commission presents it when competence is exclusive, whereas the Presidency presents the agreed position for matters falling under shared competence. This background practice suggests that the new reference made in Article 218(3) TFEU to the designation of an EU negotiator 'depending on the subject of the agreement envisaged' would make it difficult for the Commission to act as a sole negotiator when an agreement partly concerns the CFSP, which is not a domain of EU exclusive competence.

¹⁶³ *Opinion 1/75* (n 76) 1359–1360; Case C-327/91 *France v Commission* (n 24). It may be argued that the ECJ's definition of an agreement in *Opinion 1/75* related only to an 'envisaged agreement' for the purposes of its advisory jurisdiction under Art 218(1), but the Court in Case C-327/91 clearly ruled that the term agreement in Art 218 was intended to indicate 'any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation'.

¹⁶⁴ Case C-327/91 *France v Commission* (n 24); Case C-189/97 *European Parliament v Council* (EC/Mauritania fisheries agreement) [1999] ECR I-4741.

¹⁶⁵ Case C-233/02 *French Republic v Commission* (Guidelines on regulatory cooperation and transparency concluded with the USA) [2004] ECR I-2759.

¹⁶⁶ Art 218(9) TFEU.

¹⁶⁷ M. Mareseanu, 'Unilateral Suspension and Termination of Bilateral Agreements Concluded by the EC' in M. Bultmann, L. Hancher, A. McDonnell, and H. Sevenster (eds), *Views of European Law from the Mountain. Liber Amicorum Piet-Jan Slot* (Kluwer Law International, 2009) 455–466.

¹⁶⁸ The literature on mixed agreements is vast. See, for instance, D. O'Keefe and H.G. Schermers (eds), *Mixed Agreements* (Kluwer, 1983); J. Halikowski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer, 2001).

¹⁶⁹ A. Rosas, 'The European Union and Mixed Agreements' in Dashwood and Hillion (n 32).

¹⁷⁰ On the range of ways which the EU has developed to manage shared competence see Cremona (n 38).

¹⁷¹ For a similar argument see the Opinion of AG Kokott, 26 Mar 2009, in Case C-13/07 *Commission v Council* (Accession of Vietnam to the WTO) [67]–[64]. The case was withdrawn by the Commission before the ECJ ruled. See (n 88).

¹⁷² Beekhout (n 77) 191.

¹⁷³ *Ruling 1/78 Euratom (Nuclear Materials)* [1978] ECR 2151, [35].

¹⁷⁴ *Ibid* [36].

¹⁷⁵ See also Case C-25/94 *Commission v Council* (PAO agreement) [1996] ECR I-1469, [48].

¹⁷⁶ See however the suggestion by AG Jacobs that there might be a case for joint liability at the international level in Case C-316/91 *Parliament v Council* (n 59) [69].

¹⁷⁷ Case C-246/07 *Commission v Sweden*, 20 Apr 2010.

¹⁷⁸ *Opinion 1/94* (n 41) [107]; *Opinion 2/00* (n 22) [41]; *Opinion 1/08* (n 88) [127].

The phenomenon of mixity has attracted a range of views, with some regarding it as a necessary evil which is rendered all the more problematic by the enlargement of EU membership, while others have praised it as a 'near-unique contribution to true federalism'.¹⁷⁹

(c) THE ROLE OF THE EUROPEAN PARLIAMENT

Although the power of the European Parliament has been consistently growing in external relations, it has done so in small steps.¹⁸⁰ The latest step taken by the Lisbon Treaty however is particularly significant. The Parliament is called upon to act mainly at the stage of conclusion of agreements, which considerably reduces its opportunity for influencing their content.¹⁸¹ However, a range of informal mechanisms have been created to compensate for this, in order to enable the Parliament to be 'regularly and fully informed', including through the participation of MBPs as observers during negotiations, and so that its views can be taken into account.¹⁸²

The basic position today is that the Council adopts the decision concluding an international agreement after obtaining the Parliament's consent. Under the terms of Article 218(6) such consent is required in five cases: (i) Association Agreements referred to in Article 217 TFEU, (ii) agreements on EU accession to the ECHR, (iii) other agreements which establish a specific institutional framework by organizing cooperation procedures, (iv) agreements having important budgetary implications for the Union,¹⁸³ and finally (v) agreements covering fields of EU competence to which either the ordinary legislative procedure applies or the special legislative procedure where consent by the European Parliament is required. This last category largely reconciles the roles of the European Parliament in the internal decision-making process and in the field of external relations. The most significant impact of this change is that no international agreement in the field of the CCP may be concluded without the Parliament's consent, whereas in the past even simple consultation was not required.¹⁸⁴ In order to avoid excessive delay in negotiations and conclusion, the Parliament and the Council can agree upon a time limit within which the Parliament is to deliver its opinion in an urgent situation.

The cases where mere consultation of the Parliament applies are now the exception,¹⁸⁵ and in such cases the Council may impose on the Parliament a deadline for communicating its opinion. There is no formal requirement to consult the Parliament where an agreement exclusively concerns the CFSP.

¹⁷⁹ JHH Weller, 'The External Legal Relations of Non-Unitary Actors: Mixity and the Federal Principle' in JHH Weller, *The Constitution of Europe: Do the New Clothes Have an Emperor?* (Cambridge University Press, 1999).

¹⁸⁰ S Krauss, 'The European Parliament in EU External Relations' (2000) 5 EFA Rev 215; D Thym, 'Parliamentary Accountability of EU External Relations' in Cremona and de Witte (n 20).

¹⁸¹ See Bechthout (n 77) 183 for a democracy-based critique of the omission of the European Parliament from the conclusion of international agreements, especially those negotiated under the Second and Third Pillars.

¹⁸² This was done previously under the so-called Luns-Westendorp procedure and at present under the Framework Agreement on relations between the European Parliament and the Commission. For controversy over the latter see (n 95).

¹⁸³ Note that the Council and the European Parliament may, in an urgent situation, agree upon a time limit for Parliament's assent. This category of agreements has given rise to problems of interpretation, particularly concerning which budgetary implications can be said to be 'important'. See Case C-189/97 *European Parliament v Council* (n 164) for discussion as to what the appropriate point of comparison should be for weighing the amount of expenditure under a given agreement.

¹⁸⁴ M Cremona, 'Balancing Union and State Interests. Opinion 1/08, Choice of Legal Base and the Common Commercial Policy under the Treaty of Lisbon' (2010) 35 ELRev 678; A Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 EFAR 153; N Lavarinos and S Adam, 'How Exclusive is the Common Commercial Policy of the EU After Lisbon?' (2010) 7-8 ELR 263.

¹⁸⁵ See, eg, Art 64(3) TFEU on the adoption of certain restrictive measures in the field of liberalization of capital movements to or from third countries, where mere consultation is required.

(d) THE MEMBER STATES' DUTY OF SINCERE COOPERATION

Although there is no explicit Treaty provision which specifies that the Member States must not enter into negotiations and conclude international agreements which would deviate from the position taken by the EU, it seems that the supremacy of EU law, together with Article 4(3) TEU, effectively requires states to abstain from any such action or from enacting any rules which would conflict with EU norms.

We have seen that Article 4(3) TEU requires Member States to facilitate the achievement of the Union's tasks and to abstain from any measure which could jeopardize the attainment of the Treaty objectives. This 'duty of sincere cooperation' applies whether the EU's competence is exclusive or shared. The implications of this provision have been held to mean that when the EU institutions envisage taking EU action, and once they adopt a decision authorizing the Commission to negotiate a multilateral agreement, the Member States are under a duty to cooperate closely with the EU institutions in order to 'facilitate the achievement of the EU's tasks and to ensure the coherence and consistency of the action and its international representation'.¹⁸⁶ If on the other hand they negotiate, conclude, ratify, or implement bilateral or multilateral treaties concerned with the same issues without cooperating or consulting with the Commission they will be in breach of EU law.

The ECJ recently clarified the obligations arising for the Member States from the duty of sincere cooperation for the implementation of an international agreement. The Court ruled that Greece, by submitting to the International Maritime Organization (IMO) a proposal for monitoring the compliance of ships and port facilities with certain requirements of the International Convention for the Safety of Life at Sea, had failed to fulfil its obligations under the duty of sincere cooperation.¹⁸⁷ As a result, the mere initiation of a procedure that might have led the IMO to adopt a new rule which could affect EU rules was sufficient for the ECJ to conclude that the proposal submitted by Greece amounted to an impermissible exercise by the Member State of an exclusive EU competence. The duty of sincere cooperation is particularly important where, as in this case, the EU is not a party to an international agreement and the Member States act jointly in the EU's interests.¹⁸⁸ However, even in a field of shared competences such as the negotiation of a mixed environmental agreement, the ECJ ruled that Member States are under duties of action and abstention once the Commission has submitted proposals to the Council which, although not yet adopted by the Council, represent a point of departure for the EU's 'concerted common strategy'.¹⁸⁹

(e) COOPERATION WITHIN INTERNATIONAL ORGANIZATIONS

The TFEU expressly provides for the establishment of relations with other international entities. Article 220 TFEU refers to the maintenance of all appropriate relations with the organs of the UN and its specialized agencies,¹⁹⁰ the Council of Europe, the OECD, the OSCE, and more generally with 'all international organizations'. The maintenance of such relations is the task of the High Representative for CFSP matters¹⁹¹ and of the Commission in other cases.

¹⁸⁶ Case C-266/03 *Commission v Luxembourg (Inland Waterways Agreement)* [2005] ECR I-4805; Case C-433/03 *Commission v Germany (Inland Waterways Agreement)* [2005] ECR I-6985.

¹⁸⁷ Case C-45/07 *Commission v Greece* [2009] ECR I-701.

¹⁸⁸ See also *Opinion 2/91* (n 45) [119].

¹⁸⁹ Case C-246/07 *Commission v Sweden* (n 177) [91].

¹⁹⁰ On the complexities of EU representation at the UN see A Degrand Guillaud, 'Actors and Mechanisms of EU Coordination at the UN' (2009) 14 EFAR 405 and 'Characteristics of and Recommendations for EU Coordination at the UN' (2009) 14 EFAR 507. The EU's recent attempt to gain speaking rights at the UN General Assembly was initially opposed by other regional groupings but was subsequently approved on 3 May 2011.

¹⁹¹ Art 27(2) TEU.

Other Treaty provisions mention relations between the EU and 'competent' international organizations in the context of the EMU, education and sport, culture, public health, the environment, and development cooperation. Article 138 TFEU makes specific provision for the Council to decide on the position of the Union and its representation, at the international level, in relation to issues concerning economic and monetary union. In the context of the CFSP, Article 34 TEU provides that the 'Member States shall coordinate their action in international organizations and at international conferences'. In *Opinion 1/76*, the ECJ ruled that the powers of the EU to enter international agreements include a power, within the scope of the then Community's competence, to enter agreements establishing international organizations.¹⁹² This was further implicitly confirmed by the ECJ's *Opinion 1/94* where participation in the Agreements establishing the World Trade Organization was approved. EU participation can take either the form of full membership, as in the WTO example,¹⁹³ or the form of observer status, as in the case of the ILO. In many instances, as in the WTO case, the EU participates in the organization alongside the Member States. If membership of the organization in question is open only to states, then the Member States will adopt a common position on the issue for which the EU is competent, and they must act jointly in the Union's interest in accordance with their general duty of cooperation.¹⁹⁴

7 THE EU AND INTERNATIONAL LAW

As an entity with international legal personality, the EU is the subject of rights and obligations arising under international agreements and under international law. This applies to all areas in which the EU has competence including the CFSP, despite the limited jurisdiction of the ECJ over this field.

(A) INTERNATIONAL AGREEMENTS CONCLUDED BY THE EU ARE BINDING UPON IT AND ARE PART OF EU LAW

Article 216(2) TFEU applies the international law principle of *pacta sunt servanda* within EU law by providing that agreements concluded by the Union are binding on the institutions of the Union and on its Member States.¹⁹⁵ The Court has consistently held since the *Haegeman* ruling that once an agreement enters into force, its provisions form an 'integral part' of Community law, now EU law.¹⁹⁶ The ECJ has also ruled that Member States are in violation of their obligations under EU law where they fail to adopt the measures necessary to implement an international agreement concluded by the EU.¹⁹⁷ In other words, agreements entered into by the EU bind the Member States by virtue of their duties under EU law and not international law.

¹⁹² *Opinion 1/76* (n 41); S Marchisio, 'EU's Membership in International Organisations' in Cannizzaro (n 130); R Frid, *The Relations between the EC and International Organizations—Legal Theory and Practice* (Kluwer, 1995).

¹⁹³ Other examples include the Food and Agriculture Organization and the European Bank for Reconstruction and Development. In some cases the EU has joined pre-existing international organizations, whereas in other cases it has participated in the agreement creating a new organization.

¹⁹⁴ *Opinion 2/91* (n 45) [1]–[5].

¹⁹⁵ *Reckhout* (n 77) 276.

¹⁹⁶ Case 181/73 *Haegeman* [1974] ECR 449, [5]; *Opinion 1/91* (EEA Agreement I) [1991] ECR 6079, [37].

¹⁹⁷ See, eg, Case C-239/03 *Commission v France* (*Etang de Berre*) [2004] ECR I-9325. Similar issues were raised by the proposal for an international agreement creating a European and EU patents court (see *Opinion 1/09* given by the ECJ, 8 Mar 2011, finding the envisaged agreement to be incompatible with the EU Treaties), and by the proposed accession of the EU to the ECHR and its judicial system as noted by the ECJ in its Discussion Document on certain aspects of the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 5 May 2010.

(B) THE EU LEGAL SYSTEM AS AN AUTONOMOUS LEGAL ORDER

When the EU has become a party to an organization or an agreement setting up bodies the powers of which may conflict with those of the EU institutions, the Court has been particularly insistent on defending the autonomy of the EU legal order. In *Opinion 1/76*, the ECJ ruled out the possibility of establishing a special Tribunal composed of six judges from the ECJ and one judge from Switzerland, on the ground that ECJ judges might face a conflict of jurisdiction or allegiance to two different bodies.¹⁹⁸

A similar ruling was given in relation to provisions of the proposed EEA Agreement in *Opinion 1/91*.¹⁹⁹ The proposed conferral of jurisdiction upon a new EEA Court which would have been composed of three judges from the ECJ and three from EFTA states was held to be incompatible with Community law. So was the fact that the agreement had the effect of introducing into the Community legal order a large body of legal rules which would be juxtaposed to a corpus of identically worded Community rules, with all the problems of interpretation and consistency that would follow. This was said to conflict with what was then Article 220 EC²⁰⁰ and, more generally, with the very foundations of the Community.²⁰¹ A similar approach can be seen in *Opinion 1/00* on the agreement establishing a European Common Aviation Area where, although ultimately it upheld the compatibility of the agreement with the EC Treaty, the Court underscored the importance of 'the preservation of the autonomy' of the EU legal order.²⁰² In *Opinion 1/09* on the creation of a new European and EU patents court, the ECJ ruled that the envisaged agreement establishing the new international court, which would have given exclusive jurisdiction to hear actions brought by individuals in the field of the EU patent to the new court, would deprive the ECJ of its power to give preliminary rulings to national courts on questions of interpretation arising from such disputes, and consequently was incompatible with the EU Treaties.²⁰³

The exclusive jurisdiction of the ECJ is confirmed by Article 344 TFEU, in accordance with which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. The breach of this obligation formed the basis of the *Sellafield/MOX Plant* case brought by the Commission against Ireland.

Case C-459/03 *Commission v Ireland*
[2006] ECR I-4635

[Note Lisbon Treaty renumbering: Arts 226 and 292 EC are now Arts 258 and 344 TFEU]

Ireland instituted proceedings against the UK before the international arbitral tribunal provided for under the United Nations Convention on the Law of the Sea (UNCLOS) in relation to the failure to protect the marine environment with regard to the operation of the MOX plant situated on the Irish Sea. The Commission as a result brought proceedings against Ireland under Article 226 EC for violation of the obligation in Article 292 EC. The ECJ ruled that the breach related to an area of shared external

¹⁹⁸ *Opinion 1/76* (n 41).

¹⁹⁹ *Opinion 1/91* (n 196).

²⁰⁰ This Art is replaced, in substance, by Art 19 TEU. Art 19 sets out the basic task and role of the ECJ by providing that it 'shall ensure that in the interpretation and application of the Treaties the law is observed'.

²⁰¹ Following renegotiation of the agreement, and the replacement of the earlier proposed EEA Court with an EFTA Court consisting only of judges from the EFTA countries, with more limited jurisdiction, the ECJ upheld the compatibility of the revised Agreement with the EC Treaty: *Opinion 1/92* (EEA Agreement II) [1992] ECR I-2821.

²⁰² *Opinion 1/00* on the establishment of a European Common Aviation Area [2002] ECR I-3493.

²⁰³ *Opinion 1/09*, 8 Mar 2011.

competence, and that the matters covered by the relevant UNCLOS provisions were to a large extent already regulated by Community measures. It ruled further that UNCLOS had been concluded by the Community, and continued:

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123. The Court has already pointed out that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. That exclusive jurisdiction of the Court is confirmed by Article 292 EC, by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein (see, to that effect, Opinion 1/91 and Opinion 1/00 ...).

124. It should be stated at the outset that the Convention precisely makes it possible to avoid such a breach of the Court's exclusive jurisdiction in such a way as to preserve the autonomy of the Community legal system.

125. It follows from Article 282 of the Convention that, as it provides for procedures resulting in binding decisions in respect of the resolution of disputes between Member States, the system for the resolution of disputes set out in the EC Treaty must in principle take precedence over that contained in Part XV of the Convention.

126. It has been established that the provisions of the Convention in issue in the dispute concerning the MOX plant come within the scope of Community competence which the Community exercised by acceding to the Convention, with the result that those provisions form an integral part of the Community legal order.

127. Consequently, the dispute in this case is indeed a dispute concerning the interpretation or application of the EC Treaty, within the terms of Article 292 EC.

128. Furthermore, as it is between two Member States in regard to an alleged failure to comply with Community-law obligations resulting from those provisions of the Convention, this dispute is clearly covered by one of the methods of dispute settlement established by the EC Treaty within the terms of Article 292 EC, namely the procedure set out in Article 227 EC.

Ultimately, the ECJ ruled that Ireland had violated its obligation to respect the exclusive nature of the ECJ's jurisdiction to resolve disputes concerning the interpretation and application of provisions of EU law, and that such a violation involved a manifest risk of adverse effects on the jurisdictional order laid down in Treaties and on the autonomy of the EU (formerly the Community) legal system.

(c) THE EFFECT OF OTHER RULES OF INTERNATIONAL LAW, AND OF INTERNATIONAL AGREEMENTS TO WHICH THE MEMBER STATES ARE PARTY

Article 216(2) TFEU mentions only agreements which have been concluded by the EU, and makes no reference to other rules of international law. However, the ECJ has acknowledged the binding nature of such other rules. Further, as we have seen above, since the enactment of the Lisbon Treaty, Article 3(5) TEU declares that the EU shall contribute to 'the strict observance and the development of international law, including respect for the principles of the United Nations Charter'. However, the cases in which the ECJ has invoked or applied rules or principles of international law other than international agreements to which it is party remain few in number:

Two decades ago in *Poulsen* the ECJ ruled that the EU must respect international law in the exercise of its powers,²⁰⁴ and specifically that it was required to comply with the rules of customary international law when adopting a regulation suspending trade concessions resulting from an agreement concluded with a non-member country. Shortly afterwards in *Racke* the Court declared that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of fundamental change of circumstances (*rebus sic stantibus*) are binding on the EU institutions and form part of the EU legal order.²⁰⁵ In a ruling concerning the International Dairy Agreement, the Court drew on the general rule of international law requiring the parties to any agreement to show good faith in its performance.²⁰⁶ More recently in the *Firma Brita* case, in which an apparently technical customs dispute concealed the complex politics of the Middle East, the ECJ ruled that the EU must respect the general principle of international law, also enshrined in Article 34 of the Vienna Convention on the Law of Treaties, concerning the relative effect of treaties, according to which treaties do not impose any obligations, or confer any rights, on third states (i.e. non-parties) without their consent.²⁰⁷ Applying this principle to the facts of *Brita*, the ECJ ruled that if the EC-Israel Association Agreement were interpreted to mean that the Israeli customs authorities enjoyed competence in respect of products originating in the West Bank, this would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence expressly conferred upon them under the terms of the EC-Palestinian Liberation Organization Association Agreement. No doubt reflecting the highly contested political dispute over Israeli settlements within the Occupied Territories underlying the facts of the case, the judgment has been criticized for its 'ill-founded, incomplete, one-dimensional and selective' use of international law,²⁰⁸ and for raising as many questions as it answered.²⁰⁹

In another important and controversial case concerning international law, the ECJ in *Kadi* ruled that the EU's obligation to respect international law in the exercise of its powers and the special importance attached to resolutions of the UN Security Council under Chapter VII of the UN Charter would not prevent the Court from annulling EU measures implementing a Security Council resolution where those measures violated fundamental rights protected within EU law.²¹⁰ According to the ruling of the Court, 'the obligations imposed by an international agreement', even by the UN Charter, 'cannot have the effect of prejudicing the constitutional principles of the EC Treaty'.²¹¹ The Court further ruled that even if the UN Charter were to have primacy over secondary EU acts, it would not have primacy over the EU Treaties or the general principles of EU law.²¹² In one of its most dramatic rulings to date on the autonomy of the EU legal system and its separateness from the international legal order, the ECJ declared that 'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system'.²¹³ The *Kadi* case is discussed further in Chapter 11.

As regards international agreements to which the EU is not a party, but which are binding on the Member States, Article 351 TFEU specifies that, in the case of agreements concluded before 1 January 1958 (or, for acceding states, before the date of their accession) between one or more Member States on

²⁰⁴ Case C-286/90 *Anklagemyndigheden v Poulsen and Diva Navigation* [1992] ECR I-6019, [9].

²⁰⁵ Case C-162/96 *Racke GmbH & Co v Hauptzollamt Mainz* [1998] ECR I-3655, [46].

²⁰⁶ Case C-61/94 *Commission v Germany* (n 162) [30].

²⁰⁷ Case C-386/08 *Firma Brita*, 25 Feb 2010, [44].

²⁰⁸ G Harpaz and E Robinson, 'The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita' (2010) 35 *ELRev* 951.

²⁰⁹ I Kornfeld, 'ECJ holds that West Bank Products are outside the scope of the EU-Israel Association Agreement' (2010) 14 *ASIL Insight*.

²¹⁰ Cases C-402 and 415/05 P (n 156).

²¹¹ *Ibid* [285].

²¹² *Ibid* [306]–[308].

²¹³ *Ibid* [282].

the one hand and one or more third countries on the other, the rights and obligations arising shall not be affected by the provisions of the TEU or the TFEU. The ECJ has clarified further the conditions for the application of Article 351 TFEU (ex Article 307 EC) in various cases. In *T. Port*, it ruled:

Thus, for a Community provision to be deprived of effect as a result of an international agreement, two conditions must be fulfilled: the agreement must have been concluded before the entry into force of the Treaty and the third country concerned must derive from it rights which it can require the Member State concerned to respect.²¹⁴

In the *Bilateral Investment Treaties* (BITS) cases, the ECJ ruled that the purpose of Article 351 TFEU was to make it clear, in accordance with the principles of international law, that application of the EU Treaties does not affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations.²¹⁵ The EU itself, however, is not bound by such previous agreements. Article 351 contains only a duty on the part of the EU institutions not to impede the performance of Member States' obligations stemming from such a prior agreement which confers rights on third countries.²¹⁶

Further, to the extent that such agreements are not compatible with the EU Treaties, the ECJ has ruled that the Member States concerned are obliged to take all appropriate steps to eliminate the incompatibilities established. The case below illustrates that the fact that a Member State encounters difficulties in bringing its obligations to a third state in line with its obligations under EU law does not release the state from its obligation to adjust and, where necessary, to denounce the conflicting agreement.²¹⁷

Case C-84/98 *Commission v Portugal* [2000] ECR I-5215

[Note Lisbon Treaty renumbering: Art 234 EEC is now Art 351 TFEU]

Following its accession to the EC in 1986 Portugal was required to adjust its prior agreement with the Federal Republic of Yugoslavia (FRY) so as to respect Regulation 4055/86 on the freedom of maritime transport services between Member States and third countries, but failed to do so. The Commission brought infringement proceedings against Portugal before the ECJ.

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39. In this case, the Portuguese Government has not succeeded in adjusting the contested agreement by recourse to diplomatic means within the time-limit laid down by Regulation No 4055/86.

40. It must be borne in mind that the Court has already held that, in such circumstances, in so far as denunciation of such an agreement is possible under international law, it is incumbent on the Member State concerned to denounce it (see, to that effect, *Commission v Belgium* [1999] ...).

41. However, the Portuguese Government denies any failure to fulfil its obligations ...

²¹⁴ Cases C-364-365/95 *T. Port GmbH & Co v Hauptzollamt Hamburg-Jonas* [1998] ECR I-1023, [61].

²¹⁵ Case 205/06 [33]; Case C-249/06 [34]; Case C-118/07 [34] (n 69).

²¹⁶ Case 812/79 *Attorney General v Juan C. Burgoa* [1980] ECR 2787, [9].

²¹⁷ See also Case C-170/98 *Commission v Belgium* [1999] ECR I-5493; Case C-62/98 *Commission v Portugal* [2000] ECR I-5171; Case C-84/98 *Commission v Portugal* [2000] ECR I-5215.

49. Finally, the Portuguese Government contends, in essence, that, with regard to pre-Community conventions concluded between a Member State and a third country, although Article 234 of the Treaty imposes the obligation to take all appropriate steps to eliminate any incompatibility between a rule of the convention and a Community rule, that provision is not indifferent to the legal consequences and political costs flowing from that obligation. Cases where a convention must be denounced under Article 234 of the Treaty arise only exceptionally and in extreme circumstances. Such denunciation would involve a disproportionate disregard of the interests linked to its foreign policy as compared with the Community interest. Moreover, the Commission should have referred to that provision in the statement of the reasons for a request for a pre-Community convention to be adjusted or denounced ...

[The ECJ went on to conclude that it was not impossible, in the case at hand, for Portugal to respect the rights of the FRY since the agreement itself enabled the parties to denounce it.]

58. Furthermore, although, in the context of Article 234 of the Treaty, the Member States have a choice as to the appropriate steps to be taken, they are nevertheless under an obligation to eliminate any incompatibilities existing between a pre-Community convention and the EC Treaty. If a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded.

59. As regards the argument that such denunciation would involve a disproportionate disregard of foreign-policy interests of the Portuguese Republic as compared with the Community interest, it must be pointed out that the balance between the foreign-policy interests of a Member State and the Community interest is already incorporated in Article 234 of the Treaty, in that it allows a Member State not to apply a Community provision in order to respect the rights of third countries deriving from a prior agreement and to perform its obligations thereunder. That article also allows them to choose the appropriate means of rendering the agreement concerned compatible with Community law.

61. In those circumstances, it must be held that, by failing either to denounce or adjust the contested agreement so as to provide for fair, free and non-discriminatory access by all Community nationals to the cargo-shares due to the Portuguese Republic, as provided for in Council Regulation (EEC) No 4055/86, the Portuguese Republic has failed to fulfil its obligations under Articles 3 and 4(1) of that regulation.

In the BITS cases,²¹⁸ the ECJ defined the obligations of Member States under Article 351 TFEU very broadly. The agreements, which had been concluded by Austria, Sweden, and Finland with a range of third countries, contained provisions guaranteeing the free transfer, without undue delay and in freely convertible currency, of payments connected with an investment. Article 63 TFEU prohibits all restrictions on the movement of capital and on payments between the Member States, and between Member States and third countries, but Articles 64(2), 66, and 75 TFEU empower the EU to adopt measures to restrict such movements which involve direct investment. The BITS in question in these cases did not contain any provision allowing for the unilateral suspension of their implementation in the event of the EU exercising that competence. The ECJ rejected the argument of the states that they could, in the event that the Council decided to exercise its restrictive power under the EU Treaty, negotiate with their third-country partners with a view to suspending, on a temporary basis, the implementation of their bilateral agreements. The Court ruled that the time required for such international negotiations would be inherently incompatible with the practical effectiveness of the measures, and that the possibility of relying on international law mechanisms, such as suspension or denunciation of the agreements, would be too uncertain to guarantee that the Council's measures could be effectively applied. The mere risk of difficulties in the implementation of potential future Council measures was sufficient for it to find an infringement by the three Member States concerned.

²¹⁸ (N 215).

In the case of the GATT 1947, the ECJ ruled in the *International Fruit Company* case that the EC was bound by its provisions, notwithstanding the fact that it was not a party to it. The Court declared that the EC had assumed the functions inherent in the tariff and trade policy in their entirety on the expiry of the transitional period, and since this is an area governed by the GATT, the provisions of that agreement bound the Community.²¹⁹

8 THE LEGAL EFFECT OF INTERNATIONAL AGREEMENTS IN THE EU LEGAL ORDER

One of the major legal topics within EU external relations has been the question of what effect international agreements have within the EU legal order. We have seen above that international agreements entered into by the EU are deemed to be an integral part of the EU legal order²²⁰ and are binding upon the EU in accordance with Article 216(2) TFEU. We have also seen in Chapter 7 that most forms of binding EU law have been held by the Court to be in principle capable of having direct effect.

Arguments may be made both for and against the direct legal enforceability of international agreements by private parties before domestic courts. On the one hand, as treaties concluded with other states or international organizations, they can be viewed as traditional international agreements binding only the states or organizations which signed them, having no automatic 'self-executing' quality and conferring neither rights nor obligations on individuals. On the other hand, as agreements entered into by the EU, they can be viewed as sharing some of the key characteristics of EU law, and in particular could be capable of direct effect, of being invoked and enforced by individuals whenever sufficiently precise and unconditional. Opting broadly for the approach which would integrate agreements made by the EU into the law of the Member States, the Court held that international agreements can, under certain circumstances, be directly effective.

We shall see, however, that in the field of international agreements a range of political and strategic considerations comes into play, and the question whether or not the provisions of a particular agreement can be judicially enforced at the suit of individual litigants is not determined solely by reference to the legal criteria first developed in *Van Gend en Loos*.

The issue which dominated this area of law for many years and has generated a vast academic literature, namely whether the provisions of the GATT 1947 and the successor World Trade Organization (WTO) agreements can have direct effect, was first raised several decades ago.

Cases 21–24/72 *International Fruit Company v Produktschap voor Groenten en Fruit* [1972] ECR 1219

A Dutch court made a preliminary reference to the ECJ, asking whether it had jurisdiction to rule on the validity of Community regulations in relation to a provision of international law and if so whether the regulations in question were contrary to the GATT.

²¹⁹ Cases 21–24/72 *International Fruit Company NV v Produktschap voor Groenten en Fruit* [1972] ECR 1219, [14]–[18]. Compare the ECJ ruling in Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, [85], to the effect that where neither the EU nor all the Member States were party to an international agreement, the EU would not be treated as having succeeded to the international obligations of Member States under the agreement.

²²⁰ See (n 196).

THE ECJ

7. Before the incompatibility of a Community measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision.

8. Before invalidity can be relied upon before a national court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts.

18. It therefore appears that, in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community.

19. It is also necessary to examine whether the provisions of the General Agreement confer rights on citizens of the Community on which they can rely before the courts in contesting the validity of a Community measure.

20. For this purpose, the spirit, the general scheme and the terms of the General Agreement must be considered.

The Court concluded from various aspects of the GATT, including the 'great flexibility of its provisions', the possibilities of derogation, and the power of unilateral withdrawal from its obligations, that it was 'not capable of conferring on citizens of the Community rights which they can invoke before the courts'. In other words, in terms of the criteria for direct effect laid down in earlier cases, the provisions of GATT were insufficiently precise and unconditional in the sense that they permitted the obligations contained therein to be modified, and they allowed for too great a degree of flexibility. The ECJ was unwilling to accord direct effect to international obligations of this nature, no doubt also because they were normally invoked to challenge the legality of EU legislation.²²¹

In the later *Polydor* case, the Court was confronted with a provision of a free trade agreement between the EU and Portugal before Portugal had joined the EU.²²² Here the ECJ ruled that a provision of the trade agreement on free movement of goods, although it was worded identically to a provision of the then EEC Treaty (now Article 34 TFEU), was not to be interpreted in the same way and should not be given direct effect, since the agreement with Portugal did not have the same aim or purpose as the EEC Treaty of establishing a single market.

In *Kupferberg*,²²³ however, the ECJ ruled that a different provision of the Portuguese free trade agreement did have direct effect, since the provision was unconditional, sufficiently precise, and its direct application was within the purpose of the agreement. It is notable that, unlike in the GATT cases, the effect of declaring the trade agreement in *Kupferberg* to be directly enforceable was to extend the scope of Community rules rather than to challenge or invalidate them. Similarly, the ECJ has held that provisions of the earlier Lomé Convention governing relations between the EU and the African, Caribbean, and Pacific states were directly effective where it was national rather than EU legislation which was being challenged for compatibility with the Convention.²²⁴

It should be noted that in paragraph 8 of the *International Fruit* judgment, the Court appeared to equate direct effect with the possibility of review of legality, and to rule out the latter unless the former were present. However, in the later *Nakajima* case, the Court distinguished between the 'direct effect' of the provisions of an international trade agreement in conferring individual rights on the one hand,

²²¹ This was confirmed in various cases after *Kupferberg* including Case 9/73 *Schlüter v Hauptzollamt Lärzsh* [1973] ECR 1135; Case C-469/93 *Amministrazione delle Finanze dello Stato Chiquita Italia* [1995] ECR I-4533.

²²² Case 270/80 *Polydor Ltd and RSO Records Inc v Harlequin Record Shops Ltd. and Simons Records Ltd* [1982] ECR 329.

²²³ Case 104/81 *Hauptzollamt Mainz v CA Kupferberg & Cie KG* [1982] ECR 3641; G. Bebr, 'Agreements Concluded by the Community and their Possible Direct Effect: From *International Fruit Company* to *Kupferberg*' (1983) 20 CMLRev 35.

²²⁴ Case C-469/93 (n 221).

and the possibility of those provisions being invoked before the ECJ to claim that EU legislation was incompatible with them on the other.²²⁵ Subsequently in *Germany v Commission*, the ECJ made clear that a GATT provision could be invoked for the purposes of alleging the incompatibility of an EU measure in two circumstances only: (1) where the EU intended to implement that particular obligation, or (2) where the EU measure being challenged expressly referred to the particular GATT provision.²²⁶

In the recent *Ikea Wholesale* case, however, the ECJ appeared to narrow the *Nakajima* and *Germany v Commission* line of reasoning.²²⁷ In earlier case law the ECJ had accepted that the EU intended, in adopting EU anti-dumping legislation, to satisfy the obligations arising from the GATT and the international Anti-Dumping Agreement. Applying the *Nakajima* principle, the validity of the specific Council regulation imposing definitive anti-dumping duties in the case should therefore be assessed not only in light of the general EU anti-dumping legislation, but also of the Anti-Dumping Agreement. In *Ikea Wholesale*, however, the ECJ treated the EU's initial intent to legislate in compliance with the Anti-Dumping Agreement as having been superseded by a later regulation which excluded repayment of duties, in spite of a subsequent report by the dispute settlement body (DSB) of the WTO finding the EU regulation in question to violate the Anti-Dumping Agreement.²²⁸ This means that the political room for manoeuvre given to the EU institutions in implementing the WTO agreements has been expanded further, by enabling them to refuse to follow a DSB ruling on the compatibility of an EU measure with the Anti-Dumping Agreement, even where the EU had previously legislated with the intention of implementing that Agreement. In the later *Van Parys* case, too, the ECJ refused to apply the *Nakajima* principle to the situation of an EU regulation intended to implement a WTO DSB ruling, and would not assess the validity of the regulation in the light of the WTO rules in question, declaring that the EU had not in this situation intended to implement a 'particular obligation' in the context of the WTO.²²⁹

Despite this narrowing of the applicability of the *Nakajima* principle, the ECJ in other cases has applied the obligation of harmonious interpretation, the principle that EU law should be interpreted in the light of international law and of binding international agreements,²³⁰ to provisions of the GATT and other WTO agreements such as that on Trade-Related Intellectual Property Rights (TRIPs).²³¹ This has the consequence of enhancing their effectiveness in certain circumstances, although not normally when they are being invoked to challenge EU measures.

It was argued, following the establishment of the WTO and the adoption of the new GATT in 1994, that in view of the more effective means of dispute settlement and enforcement under the new system, the assumptions on which the GATT 1947 had been held to lack direct effect no longer applied.²³²

²²⁵ Case C-69/89 *Nakajima v Council* [1991] ECR 2069, [28]–[29]. For this purpose, according to the Court, the provisions need only be binding on the Community. However, in the case in question the ECJ ruled that the Community anti-dumping rules in issue did not conflict with the Anti-Dumping Code adopted under the GATT. See also Case 70/87 *Pedrol v Commission* [1989] ECR 1781, and compare Case C-76/00 *P. Petrotub SA and Republica SA v Council* [2003] ECR I-79.

²²⁶ Case C-280/93 *Germany v Commission* [1994] ECR I-4873, and see Case C-76/00 *P. Petrotub* (n 225), in which a Council reg was annulled for incompatibility with the GATT/WTO Anti-Dumping Code.

²²⁷ Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723; C. Herrmann, Note (2008) 45 CMLRev 1507.

²²⁸ *Ibid* [55].

²²⁹ Case C-377/02 *Van Parys v BIRB* [2005] ECR I-1465, [40]–[41]. This was confirmed by the ECJ in Cases C-120 and 121/06 *FLAMM and Pedon v Council and Commission* [2008] ECR I-6513, [115].

²³⁰ Case C-51/94 *Commission v Germany* (n 162) [52]; Case C-341/95 *Safety Hi-Tech v S & T srl* [1998] ECR I-4355, [20]; Case C-286/90 *Poulsen* (n 204) [9]; Case C-263/08 *Djurgräden-Lilla Värtans Miljöskyddsforening* [2009] ECR I-9967, [51].

²³¹ Case C-53/96 *Hermès International v FHT Marketing Choice* [1998] ECR I-3603; Cases C-300 and 392/98 *Dier v Tuk Consultancy* [2000] ECR I-11307; Case C-245/02 *Anheuser-Busch Inc v Budějovický Budvar, národní podnik* [2003] ECR I-10989, [54]–[57].

²³² See, eg, Case T-228/95 *R S Lehrfreund Ltd v Council and Commission* [1996] ECR II-111, [28], and many cases which followed. There is also a vast and specialized academic literature on this subject.

Having avoided addressing the question of the legal effect and enforceability of the WTO agreements in a series of cases before the ECJ and the CFI (now the General Court), the ECJ finally confronted it directly.

Case C-149/95 *Portugal v Council* [1999] ECR I-8395

Portugal brought an action for annulment of a 1996 Council Decision, arguing *inter alia* that the Decision was in breach of the WTO rules, including provisions of GATT 1994. Portugal argued that the case did not raise the problem of direct effect but rather 'the circumstances in which a Member State may rely on the WTO agreements before the Court for the purpose of reviewing the legality of a Council measure'. The ECJ began by indicating that it was only where an international agreement did not itself settle the question of the effects which its provisions would have within the legal orders of the contracting parties that it would fall to be decided by the courts.

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36. While it is true that the WTO agreements, as the Portuguese Government observes, differ significantly from the provisions of GATT 1947, in particular by reason of the strengthening of the system of safeguards and the mechanism for resolving disputes, the system resulting from those agreements nevertheless accords considerable importance to negotiation between the parties.

[The ECJ examined the dispute-settlement rules of the WTO, and noted that although they provided for withdrawal of any measures found to be incompatible with WTO rules, they also allowed for compensation to be paid instead as a temporary measure where withdrawal would be impracticable. And if a member of the WTO failed to comply with a recommendation made by the dispute resolution body, that member would be requested to enter negotiations with the other party to the dispute with a view to finding mutually acceptable compensation. The Court continued:]

40. Consequently, to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of entering into negotiated arrangements even on a temporary basis.

41. It follows that the WTO agreements, interpreted in the light of their subject-matter and purpose, do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties.

42. As regards, more particularly, the application of the WTO agreements in the Community legal order, it must be noted that, according to its preamble, the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to 'entering into reciprocal and mutually advantageous arrangements and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community, such as the agreement which the Court was required to interpret in *Kupferberg*.

43. It is common ground, moreover, that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.

44. Admittedly, the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the Community are of direct application whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement (*Kupferberg*, paragraph 18).

45. However, the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO agreements which are based on 'reciprocal and mutually advantageous arrangements and which must *ipso facto* be distinguished from agreements concluded by the Community, referred to in paragraph 42 of the present judgment, may lead to disuniform application of the WTO rules.

46. To accept that the role of ensuring that those rules comply with Community law devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.

47. It follows from all those considerations that, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.

The ECJ went on to rule that the neither of the two conditions established in the *Nakajima* and *Germany cases*²³³ was fulfilled, and so it could not review the legality of the Council decision in the light of the WTO rules. A number of factors were thus cited by the ECJ as arguments against the direct judicial enforceability of the WTO agreements.

First, the Agreements themselves do not specify precisely what their own methods of enforcement are to be, given that compensation is permitted in certain circumstances as an alternative to direct enforcement, and that there is scope for negotiation over the recommendations of the WTO dispute-settlement bodies.

Secondly, the ECJ took the view that the WTO was still founded on the principle of mutually advantageous negotiations, rather than on clearly and precisely binding legal commitments of the kind to be found in other international agreements entered into by the EU. Such other agreements, according to the Court, include those involving an 'asymmetry of obligations', where a guarantee of clear legal enforcement by the EU is given regardless of the lack of direct reciprocity in the relationship with the other party, for example the previous Lomé agreements with the ACP states, as well as those involving special relationships of integration with the Community such as the Portugal free trade agreement in *Kupferberg*, or the Europe Association Agreements.²³⁴ In other words, lack of reciprocity in obligations and commitments under an international agreement has not in itself been sufficient reason for the ECJ to deny the direct applicability of such an agreement. However, the Court was unwilling to accord such legal effect within the EU legal order to the WTO agreements, given the particular kind of lack of reciprocity in enforcement which this would involve—i.e. the EU Courts giving effect to the obligations contained in these broad-ranging multilateral trade agreements while the other trading partners could enjoy the full 'scope for manoeuvre' expressly permitted under them. The ECJ also commented that the lack of reciprocity in terms of willingness to recognize the direct applicability of the WTO agreements could lead to 'dis-uniform application of WTO rules'.

The Court's judgment generated another avalanche of academic commentary, much of which conceded that while the legal reasoning was less than convincing, the political motivation for the ruling is relatively obvious.²³⁵ For some, this motivation was regrettable;²³⁶ for others it was entirely pragmatic

and even laudable, given criticisms of the WTO system for privileging trade liberalization over other social and environmental values.²³⁷

Since the *Portugal* ruling, the ECJ and the CFI have repeatedly resisted attempts to narrow the potential scope of the judgment. The ECJ ruled out any remaining uncertainty over the direct effect of provisions of the GATT,²³⁸ and confirmed the application of the *Portugal* ruling in this respect to other WTO agreements such as TRIPs,²³⁹ and on Technical Barriers to Trade (TBT).²⁴⁰ The CFI also rejected a series of creative legal arguments including attempts to rely on Article 351 TFEU (ex Article 307 EC)²⁴¹ or on the principle of *pacta sunt servanda*,²⁴² or to invoke provisions of the WTO agreements in the context of actions for damages.²⁴³ A number of unsuccessful attempts were also made to invoke the *Nakajima* and *Germany* doctrine,²⁴⁴ in order to rely on the effects of the ruling of a dispute settlement panel within the WTO system,²⁴⁵ specifically by arguing that the EU intended to implement or execute a particular WTO obligation following a dispute-settlement process.²⁴⁶ Despite rejecting further attempts of this kind in *IKEA*, and *Biret*, the ECJ in *Biret* seemed to leave open the possibility that a provision of the WTO agreements, including as in this case the Agreement on Sanitary and Phytosanitary Standards (SPS), might be capable of being invoked to challenge the legality of an EU measure in the context of an action for damages, following the expiry of the reasonable period for compliance with its ruling set by a WTO DSB.²⁴⁷ However the Court in *FIAMM* firmly closed the door on attempts to claim damages based on WTO violations, even those following a DSB ruling, and rejected the argument that a decision of the WTO Dispute Settlement Body, as compared with a provision of one of the WTO agreements, could be given 'direct effect'.²⁴⁸

In contrast to its reluctance to permit the judicial enforceability of the WTO agreements, the ECJ seemed initially to be more willing to recognize the enforceability of a number of other international agreements, even multilateral agreements, which did not involve special relations of integration with the EU. In the *Biotechnology* case, the ECJ declined to rule on whether the Rio Convention on Biological Diversity had created directly effective individual rights in the narrow sense, but confirmed its broader invocability by declaring that, unlike the WTO agreements, the Biodiversity Convention was 'not strictly based on reciprocal and mutually advantageous arrangements' and that courts could therefore review the Community's compliance with the obligations contained therein.²⁴⁹ Moreover in the case of a regional

²³³ A. Roses, 'Portugal v Council' (2000) 37 CMLRev 797.

²³⁴ Case C-307/99 *OGT v Hauptzollamt Hamburg-St. Annen* [2001] ECR I-3159.

²³⁵ Cases C-300 and 392/98 *Dior* (n 231); Case C-69/99 *Schieving-Nijstad v Groeneweld* [2001] ECR I-5851, [51]–[55]; Case C-245/02 *Anheuser-Busch* (n 231) [54]–[57]; Case T-279/03 *Galileo International Technology LLC v Commission* [2006] ECR II-1291.

²³⁶ Cases C-27 and 122/00 *The Queen v Secretary of State for the Environment, Transport and the Regions, ex p Omega Air Ltd and others* [2002] ECR I-2569.

²³⁷ Case T-2/99 *T. Port GmbH v Council* [2001] ECR II-2093; Case T-3/99 *Bananatrading GmbH v Council* [2001] ECR II-2093. For pre-*Portugal v Council* cases attempting to use Art 351 TFEU (ex Art 307 EC) in the context of the GATT see Cases C-364 and 365/95 *T. Port* (n 214).

²³⁸ Case T-363/00 *Beamglow Ltd v Parliament, Council and Commission* [2005] ECR II-5459.

²³⁹ Case T-18/99 *Cordis Obst und Gemüse Großhandel v Commission* [2001] ECR II-913; Case T-30/99 *Bocchi Food Trade International v Commission* [2001] ECR II-943; Case T-52/99 *T. Port v Commission* [2001] ECR II-981.

²⁴⁰ See (an 225 and 226). The Commission recently argued that the *Nakajima* exception should be abolished, or treated as an aspect of the obligation of harmonious interpretation with international law, but the AG rejected the argument and the ECJ did not address it. Case C-313/04 *Franz Egenberger GmbH Molkerei und Trockenwerk v Bundesamt für Landwirtschaft und Ernährung* [2006] ECR I-6331.

²⁴¹ Previously see Case T-18/99 *Cordis* (n 243); Case T-30/99 *Bocchi* (n 243); Case T-52/99 *T. Port* (n 243).

²⁴² Case T-19/01 *Chiquita Brands International, Inc v Commission of the European Communities* [2005] ECR II-315, [83]–[171].

²⁴³ Case C-94/02 *P. Établissements Biret et Cie SA v Council* [2003] ECR I-10565, [54]–[68]; M. Mendes, 'The Impact of WTO Rulings in the Community Legal Order' (2004) 29 *ELRev* 517; A. Tades, Note (2004) 41 CMLRev 1661.

²⁴⁴ Cases C-120 and 121/06 *FIAMM* (n 229) [109]–[133]. The ECJ here also rejected the possibility of liability on the part of the Council or Commission in the absence of unlawful conduct when exercising its legislative powers.

²⁴⁵ Case C-377/98 *Netherlands v Council* [2001] ECR I-7079.

²³³ See (nn 225 and 226).

²³⁴ (N 97).

²³⁵ For one example see S. Peers, 'Fundamental Right or Political Whim? WTO Law and the ECJ' in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart, 2001) 111, 120–122.

²³⁶ See, e.g. G. Zonnekeyn, 'The Status of WTO Law in the Community Legal Order: Some Comments in the Light of the Portuguese Textiles Case' (2000) 25 *ELRev* 293; S. Griller, 'Judicial Enforceability of WTO Law in the EU' (2000) 3 *JIEL* 441. A longstanding advocate of the justiciability and direct effect of the GATT/WTO agreements has been E.-U. Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948' (1994) 31 CMLRev 1157 and 'Proposals for a New Constitution for the European Union: Building Blocks for a Constitutional Theory and Constitutional Law of the EU' (1995) 32 CMLRev 1123.

environmental agreement, the ECJ ruled that the Protocol for the protection of the Mediterranean Sea against pollution from land-based sources, and a later amended Protocol which had been signed by the EU and approximately twenty-one other states in the region was directly effective.²⁵⁰

The ECJ in *Racke* ruled that provisions of the EEC-Yugoslavia cooperation agreement of 1980 were directly effective, and could be invoked along with provisions of customary international law to challenge the legality of an EU regulation.²⁵¹ Similarly, in a series of cases involving various Europe Association Agreements, the ECJ declared their provisions on freedom of establishment and the free movement of workers to be directly effective.²⁵² These judgments follow the pattern of similar rulings in which the Court has recognized the direct effect of various provisions of association or cooperation agreements with third countries,²⁵³ as well as the provisions of secondary decisions adopted by association councils or bodies set up under those agreements.²⁵⁴ Agreements of this sort fall within the category of those setting up 'special relations of integration' with the EU of the kind referred to by the ECJ in paragraph 42 of its ruling in *Portugal v Council*.

While it may seem therefore that the ECJ has, with the exception of the WTO agreements, treated international agreements as being capable of having direct effect within the EU legal order, the Court in 2008 in the *Intertanko* case for the first time applied its restrictive reasoning from the GATT/WTO agreements case law to another kind of international agreement.²⁵⁵ In *Intertanko* the ECJ refused to assess the validity of EU legislation in the light of the UN Convention on the Law of the Sea (UNCLOS) or the related MARPOL (marine pollution) Convention. A challenge had been brought to the validity of EU legislation on ship-source pollution, alleging that it violated the provisions of UNCLOS. Returning to its ruling in the *International Fruit Company* case, the ECJ declared that UNCLOS does not in principle grant independent rights and freedoms to individuals, and that the nature and broad logic of UNCLOS prevented the Court from being able to assess the validity of a Community measure in the light of that Convention.

It is notable that the Court relied on the argument that UNCLOS does not grant rights to individuals, rather than on the political flexibility maintained by the Convention, in order to reach its conclusion that it could not review the legality of EU legislation in the light of UNCLOS. A further curious feature of the *Intertanko* ruling is that it ignored the distinction drawn earlier by the ECJ in *Nakajima* between the question of conferral of individual rights and the question whether provisions of an international agreement can be invoked to challenge the validity of EU law.²⁵⁶ The *Intertanko* case also leaves open the question whether Member States, rather than individuals, may challenge the validity of Union legislation in light of UNCLOS.²⁵⁷ More generally, the case raises the question whether the ECJ is beginning to change its approach on the invocability of international agreements. It may be that, rather than the GATT/WTO case law being the exception to a general rule of invocability of international agreements binding on the EU, that case law is now joined by *Intertanko* to create

²⁵⁰ Case C-213/03 *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région v BDP* [2004] ECR I-7357, [31]–[47].

²⁵¹ Case C-162/96 (n 205).

²⁵² (N 97).

²⁵³ For a small sample see Case C-18/90 *Onem v Kriber* [1991] ECR I-159; Case C-179/98 *Belgium v Masbahi* [1999] ECR I-7955 on the EEC-Morocco Cooperation Agreement; Case C-103/94 *Krid v WATTS* [1995] ECR I-719; Case C-113/97 *Babahentini v Belgium* [1998] ECR I-813 on the EEC-Algeria Cooperation Agreement; Case C-37/98 *Savas* [2000] ECR I-2927 on the EC-Turkey Association Agreement.

²⁵⁴ There are dozens of cases on these issues. For a small selection see Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719; Case C-192/89 *Sevinco* [1990] ECR I-3461; Case C-237/91 *Kus* [1992] ECR I-6781; Cases C-317 and 369/01 *Abatay* [2003] ECR I-12301, [58]–[59]; Case C-373/02 *Ozürk* [2004] ECR I-3605, [37]–[68]; Case C-136/03 *Dorr* [2005] ECR I-4759, [58]–[69]; Case C-230/03 *Sedat* [2006] ECR I-157, [33]; Case C-337/07 *Altun* [2008] ECR I-10323, [20].

²⁵⁵ Case C-308/06 *Intertanko and others* [2008] ECR I-4057.

²⁵⁶ See (n 225) and text.

²⁵⁷ For comments see P Beckhoul, Note (2009) 46 CMLRev 2041; E Denza, Note (2008) 33 EILRev 870; S Adam, P Devisscher, and F Van Elslande, Note, CDDE 2009/3–4, 537.

the opposite presumption that international agreements will generally not be invocable to challenge EU acts unless they can satisfy a more demanding criterion of direct effect premised on the conferral of individual rights.

9 THE ROLE OF THE ECJ IN EU INTERNATIONAL RELATIONS

It is clear from the above discussion of the ECJ's approach to the effect of international agreements in the EU legal order, as well as its approach to the nature and breadth of EU competence and the scope of the CCP in the early years, that the Court has played an active and at times activist role in EU external relations. Below, an overview of the Court's role in the expanding field of international relations will be provided.

(A) PRE-EMPTIVE JURISDICTION: THE ADVISORY OPINION PROCEDURE OF ARTICLE 218(11)

The most distinctive source of ECJ jurisdiction in the field of international relations is the advisory opinion procedure provided for in Article 218(11) TFEU.²⁵⁸ Article 218(11) stipulates:

A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended, or the Treaties are revised.

The fact that either a Treaty amendment or a modification of the proposed agreement is required in the case of a negative opinion indicates that the Court's opinions are binding on the institutions. In its first Opinion, the ECJ outlined the rationale for this advisory procedure, and indicated that the scope of the questions which can form the subject of the request includes questions concerning the competence of the EU (then the EC) to enter the agreement:

Opinion 1/75 (Understanding on a Local Cost Standard)
[1975] ECR 1355

[Note Lisbon Treaty renumbering: Art 228 EC is now Art 218 TFEU]

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The compatibility of an agreement with the provisions of the Treaty must be assessed in the light of all the rules of the Treaty, that is to say, both those rules which determine the extent of the powers of the institutions of the Community and the substantive rules.

It is the purpose of the second subparagraph of Article 228 (1) to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements

²⁵⁸ And Arts 103–105 of European Atomic Energy Community Treaty. While there is no formal Opinion given by the AGs, they are heard in closed session. In *Opinion 1/89* (n 197), eg, the 8 AGs were heard. See S Adam, *La procédure d'avis devant la Cour de justice de l'Union européenne* (Bruxelles, 2011).

binding upon the Community. In fact, a possible decision of the Court to the effect that such an agreement is, either by reason of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty could not fail to provoke, not only in a Community context, but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries.

For the purpose of avoiding such complications the Treaty had recourse to the exceptional procedure of a prior reference to the Court of Justice for the purpose of elucidating, before the conclusion of the agreement, whether the latter is compatible with the Treaty. This procedure must therefore be open for all questions capable of submission for judicial consideration, either by the Court of Justice or possibly by national courts, in so far as such questions give rise to doubt, either as to the substantive or formal validity of the agreement with regard to the Treaty.

There is no time limit for the submission of a request under Article 218(11). Moreover, as we have seen above, the term 'agreement' has been interpreted broadly so as to include 'any undertaking entered into by entities subject to international law which has binding force, whatever its legal designation'.²⁵⁹ On the other hand, the ECJ indicated in its *Opinion 2/94* on accession to the ECHR that the purpose of the agreement envisaged must be known before the Court is in a position to give an opinion.²⁶⁰ The Court ruled that it was not necessary that the Council should already have adopted a decision to open negotiations, but the Court would need sufficient information concerning the specific arrangements envisaged, such as the proposed mechanism for judicial control under the ECHR. Since no such information was provided for the purpose of *Opinion 2/94*, the Court ruled that it could not give its opinion on that particular point.

Once the EU has expressed its intention to be bound by the agreement, namely once it has concluded the agreement, the ECJ is precluded from continuing with an Article 218(11) procedure.²⁶¹ Following its conclusion (even if this takes place after the request for an opinion has been filed) it is no longer an 'envisaged agreement' within the meaning of Article 218(11), the preventive function of the procedure cannot be achieved, and the ECJ's advisory jurisdiction is excluded.²⁶² This is clear from *Opinion 1/04* in which the ECJ refused to provide an opinion on the compatibility with the Treaty of the agreement envisaged with the US on the exchange of air Passenger Name Data (PNR).²⁶³ The Council had rapidly concluded the agreement only a few weeks after Parliament's request was filed, thereby circumventing the possibility for an advisory opinion, and requiring Parliament to bring a subsequent action for annulment instead.

Once the legal basis on which the EU may act in concluding an agreement has been established, the ECJ has ruled that it is beyond its jurisdiction to engage in a more precise delineation of competence, particularly since the Article 218(11) procedure is not intended to resolve the difficulties associated with the implementation of an envisaged agreement entailing shared competence.²⁶⁴

Although the question is contested, the general exclusion of ECJ jurisdiction over the CFSP would seem to exclude the possibility of the Court providing an opinion on the compatibility of an envisaged agreement which relates exclusively or principally to this field.²⁶⁵ However, the ECJ's jurisdiction under Article 40 TEU to ensure that the implementation neither of the CFSP nor of the rest of the EU's

²⁵⁹ *Opinion 1/75* (n 163).

²⁶⁰ *Opinion 2/94* (n 34).

²⁶¹ Beckhout (n 77) 230.

²⁶² *Opinion 3/94 (Banana Framework Agreement)* [1995] ECR I-4577.

²⁶³ *Opinion 1/04* [2004] OJ C118/L.

²⁶⁴ *Opinion 2/00* (n 22) [17]–[18].

²⁶⁵ M Cremona, 'The Union as a Global Actor: Roles, Models and Identity' (2004) 41 CMLRev 571, 572; T Corthaut, 'An Effective Remedy for All? Paradoxes and Controversies in Respect of Judicial Protection in the Field of the CFSP under the European Constitution' [2005] Tilburg Foreign Law Review 124.

policies adversely affects the powers and procedures of the other may provide a basis for an advisory opinion which focuses on questions of procedure and competence.

(b) JURISDICTION OF THE ECJ OVER INTERNATIONAL AGREEMENTS UNDER OTHER EU TREATY PROCEDURES

International agreements entered into by the EU may form the subject matter of a reference for a preliminary ruling on a point of interpretation or validity under Article 267 TFEU. In the first example of such a reference, the ECJ ruled in *Haegeman* that the EU's association agreement with Greece was an act of the institutions within the meaning of Article 267 TFEU.²⁶⁶ Therefore, the provisions of the Agreement formed an integral part of EU law and the Court had jurisdiction to give preliminary rulings on their interpretation. In addition to agreements concluded by the EU, the Court has asserted its jurisdiction to interpret other acts such as decisions of bodies (like the Turkey–EU Association Council) set up under an agreement²⁶⁷ as well as non-binding recommendations made under an international agreement.²⁶⁸

We will see in Chapter 12 that the ECJ may hear infringement proceedings brought against Member States under Article 258 for violation of their obligations under an international agreement which is binding on the EU. This is true also with regard to the WTO agreements even though, as we saw in *Portugal v Council*,²⁶⁹ they are not among the rules which Member States may invoke to plead the illegality of EU acts.

International agreements and other provisions of international law have also been held to be amongst the rules of law to be taken into account in assessing the validity of EU measures. This was made clear in the *International Fruit Company* case, which has been discussed above in relation to the direct effect of international agreements.²⁷⁰ By treating international agreements in the same way as internal EU acts for these purposes, the Court was able to broaden its jurisdiction and to hear actions for annulment and actions for damages brought on the basis of international agreements. However, we have seen above, both from the case law on the GATT/WTO agreements and the *Intertanko* case concerning UNCLOS, that the ECJ does not accept every international agreement as a legal source for assessing the validity of EU legislation.²⁷¹

In addition to entertaining actions for the annulment of EU acts alleged to violate international agreements, the ECJ will also hear actions for annulment of an EU decision to conclude an international agreement. The grounds for annulment of a decision concluding an international agreement alleged to violate the Treaty are the same as for internal acts under Article 263(2) TFEU: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. Thus the alleged infringement may arise from the procedure followed for the conclusion of an international agreement,²⁷² or the substantive provisions of the agreement,²⁷³ or the agreement may be *ultra vires* in the sense that the EU lacked competence to conclude it.²⁷⁴ The obligation to state reasons means that a specific reference to the legal basis upon which the agreement is concluded is required.²⁷⁵ EU legislative acts can also now be

²⁶⁶ Case 181/73 *Haegeman* (n 196) [4]–[6].

²⁶⁷ Case C-192/89 *Sevince* (n 254).

²⁶⁸ Case C-188/91 *Deutsche Shell* [1993] ECR I-363.

²⁶⁹ Case C-268/94 *Portugal v Council* [1996] ECR I-6177.

²⁷⁰ (N 219).

²⁷¹ See (nn 219–248) and text, and also (n 255).

²⁷² See, eg, Case C-327/91 *France v Commission* (n 24).

²⁷³ Case C-122/95 *Germany v Council* [1995] ECR I-973.

²⁷⁴ Cases C-317 and 318/04 *European Parliament v Council (PNR)* (n 28).

²⁷⁵ Case C-370/07 *Commission v Council* [2009] ECR I-8917, discussed at (n 23) [37]–[55]. This case concerned a decision establishing the position to be adopted by the EU within an organ created by an international agreement.

annulled by the ECJ for non-compliance with the Charter of Fundamental Rights, and more generally with the provisions of the TEU, including the general values, principles, and objectives laid down in Articles 2 and 3. These are all included within the term 'infringement of the Treaties or of any rule of law relating to its application' in Article 263(2) TFEU.

Since international agreements concluded by the EU are binding upon it, violation of their provisions may, at least in theory, form the basis for an action in damages under Article 340 TFEU. Thus far, however, no such action has been successful. Most of the cases brought have been based on an alleged violation of WTO law, and the ECJ has consistently held that the provisions of the WTO agreements do not form part of the rules by which the ECJ and General Court review the legality of EU acts, they do not enable individuals to rely on their provisions before the Courts, and their infringement will not give rise to non-contractual liability on the EU's part.²⁷⁶

(c) THE ECJ AND MIXED AGREEMENTS

Although the Court's first ruling on the interpretation of an international agreement in the *Haegeman* case concerned a mixed agreement, that fact seemed to play no part in the Court's assessment of its jurisdiction in that case.²⁷⁷ The mixed nature of the agreement was invoked for the first time in *Demirel*, concerning the EC-Turkey Association Agreement:

Since the agreement in question is an association agreement creating special, privileged links with a non-member country, which must, at least to a certain extent, take part in the Community system, Article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty. Since freedom of movement for workers is, by virtue of Article 48 of the EEC Treaty, one of the fields covered by that Treaty, it follows that commitments regarding freedom of movement fall within the powers conferred on the Community by Article 238. Thus the question whether the Court has jurisdiction to rule on the interpretation of a provision in a mixed agreement containing a commitment which only the Member States could enter into in the sphere of their own powers does not arise.²⁷⁸

While this passage seems to suggest that the Court's jurisdiction over mixed agreements covers all issues, with the exception of matters falling within the exclusive competence of the Member States, the question of the ECJ's jurisdiction in cases where the relevant provisions of the international agreement at issue were concluded on the basis of the Member States' shared powers was not directly addressed in the case.²⁷⁹

The point arose however in *Hermès*, in which a preliminary reference was made to the ECJ on a question concerning the interpretation of Article 50 of the TRIPs Agreement, concerning the power of judicial authorities to order provisional measures to prevent certain infringements of intellectual property rights.²⁸⁰ One of the objections raised was that the dispute concerned the application of national trade mark law. The Court replied that it did indeed have jurisdiction, since the provision in question applied also to Community trade marks:

²⁷⁶ See (nn 219–248).

²⁷⁷ P Koutrakos, 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure' (2002) 7 *EPA* 25.

²⁷⁸ Case 12/86 *Demirel* (n 254).

²⁷⁹ A Dashwood, 'Preliminary Rulings on the Interpretation of Mixed Agreements' in D O'Keefe and A Bayaso (eds), *Judicial Review in European Union Law* (Kluwer, 2001) 171.

²⁸⁰ Case C-53/96 *Hermès International* (n 231).

[W]here a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply... In the present case, as has been pointed out in paragraph 28 above, Article 50 of the TRIPs Agreement applies to Community trade marks as well as to national trade marks.

Subsequently in *Parfums Christian Dior*, which again concerned Article 50 of the TRIPs Agreement, the ECJ extended further the scope of its jurisdiction to rule on Article 50:

Cases 300 and 392/98 *Parfums Christian Dior*
[2000] ECR I-11307

[Note Lisbon Treaty renumbering: Art 177 EEC is now Art 267 TFEU]

THE ECJ

36. In that regard, the Member States and the Community institutions have an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they concluded the WTO Agreement, including TRIPs (see, to that effect, Opinion 1/94...).

37. Since Article 50 of TRIPs constitutes a procedural provision which should be applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situations covered by Community law, that obligation requires the judicial bodies of the Member States and the Community, for practical and legal reasons, to give it a uniform interpretation.

38. Only the Court of Justice acting in cooperation with the courts and tribunals of the Member States pursuant to Article 177 of the Treaty is in a position to ensure such uniform interpretation.

39. The jurisdiction of the Court of Justice to interpret Article 50 of TRIPs is thus not restricted solely to situations covered by trade-mark law.

This seems to be a strong assertion of the Court's jurisdiction with regard to the TRIPs Agreement. It has been argued however that the ECJ in this case was unclear as to the limits of its jurisdiction, and that while it might be expected that the ECJ would claim jurisdiction only over the definition of obligations clearly assumed by the EU, in practice the Court is reluctant to allocate competences within mixed agreements, and has only clearly excluded its own jurisdiction in areas which unquestionably fall within the exclusive competence of the Member States.²⁸¹

Nevertheless, the Court in *Dior* did not purport to interfere with the jurisdiction of Member States' courts to appraise the direct effect of provisions which fall within neither exclusive EU competence nor exclusive Member State competence, and in respect of which the EU has not yet legislated:

47. In a field to which TRIPs applies and in respect of which the Community has already legislated, as is the case with the field of trade marks, it follows from the judgment in *Hermès*, in particular paragraph 28 thereof, that the judicial authorities of the Member States are required by virtue of Community law when called upon to apply national rules with a view to ordering provisional measures for the protection

²⁸¹ Koutrakos (n 75) 201.

of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs.

48. On the other hand, in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(8) of TRIPs or that it should oblige the courts to apply that rule of their own motion.

The broad jurisdiction of the Court to rule on the interpretation of mixed agreements was confirmed in two subsequent sets of infringement proceedings brought by the Commission against Member States, involving the Berne Convention for the Protection of Literary and Artistic Works²⁴² and the Convention for the Protection of the Mediterranean Sea respectively.²⁴³ The Court ruled that mixed agreements had the same status within the EU legal order as purely EU (then Community) agreements 'insofar as the provisions fall within the scope of Community competence', and it repeated that when they ensure compliance with commitments arising from an agreement entered by the EU, the Member States are fulfilling an obligation in relation to the EU which has assumed responsibility for its performance.²⁴⁴ In both cases, the subject matter of the agreements was held to be largely governed by EU law, and the Court ruled that there was a clear EU interest in compliance by the Member States and the EU with the commitments entered.

To sum up, the ECJ has clearly construed its jurisdiction over mixed agreements very broadly, and it seems that only where a particular area falls clearly within the exclusive competence of the Member States under a mixed agreement will the Court actually decline to interpret or enforce it. However, the Court decided in *Merck Genéricos* that in a field such as patent law, where there is only limited EU legislation, the Member States remain competent to choose whether or not to give certain provisions of a mixed agreement direct effect.²⁴⁵

(D) THE ECJ AND THE CFSP

The jurisdiction of the Court is expressly excluded from the field of the CFSP.²⁴⁶ However, Article 275 TFEU contains two major exceptions to the exclusion of ECJ jurisdiction. The first relates to the boundaries between the CFSP and the rest of EU law, which are now governed by Article 40 TEU.²⁴⁷ The CFSP was created to include all areas of foreign and security policy within its scope, and the possibility of conflict with other parts of EU external competence was therefore quite clear. The terms of Article 40 TEU, which, as indicated above, protect the CFSP and the other parts of EU law against undue encroachment by the other, mean that the ECJ, in practice, may exercise judicial control over the choice of legal basis and consequently may check that the EU

was competent to act as it did, and that the procedural requirements provided in the appropriate Treaty basis have been satisfied.

The second exception empowers the Court to hear actions brought by natural or legal persons to review the legality of decisions which effectively provide for the imposition of sanctions or 'restrictive measures' against them.²⁴⁸ This amendment, introduced by the Lisbon Treaty, follows the approach adopted by the ECJ to its own jurisdiction in the earlier *Kadi* case.²⁴⁹

There had in fact already been sustained criticism of the lack of adequate judicial control over the law adopted within the CFSP, particularly on account of the likely consequences for affected individuals.²⁵⁰ An increasing number of CFSP measures have a quasi-legislative character, and the limits of judicial review over the CFSP led to its description as 'patently insufficient from the perspective of the rule of law'.²⁵¹ Further, the EU Courts have generally been reluctant to exercise strong judicial control over political decisions of the EU institutions on sensitive matters, which compounds the problem of limited judicial scrutiny over CFSP acts.

10 COHERENCE, CONSISTENCY, AND COOPERATION IN THE GOVERNANCE OF EU INTERNATIONAL RELATIONS

One of the key aims of EU foreign policy is said to be the coordination of the variety of different external activities. As noted above, some overlap in competences is inevitable given that the CFSP covers 'all areas of foreign and security policy'. While not the only or even the most important aspect of foreign policy, consistency is nonetheless a significant goal in the external relations of an entity like the EU, which is a relative newcomer to the international scene and which still lacks a coherent and recognizable international identity. It is now the task of the Foreign Affairs Council and the High Representative to ensure consistency in the Union's external action.²⁵² Given the position of the High Representative as Vice-president of the Commission and President of the Foreign Affairs Council, she is assumed to be in a unique position to coordinate the various aspects of EU external action.

In order to establish and shape its international role more effectively, the EU needs to ensure coordination on a number of different levels. Coordination needs to be pursued, first, in the international representation of the EU, secondly, across the different activities of the EU, and, thirdly, between the Member States and the EU.

(A) INTERNATIONAL REPRESENTATION AND THE EU

In order to perform its tasks under the Treaties, the EU has developed extensive diplomatic relations with other subjects of international law. Almost all states have established diplomatic missions to the EU, which have been renamed Representative missions to the EU, and the EU maintains relations through EU delegations in more than 150 states and international organizations.²⁵³ They are placed

²⁴² Case C-13/00 *Commission v Ireland (Berne Convention)* [2002] ECR I-2943.

²⁴³ Case C-239/03 *Commission v France* (n 197). See also, Case C-240/09 *Lesoochvandrské zoskupenie*, 8 March 2011 [31]–[35] on Art 9(3) of the Aarhus Convention.

²⁴⁴ *Ibid* [25]–[26].

²⁴⁵ Case C-431/05 *Merck Genéricos Produtos Farmacêuticos* [2007] ECR I-7001, [46]–[47].

²⁴⁶ Art 24(1) TEU; Art 275 TFEU.

²⁴⁷ See (n 127) and text. The ECJ had recognized such a role for itself under the predecessor to Art 40 TEU, which was Art 47 EU. In Case C-170/96 *Commission v Council (Airport Transit Vistas)* (n 132) [16]–[17] the ECJ defined its role as being to ensure that acts which fell under the TEU did not encroach upon the powers conferred by the EC Treaty on the Community. The Court ruled that it had jurisdiction to review the content of a measure adopted outside the scope of the Community Pillar in order to ascertain whether it affected the powers of the Community, and to annul the measure if it appeared that it should have been based on a provision of the EC Treaty instead. There is no reason why the interpretation of Art 47 EU in this earlier case would not be equally applicable to an interpretation of Art 40 TEU as far as concerns the CFSP. See also Case C-176/03 *Commission v Council (Environmental crimes)* [2005] ECR I-7879.

²⁴⁸ Art 274 para 2 provides: 'The Court shall have jurisdiction... to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union'.

²⁴⁹ Cases C-402 and 415/05 P (n 156).

²⁵⁰ P Eeckhout, 'Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations', 2005 Walter van Gerven Lectures, Leuven.

²⁵¹ *Ibid*.

²⁵² Arts 16(5) and 18(4) TEU.

²⁵³ Art 221 TFEU. The fact that Commission delegations have been replaced by Union delegations, following the Lisbon Treaty, is an important symbolic shift.

under the authority of the High Representative and enjoy customary privileges and immunities under international law. Their task is to communicate the views and to represent the interests of the Union as a whole. As far as international organizations are concerned, Article 220 TFEU provides that it shall be for the Commission to ensure the maintenance of all appropriate relations with the organs of the United Nations and its specialized agencies, the Council of Europe, the OECD, the OSCE, and with 'all international organisations'.²⁹⁴

Several provisions of the TEU aim at organizing the representation of the interests of the Union internationally. Article 27(2) TEU provides that in matters which come within the scope of the CFSP the Union is represented by the High Representative, who shall express the position of the Union in international organizations and in international conferences. The High Representative and the Member States are responsible for the implementation of CFSP decisions.²⁹⁵ The High Representative is assisted by the European External Action Service,²⁹⁶ which is to work in cooperation with the diplomatic services of the Member States.²⁹⁷ Moreover, the Council may, on a proposal of the High Representative, appoint a special representative with a mandate in relation to particular policy issues.

Article 34 TEU requires Member States to coordinate their action in international organizations and at international conferences as well as to uphold EU common positions in such fora, but, given the institutional complexity of the EU and the elaborate sharing of powers between the EU and the Member States in the field of external relations, this is not a straightforward task.²⁹⁸ It is however for the High Representative to organize this cooperation. In international organizations and at international conferences where not all the Member States participate, those which do take part have particular duties: they are required to uphold EU common positions and to keep the others, as well as the High Representative, informed of any matter of common interest. The Member States which are also members of the UN Security Council are required to 'concert' their practice and to keep the other Member States and the High Representative fully informed. Those Member States which are permanent members of the Security Council must, in the execution of their functions, ensure the defence of the positions and the interests of the Union, even though this is without prejudice to their responsibilities under the provisions of the UN Charter.

Article 35 TEU provides for the cooperation of the diplomatic and consular missions of the Member States and the EU delegations in third countries and international conferences, and their representations to international organizations, in ensuring that the common positions and joint actions adopted by the Council are complied with and implemented. This cooperation is to take the form of an exchange of information, carrying out joint assessments, and contributing to the implementation of the EU's common positions and joint actions.

(B) THE REQUIREMENT OF COHERENCE ACROSS POLICIES

The traditional division in foreign policy between high politics, for example matters of war and peace, and low politics, for example economic and other more 'technical' matters, is arguably legally reflected in the separate legal regimes of the CFSP and of the other competences of the EU. The reality of political and economic interaction in a highly globalized world, however, prevails over

this kind of formal juridical delineation.²⁹⁹ Perhaps it is this mismatch between the constitutional framework and the practical reality of EU international relations that has kept the theme of 'coherence' at the centre of EU attention, such that it has been described as 'the true recurrent theme of European foreign policy'.³⁰⁰

Until the entry into force of the Lisbon Treaty, the legal attempt to ensure greater coherence was said to have, at best, mixed results.³⁰¹ Gauthier argued that the 'common strategy', one of the CFSP legal instruments which was to aim at greater overall unity and some kind of harmonization, had rarely been used; that the creation of the role of the Secretary General/High Representative for CFSP had also introduced a degree of competition with the Commissioners responsible for external relations, and that the power to conclude agreements which conferred on the EU an embryonic international legal personality was only a partial compromise.³⁰² Against this background, the attempt of the Lisbon Treaty drafters to introduce greater coherence by redesigning aspects of the institutional architecture of EU external relations can be understood.

Article 21(3) TEU now requires the EU to ensure consistency 'between the different areas of its external action and between these and its other policies'.³⁰³ The 'single institutional framework' referred to in the TEU's preamble is intended to ensure the desired consistency and coherence, and the High Representative has particular responsibility in this regard.

(C) COORDINATION BETWEEN THE MEMBER STATES AND THE EU: COOPERATION AND COMPLIANCE

The effectiveness of EU external activities also depends on whether it manages to ensure the cooperation, and where necessary the compliance, of its Member States. The duty of loyal or sincere cooperation is now to be found in Article 4(3) TEU. The broader application of this obligation is reinforced by Article 24(3) of the TEU, according to which the Member States are under a duty to support the EU's external and security policy 'actively and unreservedly in a spirit of loyalty and mutual solidarity'. Member States are further required to work together to enhance and develop their mutual political solidarity. The TEU stipulates that they shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations, and the Council is required to ensure compliance with these principles.

The ECJ has regularly invoked the obligation now contained in Article 4(3) TEU together with other provisions to put pressure on the EU institutions and the Member States to act in defence of the EU's common interests.³⁰⁴ The Court ruled that Member States are required to facilitate the achievement of the EU's tasks and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty.³⁰⁵ The Court emphasized that this 'duty of genuine cooperation is of general application and does not depend either on whether the Community [now EU] competence is exclusive, or on any right of the Member State to enter into obligations towards non-member countries'.³⁰⁶

The Article 4(3) TEU obligation to comply with EU law imposes legal constraints on the Member States in their external action in a number of ways. It has been held to require Member States to

²⁹⁴ To this end, two liaison offices were established, one in Geneva and one in New York, by the General Secretariat of the Council.

²⁹⁵ Art 24(1) TEU.

²⁹⁶ Council Decision 2010/427/EU of 26 July 2010 establishing the organization and functioning of the European External Action Service [2010] OJ L201/30; S Vanhoosecker and N Reslow, 'The European External Action Service: Living Forwards by Understanding Backwards' (2010) 15 EFAR 1.

²⁹⁷ Art 27(3) TEU.

²⁹⁸ On the uneven character of EU representation in international organizations see S Gstöhl, 'Patchwork Power' Europe: The EU's Representation in International Institutions' (2009) 14 EFAR 385.

²⁹⁹ For the waning of the distinction in the context of the EU see J-V Louis, 'The European Union: From External Relations to Foreign Policy?', College of Europe, EU Diplomacy Papers 2/2007.

³⁰⁰ P Gauthier, 'Horizontal Coherence and the External Competences of the European Union' (2004) 10 ELJ 23, 25.

³⁰¹ Ibid 35.

³⁰² Ibid.

³⁰³ See on this principle I Bosse-Platière, *L'article 3 du Traité UE: Recherche sur une exigence de cohérence de l'action extérieure de l'Union européenne* (Bruylant, 2009).

³⁰⁴ See, eg, Case 22/70 ERTA (n 29); Cases 3, 4, and 6/76 Kramer (n 30); Opinion 2/91 (n 45); Opinion 1/94 (n 41).

³⁰⁵ See, on the duty of sincere cooperation in the field of external relations, above Section 6(d).

³⁰⁶ Case C-433/03 *Commission v Germany* (n 186) [64]; Case C-266/03 *Commission v Luxembourg* (n 186) [58].

facilitate the application of EU law, and thus not to give effect to a bilateral agreement falling outside the field of application of the Treaties, where giving effect to it would impede the application of a right conferred by EU law and the supremacy of EU law.³⁰⁷ The *Open Skies* cases provide a further example in which, although the agreements concluded by the Member States fell largely outside exclusive EU competence, the Member States' treaty-making powers in the field were said by the ECJ to be constrained by the need to comply with the Treaty rules on the right of establishment.³⁰⁸ We have seen above that not only are the Member States precluded from individual action when an EU agreement exists, but they are also subject to special duties of action and abstention, in particular where the Commission has submitted proposals to the Council which represent the point of departure for concerted EU action.³⁰⁹

The international representation of the EU became a particularly salient issue at the time of the Uruguay Round negotiations which led to the establishment of the WTO. In *Opinion 1/94*, the Commission claimed to be the sole spokesperson for the Community and the Member States, on the basis that this was necessary to secure the effective implementation of the WTO agreements. The ECJ ruled that these concerns could not influence the allocation of competence between the EU and Member States, but it also ruled that where the subject matter of an agreement fell within shared EU–Member State competence, close cooperation between them in the process of negotiation, conclusion, and fulfilment of commitments entered into was essential.³¹⁰ The obligation to cooperate flowed from the requirement for unity in the international representation of the EU.³¹¹

In terms of dispute resolution too, Member States are bound by the duty of sincere cooperation *vis-à-vis* the EU. The ECJ ruled in the *MOX Plant* case that Ireland was in breach of the duty of cooperation by instituting dispute settlement proceedings against the UK under UNCLOS in relation to matters which fall within EU competence without consulting the Commission.³¹²

Finally, it has been argued that the unity of the international presence of the EU and its Member States which is achieved through this kind of cooperation may be greater than the unity resulting from the exclusive competence of the EU, since it operates also when the Member States are exercising their own competences.³¹³

11 CONCLUSIONS

- i. The area of external relations has become increasingly important in recent years, as the EU strives to assert its presence more effectively on the world stage, on issues such as trade, climate change, development, human rights, and international terrorism.
- ii. One of the crucial issues for the conduct of EU international relations is effective coordination across many dimensions and levels. This includes coordination across policy fields, coordination

between the EU and the Member States, and coordination at the level of international representation. Consistency across and between policies has become a constitutional requirement of EU external relations.

- iii. In an EU of twenty-seven with several applications for membership pending, the problem of coordinating the EU's international relations, the problem of effective international law-making, and the ambition of presenting a single face to the outside world become increasingly challenging.
- iv. The importance of EU external action is reflected in the range of new institutional and substantive provisions introduced by the Lisbon Treaty to enhance and streamline the EU's global profile and role. Only time and political practice will reveal whether these innovations have succeeded in strengthening the EU as an international actor.

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³⁰⁷ Case 235/87 *Mattucci v Communauté française de Belgique et al* [1988] ECR 5589, 5611–5612. See also the Bilateral Investment Treaty (BITs) cases, (n 215). While the ECJ used Art 351 TFEU (ex Art 307 EC) to resolve these cases, this Art is a mere expression of the broader principle of sincere cooperation (see on this link the conclusions of AG Poiares Maduro in Case C-205/06 *Commission v Austria* [2009] ECR I-1301, [33]–[43]).

³⁰⁸ Case C-487/98 *Commission v Denmark* [2002] ECR I-9519, [122]–[139]; M Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility and the Effects of International Law', FIDE Report, 2006.

³⁰⁹ Case C-266/03 (n 186) [60]; Case C-433/03 (n 186) [66]; Case C-246/07 *Commission v Sweden* (n 177).

³¹⁰ *Opinion 1/94* (n 41) [107].

³¹¹ *Ibid* [108]. The ECJ also referred to *Opinion 1/78* (n 62) [34]–[36] and *Opinion 2/91* (n 45).

³¹² Case C-459/03 *Commission v Ireland (MOX Plant)* [2006] ECR I-4635; see also the Opinion of AG Poiares Maduro.

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Chapter 9

The EU, the Member States and International Law

9.1 Introduction

Over the past decades, most issues concerning the interface between EU law and national law have been resolved, and Member States' authorities have grown to accept the basic tenets of supremacy and direct effect. However, once that rules of international law come into play as well, the relationship between norms from the European and the national legal order becomes less clear-cut.

The Member States continue to play an independent role on the global scene, enjoy their own rights there, and have taken up individual obligations vis-à-vis a plethora of third countries and international organisations. As we have seen, the EU has also concluded a great number of treaties and conventions, and it too is an active participant in international bodies and forums. Nonetheless, as we will observe in this chapter, while both the EU and the Member States are bound by international law, they occupy different positions within the international legal order. Moreover, they do not respond in the same way to rules that are external to their legal system. Thus, the interaction between norms of international, European and domestic pedigree is fraught with complications. Mixed agreements, the standard products of the fact that the EU and the Member States share external competences in certain domains, present a typical litmus test. The EU Treaties contain several tools and mechanisms to smoothen the interplay between international, European and national law, but these do not succeed in eradicating the tensions altogether. In the paragraphs that follow, we will investigate some of the (potential) fracture lines, and analyse the legal provisions that seek to iron them out.

This chapter is divided into two parts. First, attention will be devoted to the place of the EU in the international legal order and the way it has generally positioned itself (para. 9.2). Thereby, we shall also discuss the internal rank and effect of norms of international provenance, as well as the meandering views of the EU Courts on that subject. In the second part of the chapter, we will take a closer look at the position of the Member States, which are sandwiched between, and bound to comply with, their European as well as their international commitments (para. 9.3).

Thereby, we will devote particular attention to the intricacies surrounding the management of mixed agreements, as well as to the (waning) possibilities for seeking enforcement at international courts and tribunals.

9.2 The EU and the International Legal Order

9.2.1 *The Applicability of International Law on the EU Legal System*

As illustrated in the previous chapters, the EU deploys countless activities on the global scene, has concluded many agreements, and takes part in the work of numerous international organisations such as the WTO, WHO and UNESCO.¹ The participation of the EU in those IOs can take the form of either full membership or observer status.²

This diligent approach of the Union chimes handsomely with the freedom to contract, which is traditionally just as much a cornerstone of international law as it is of civil law. All the same, it should be added that Art. 220 TFEU in fact instructs the EU to establish appropriate forms of cooperation with the UN, with specialised UN agencies, the Council of Europe, the OSCE and the OECD. Moreover, the EU makes itself out to be innately distinct from the organisations with which it has entered into relations, by claiming to constitute an 'autonomous legal order'. Thereby, the EU Courts have taken up a central filtering role, deciding by which external norms the Union may be considered to be bound, and which it can duck out off.

The autonomy claim first manifested itself through *Costa v ENEL*, when the EC Treaty (and the norms stemming from it) was characterised as an independent source of law.³ This formed the basis for the premise of the structural priority of European law over norms of domestic law. Thus, the supranational system was to function in a top-down manner, and the highest rules could not be undermined or obscured by national laws and provisions.

The external dimension of this systemic autonomy only emerged sometime later. In Opinion 1/76, the original design for a laying-up fund for inland waterway vessels turned out to be unacceptable, due to the conflict between the jurisdiction

¹The ability of the Community to take up membership of IOs was confirmed by the ECJ in Opinion 1/76, *Draft agreement establishing a European laying-up fund for inland waterway vessels*.

²The EU is e.g. a full member of the WTO and the FAO, but holds observer status in the ILO. If an international organisation only admits states (e.g. the IMF and the World Bank), the Union may authorise its Member States to act there on its behalf and in its interest.

³Case 6/64, *Costa v ENEL*. But cf. already the 'new legal order' postulate in Case 26/62, *NV Internationale Transportonderneming Van Gend & Loos v Nederlandse Administratie der Belastingen*.

of the proposed judicial body and the ECJ.⁴ The same guarded view was taken in e.g. Opinion 1/91, when the initial framework for collaboration with the EFTA countries was rejected: it would introduce a large body of new rules juxtaposed with a corpus of identically worded provisions of EC law, causing an abundance of problems of interpretation and consistency and eroding the very foundations of the European legal system.⁵

In Opinion 1/00, the Court was even more explicit, stating that the preservation of the autonomy of the EU legal order requires, first of all, that the essential character of the powers of the Union and its institutions as conceived in the Treaties stays unaltered.⁶ Additionally, said autonomy was taken to mean that any procedure for resolving disputes and ensuring uniform interpretation foreseen in bodies and structures that are external to the EU may not have the effect of binding the Union and its institutions in the exercise of their internal powers and in the interpretation of their own legal rules. This means that, ultimately, the EU cannot be considered bound by norms originating in international law, unless and to the extent that it has accepted these and that they do not clash with the internal legal system. This has led the ECJ to reject the overriding authority of the UN in its seminal judgement in the *Kadi* case.⁷ Here also, the Court decided to refuse an unreserved application of external international obligations in order to preserve fundamental norms of the internal legal order. It will be recalled that in this case, the central dispute concerned the legality of a Regulation implementing a resolution of the UN Security Council. This venerable origin did not render it immune from judicial review, as "the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system, which is not to be prejudiced by an international agreement".⁸

In all then, one could say that the unique quality and independent position of the European system within the international arena has been vigorously stressed on different occasions.⁹ Admittedly, the EU Courts have also repeated several times that the Union must respect international law in the exercise of its powers.¹⁰ Yet, it

⁴Opinion 1/76, *Draft agreement establishing a European laying-up fund for inland waterway vessels*.

⁵Opinion 1/91, *Draft agreement on the creation of the European Economic Area* (I). Following renegotiations, a novel agreement was drawn up, which received the blessing of the ECJ in Opinion 1/92, *Draft agreement on the creation of the European Economic Area* (II).

⁶Opinion 1/00, *Envisaged agreement on the establishment of a European Common Aviation Area*.

⁷Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al-Barakaat International Foundation v Council*.

⁸*Ibid.*, para. 316.

⁹Leading some to regard the EU as a 'self-contained' legal order. Considering however that the system continues to be rooted in international law, the Vienna Convention on the Law of Treaties does not cease to apply automatically: cf. De Waele (2005), pp. 171–178.

¹⁰See e.g. Case C-286/90, *Anklagemyndigheden v Poulsen and Diva Navigation Corp.*, and Case C-386/08, *Bria GmbH v Hauptzollamt Hamburg-Hafen*.

takes considerable effort to square the outcomes of sundry cases with that creed. At the end of the line, in the face of an irreconcilable conflict, decisive weight will still be attributed to the stipulations in the founding Treaties of the Union, which are regarded as unassailable constitutional documents.¹¹ On the other hand, the treasured autonomy has not prevented the EU Courts from considering the EU to be fulsomely bound by the GATT, pushing aside the prerogatives of the Member States in the process.¹² Also, it has proclaimed that some international rules do in fact form an integral part of the European legal order, amongst others, the UN Convention on the Law of the Sea and rules of customary international law.¹³

9.2.2 The Rank and Effect of International Law in the EU Legal Order

The corollaries of the restricted applicability of general international law and the autonomous position of the EU may be observed when looking inside the European legal order. In principle, the EU considers itself bound by the treaties it has concluded and the rules of the organisations it has joined. At the same time, the EU Courts once again act as gatekeepers, exercising control over the influx of external norms, remaining wary that the legal order is 'contaminated' by rules and concepts that are not native to it.

Unsurprisingly then, in the hierarchy of norms within the European legal order, the general principles of EU law have been placed at the top of the normative pyramid, with rules of international law standing on a lower footing (with the exception of *ius cogens* norms).¹⁴ At the same time, international agreements concluded by the EU will, in case of conflict, trump any divergent secondary legislation (e.g. Regulations or Directives).¹⁵ This primacy of international agreements over provisions of secondary law also means that the latter must, as far as possible, be interpreted in a manner that is consistent with those agreements.¹⁶

¹¹Cf. Case 294/83, *Parti écologiste 'Les Verts' v European Parliament*, para. 23.

¹²Joined Cases 41–44/70, *NV International Fruit Company and others v Commission*.

¹³See, respectively, Case C-308/06, *The Queen on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*; Case C-286/90, *Anklagemyndigheden v Poulsen and Diva Navigation Corp.*

¹⁴Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al-Barakaat International Foundation v Council*. Some commentators read an earlier confirmation of this position in Case 41/74, *Van Duyn v Home Office*.

¹⁵See e.g. Case T-115/94, *Opel Austria GmbH v Council*; Case C-344/04, *The Queen on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*.

¹⁶See e.g. Case C-61/94, *Commission v Germany*; Case C-341/95, *Gianni Bettati v Safety Hi-Tech Srl*.

In the classic dichotomy between states that are dualist or monist as regards the effect of norms of international law in their legal order, the EU would appear to adhere to the latter position (albeit not entirely unreservedly). International agreements concluded by the EU automatically become part of EU law, and the rules contained therein may be relied upon before the EU Courts and the courts of the Member States.¹⁷ This e.g. holds for provisions in association and cooperation agreements.¹⁸ However, provisions contained in an agreement concluded by the European Union will not be awarded direct effect prior to an examination of the spirit, general scheme and terms of that agreement.¹⁹ Moreover, when the invalidity of EU legislation is pleaded before a national court, the ECJ is willing to review the validity of the measure concerned in the light of all the rules of international law subject to two conditions: first, the EU must be bound by those rules; second, the validity of the legislation can only be assessed in the light of an international treaty where the nature and the broad logic of the latter do not preclude this and when the provisions of that treaty are unconditional and sufficiently precise.²⁰

Contrary to what one might think, the latter does not constitute an entirely straightforward matter, and quirky outcomes may well be reached. Earlier, we already encountered the strange case of the (non-)effect of GATT and WTO norms. These rules are recognised as forming an integral part of the European legal order, yet this is sadly to little avail for those individuals that actually wish to rely on them.²¹ In *Intertanko*, taking a rather dubious view of the UNCLOS, the ECJ also rejected the direct effect of the provisions of that Convention, in light of its supposed 'nature and broad logic'.²² By way of final example, in its highly peculiar ruling in *Racke*, the ECJ denied the direct effect of a customary international law principle while simultaneously employing it as the relevant benchmark for validity review.²³

Diverse explanations have been offered to explain the variations in the Court's approach, with some emphasising the growing negotiation power and political interests of the EU, and others stressing the importance of regarding whether the

¹⁷See e.g. Case 181/73, *Haegeman v Belgium*; Case C-308/06, *The Queen on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*.

¹⁸See e.g. Case 87/75, *Bresciani v Amministrazione Italiana delle Finanze*; Case 12/86, *Demirel v Stadt Schwäbisch Gmünd*; Case C-18/90, *Office national de l'emploi v Kziber*; Case C-416/96, *El-Yassini v Secretary of State for Home Department*; Case C-438/00, *Deutscher Handballbund eV v Kolpak*.

¹⁹See e.g. Case C-469/93, *Amministrazione delle Finanze dello Stato v Chiquita Italia SpA*, and Case C-160/09, *Ioannis Katsivardas – Nikolaos Tsitsikas OE v Ipourgos Ikononikon*.

²⁰See e.g. Case C-308/06, *The Queen on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*.

²¹See Chap. 4, para. 4.4.

²²Case C-308/06, *The Queen on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*.

²³Case C-162/96, *A. Racke GmbH & Co. v Hauptzollamt Mainz*.

rules have a bilateral or a multilateral dimension.²⁴ Although no solution has yet been proffered that decisively resolves all puzzles, there is good cause to believe in the existence of a 'twin-track approach', whereby EU measures are structurally shielded from challenges, with the Court adopting instead a rather merciless position in cases where the legality of Member State action is challenged.²⁵

9.3 The Member States Between EU and International Law

9.3.1 Individual Treaty Commitments

In all fields where the EU enjoys no competence or merely a supporting one, the Member States are principally entitled to take up legal commitments with third states or international organisations.²⁶ Also, as stipulated in the first sentence of Art. 351 TFEU, no provision of EU law may affect any rights or obligations of Member States that arise from agreements they concluded with third countries or international organisations before they became members of the Union.²⁷ It should be realised that this rule not only serves the Member States themselves, but also shields the rights of the third countries or organisations in equal measure. For the latter, the EU Treaties denote a *res inter alios acta*, and as a result, the maxim of *pacta tertiis nec nocent nec prosunt* applies. Thus, the EU and its institutions should not stand in the way of a faithful performance of the obligations of the Member States that stem from a prior agreement with external partners.²⁸

The freedom of the Member States is, however, subject to four limitations. First, the powers they have retained may not be abused, and should always be exercised in a manner that avoids provoking inconsistencies with the policies agreed in the

²⁴For a splendid overview, see Bronckers (2008).

²⁵See Mendez (2010).

²⁶For example, education, culture, some aspects of public health. One might add topics that touch on military and defence issues, as the Treaties do not pronounce themselves unequivocally on the nature of the CSDP (nor, for that matter, on the CFSP).

²⁷For the founding members of the EU, this refers to agreements concluded before 1 January 1958; for states that have acceded later, the date of their accession presents the relevant yardstick.

²⁸Case 812/79, *Attorney General v Burgoa*. If over time, the EU has fully subsumed areas of competence in which all the Member States had previously entered into treaty relations, 'functional succession' may take place, with the Union replacing them and assuming their legal entitlements and obligations. For the precise conditions, see Joined Cases 41–44/70, *NV International Fruit Company and others v Commission*; Case C-188/07, *Commune de Mesquer v Total France and Total International Ltd*; Case C-301/08, *Bogiatzi v Deutscher Luftpool, Société Luxair, European Communities, Luxembourg Foyer Assurances SA*; Case C-308/06, *The Queen on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*.

context of the EU.²⁹ Contrary to what one might think, the principle of sincere cooperation or 'Union loyalty', contained in Art. 4 (3) TEU, is of general application, and not restricted to situations where the EU possesses an exclusive power.³⁰ This should be kept well in mind whenever Member States seek to take up new commitments. At the same time, when and where the Union disposes of neither an exclusive nor a shared power, the risk of clashes would in practice appear to be minimal.³¹

A second limitation concerns the exercise of the rights stemming from the earlier treaty commitments, referred to in the first sentence of Art. 351 TFEU. As the ECJ has established, Member States cannot award priority to those over their EU law obligations when the agreement *allows*, but does not *require* the Member State to adopt a measure which appears to be contrary to EU law.³²

A third limitation also relates to the earlier treaty commitments, and is to be found in the second sentence of Art. 351 TFEU. As a rule, in case an agreement concluded by a Member State before it became an EU member should prove to be incompatible with the Treaties, all appropriate steps must be taken to eliminate the incompatibilities. This behest is actually quite strong, and exceeds a simple 'best efforts' obligation. It necessitates the attainment of a specific result, imposing a duty of re-negotiation.³³ Should this come to nothing, the prior agreement will ultimately have to be denounced. Member States are thus unable to plead in their defence that they ran into grave difficulties when attempting to bring their obligations to a third country in line with their obligations under EU law.³⁴

A fourth and final limitation concerns the fact that the second sentence of Art. 351 TFEU can bite even if an incompatibility arises through subsequent EU law. What is more, in recent case law, the Court has ruled that the obligation to eliminate incompatibilities extends to hypothetical ones, with the rationale being that the

²⁹See Case C-124/95, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*.

³⁰See Case C-266/03, *Commission v Luxembourg*; Case C-433/03, *Commission v Germany*.

³¹Of course, in case the EU does enjoy an exclusive power, any new commitments undertaken by the Member State in the field concerned would immediately constitute an egregious violation of EU law. Member States should proceed cautiously in case the EU possesses a shared power: judging from Case C-205/06, *Commission v Austria* and Case C-249/06, *Commission v Sweden*, they have to avoid a potential conflict of rules, and may have to rescind prior treaty commitments that potentially clash with provisions of EU law, even when the Union has not yet exercised its powers.

³²Case C-324/93, *The Queen v Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd*.

³³Case C-62/98, *Commission v Portugal*. This entails that the inclusion of a 'disconnection clause', a provision according to which certain partners to a multilateral convention will apply special rules (here: EU law) in their relations *inter se* (in so far as such special rules govern the particular subject and apply to the case at hand), will not be enough. For illustrations of such clauses and their working, see Cremona (2010).

³⁴See e.g. Case C-170/98, *Commission v Belgium*; Case C-84/98, *Commission v Portugal*.

prevention of a potential norm conflict at the earliest possible stage guarantees the effective implementation of future EU rules.³⁵

At the end of the day then, the Member States appear to be severely constricted by the Union loyalty obligation on the one hand, and the second sentence of Art. 351 TFEU on the other. The combination of these provisions ostensibly renders largely nugatory the prerogatives handed by the first sentence of Art. 351 TFEU.³⁶ Nonetheless, the Member States continue to enjoy room for manoeuvre in their individual treaty commitments, and since overt conflicts with EU rules can be avoided through the principle of consistent interpretation, the available space becomes a little bit more appreciable.³⁷

9.3.2 EU Treaty Commitments

In the foregoing, it has already been explained that, notwithstanding the reluctance of the EU Courts to allow for an unchecked and uninhibited influx of 'foreign norms', the international agreements the EU has consciously concluded with third countries and international organisations form an integral part of the European legal order.³⁸ Consequently, the EU institutions, bodies and agencies will be bound to the terms of those agreements, and should proceed to implement them in good faith.

One might then be inclined to presume, pursuant to the *pacta tertiis nec nocent nec prosunt* maxim, that the Member States of the EU are not bound by these agreements in their capacity of sovereign individual actors on the international scene – that is to say, as far as the EU exercised an exclusive competence to bring those agreements into being.³⁹ The *pacta tertiis* principle is, however, brushed aside by Art. 216 (2) TFEU, which stipulates that agreements concluded by the Union are binding not only upon its institutions, but also upon its Member States. So, when combined with the aforementioned obligations flowing from Art. 4 (3) TEU and 351 TFEU, it becomes clear that the latter do not represent true *tertiis*. Therefore, they have to abide by the terms of treaties or conventions concluded by the EU, and should, as far as necessary, implement them in good faith as well.

As regards the status in the domestic legal order of the Member States of international agreements concluded by the EU, the principle of supremacy of EU law inexorably holds sway here too. Further, any determination of the Courts in Luxembourg regarding the (lack of) direct effect of provisions of an international

³⁵ See Case C-205/06, *Commission v Austria*; Case C-249/06, *Commission v Sweden*; Case C-118/07, *Commission v Finland*.

³⁶ The Court's tenacity in letting the rules of EU law triumph over the Member States' (prior) international commitments is magisterially portrayed in Klabbers (2009).

³⁷ See e.g. Case C-216/01, *Budvar v Rudolf Ammersin GmbH*.

³⁸ Of course, as long as there existed an adequate legal basis and no procedural errors were committed.

³⁹ Evidently, at the exercise of a shared competence the Member States will be bound *ipso facto*.

agreement will in the same way be binding for all national courts. As a result, the latter are, for example, not allowed to award a broader effect to GATT/WTO norms than ECJ case law permits. The national courts will be similarly bound by the Courts' jurisprudence on the principle of indirect effect.⁴⁰

It goes without saying that all treaties and conventions ratified by a Member State that lie completely outside the scope of EU law remain within the reserved domain of national law. Obviously then, the precise rank and effect thereof will be determined by the domestic rules that ordinarily apply there.

9.3.3 The Management of Mixed Agreements

Mixed agreements are the standard product of the exercise of a competence shared between the EU and the Member States.⁴¹ The triangle between these two separate entities and the external contracting party can give rise to convoluted legal puzzles.⁴² The provisions of a mixed agreement are binding on all contracting parties, the contracting parties are jointly and severally responsible vis-à-vis one another for its further implementation, and they can all be held to account in case of deficiencies, or a wholesale default.

Here again, the EU Member States are specifically guided and restricted by the principle of sincere cooperation, encapsulated in Art. 4 (3) TEU. Over the years, the EU Courts have steadily widened the ambit of the relevant obligations.

As remarked above, the principle of Union loyalty is applicable irrespective of whether the EU competence at stake is exclusive or shared.⁴³ The Court has stressed that, even when the subject-matter of a treaty or convention falls partly within the competence of the Union and partly within the competence of the Member States, they are required to cooperate with the EU institutions as intensely as possible, at the stage of negotiation, the stage of conclusion and the stage of implementation.⁴⁴ Once the Council adopts a decision that authorises the Commission to negotiate the agreement on behalf of the EU, this marks the start of a concerted action at international level. According to the ECJ, from that moment on, the Member States are bound to work together with the Union institutions.⁴⁵

⁴⁰ See e.g. Case 14/83, *Von Colson and Kamann v Land Nordrhein-Westfalen* and Case C-53/96, *Hermès International v FHT Marketing Choice BV*.

⁴¹ But see Chap. 8, para. 8.2.2, footnote 5.

⁴² The literature on this subject is voluminous; see inter alia Schermers and O'Keeffe (1983); Heliskoski (2001); Hillion and Koutrakos (2010).

⁴³ Case C-266/03, *Commission v Luxembourg*; Case C-433/03, *Commission v Germany*.

⁴⁴ This obligation has been held to stem from a general principle of unity in the international representation of the EU, e.g. in Opinion 2/91, *Conclusion of ILO Convention No. 170 concerning safety in the use of chemicals at work*.

⁴⁵ Case C-266/03, *Commission v Luxembourg*; Case C-433/03, *Commission v Germany*.

Strikingly, the Court has gone a step further, ruling that the Member States are already bound by special duties of action and abstention once that the Commission has submitted proposals to the Council for a concerted EU action – even if the Council did not (yet) adopt them.⁴⁶

In the conclusion of mixed agreements, a duty to facilitate the exercise of Union competence may be considered implicit, flowing from Art. 4 (3) TEU and the specific obligations of solidarity that govern all EU external action. The obligation to cooperation in full sincerity can be made explicit in a Council decision inviting the Member States to ratify a mixed agreement.⁴⁷

In the implementation of mixed agreements, the second and the third sentences of Art. 4 (3) TEU play a particular role. The EU Courts have extended their jurisdiction significantly here, empowering themselves to interpret mixed agreements in their entirety (i.e. including the provisions that are outside EU competence).⁴⁸ In their view, mixed agreements have the same status in the European legal order as 'pure' EU agreements, since the provisions come within the scope of EU competence.⁴⁹ As a result, should national courts entertain doubts with regard to any aspect of a mixed agreement, they are obliged to refer preliminary questions to the ECJ.⁵⁰

One could think that, in a domain of shared powers, because the Member States act in the context of a competence they have (partially) retained for themselves, an absence of collaboration and/or a lagging behind in implementation does not necessarily lead to an infringement procedure. An infringement procedure may, however, be initiated concerning the execution of provisions that lie outside the scope of the competence of the Union, but within the scope of EU law. According to the ECJ, in such situations, the Union has a keen interest in ensuring the implementation of a mixed agreement in its entirety.⁵¹ In the *Etang de Berre* case, France was condemned for failing to live up to its part of a mixed agreement, even though the alleged breach pertained to an aspect thereof not covered by European rules.⁵² For the Court, it sufficed that the general field was covered in large measure by EU

⁴⁶Case C-246/07, *Commission v Sweden*. See also Case C-45/07, *Commission v Greece*, entailing that in the absence of a Union common position, Member States are equally to refrain from individual action within the framework of international organisations.

⁴⁷For example, Council Decision 2000/278/EC on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIP Performances and Phonograms Treaty, OJ [2006] L 89/6; Council Decision 2002/1358/EC concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, OJ [2002] L 130/1.

⁴⁸Case C-53/96, *Hermès International v FHT Marketing Choice BV*; Case C-337/95, *Parfumes Christian Dior SA v Evora BV*.

⁴⁹Case C-13/00, *Commission v Ireland*.

⁵⁰Case C-337/95, *Parfumes Christian Dior SA v. Evora BV*; Case C-431/05, *Merck Genéricos – Produtos Farmacêuticos Lda v Merck & Co. Inc. and Merck Sharp & Dohme Lda*.

⁵¹Case C-13/00, *Commission v Ireland*.

⁵²Case C-239/03, *Commission v France*.

legislation; decisive weight was attached once again to the Union interest in compliance by both the EU and its Member States.

9.3.4 Litigating at International Courts

Should disputes arise on the terms or interpretation of an international agreement, the common route in international law is to seek resolution at an international court or tribunal. If the EU has an argument with one of its contracting parties in relation to a treaty or convention it has concluded under an exclusive competence, the matter may be resolved by the forum stipulated in the agreement concerned. If no special arrangements have been made, the usual forums may be approached (e.g. the International Court of Justice, the WTO Dispute Settlement Body, the UN Tribunal for the Law of the Sea).⁵³

Similarly, if a Member State has a difference of opinion with a treaty partner, and the agreement in question has been concluded on the basis of a reserved competence, outside the scope of EU law, it may equally seek resolution of the dispute at any competent international court or tribunal.

Where the dispute pertains to a mixed agreement, the room for such litigation is nevertheless stymied by the legal obligations resulting from EU membership. In the *Mox Plant* case, Ireland was held to account for suing the United Kingdom at the UNTLOS.⁵⁴ The ECJ considered that the subject matter of the dispute related to an area of shared external competence, as the matters covered by the UNCLOS provisions were to a large extent already regulated by EU measures. Ireland was therefore condemned for violating Art. 4 (3) TEU, as well as Art. 344 TFEU, which prohibits Member States from submitting a dispute on the interpretation or application of the EU Treaties to any methods of settlement different from those provided for therein.⁵⁵ Again, the Court presumed that it is in the EU's interest to rein in a Member State for violating any part of an international agreement, with the fact that it had been concluded under a shared competence presenting no reason to turn a blind eye.

⁵³Yet, as the EU is not itself a member of the UN, any action at the ICJ will have to be initiated by one or more Member States.

⁵⁴Case C-459/03, *Commission v Ireland*.

⁵⁵Remarkably, the UNCLOS in fact stipulated itself that specific dispute resolution mechanisms should take precedence over those in part XV of the Convention.

9.4 Conclusion

The preceding chapters have highlighted the interplay between the different sets of rules that together make up the layered global player called European Union. As this chapter has demonstrated, at the heart of this legal construction are the Member States, which are gradually coalescing, but in the absence of a comprehensive federal or unitary constitution, continually present on the global scene themselves. They remain independent actors that are active under and fully recognised by the rules of international law. At the same time, while the body of international legal rules envelops both the Union and the Member States that make up its core, these norms have a differing weight and relevance within the different layers. In the foregoing, we have seen for example how the classic adage of *pacta tertiis nec nocent nec prosunt* cannot be adhered to without qualification where it concerns the external engagements of the EU and its Member States. We have also observed how in the European context, the principle of *pacta sunt servanda* has mutated into a much more potent duty of loyalty.

As this point though, it should be recognised that the norms reviewed, stemming from various international, European and domestic sources, do not dovetail completely, and that the emerging picture is therefore not one of a seamless web of rules. In its own way, the difficulty of qualifying the EU legal order in the classic terms of monism and dualism testifies to that fact. It is open to question whether any improvement may be expected in the future, while the body of EU law grows ever more complex, and the workload for the European Courts continues to mount.

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Chapter 10

Conclusion: An Effective Global Player?

10.1 The Legal Dynamics

Quantum leaps have taken place in the evolution of the rules that regulate the Union's international relations. At the dawn of European integration, the original three Communities possessed but a limited array of external powers. Moreover, in accordance with the principles of legality and attributed powers, these powers were closely circumscribed, at least in the sense that no general competence was bestowed upon the EC that could hamper the Member States' exercise of their reserved sovereign prerogatives. Yet, over time, with the sometimes implicit, sometimes explicit support of the Member State governments, the reach of the EC's external powers steadily widened. At the same time, the structures that had been created in parallel for a mutual tuning of the various foreign and defence policies moved ever closer to the supranational structures. This motion reached an apogee in 1987 and its true zenith in 1992, resulting in the erstwhile 'second pillar' of the EU.

As recounted in earlier chapters of this book, the initial provisions governing the CFSP and the CSDP suffered from an overdose of ambiguity, leading to frictions with EC policies, most notably the CCP. In turn, these repeated tussles sparked the reforms undertaken with the Treaty of Amsterdam and, to a lesser extent, the Treaty of Nice. In some respects though, at those points in time, the black letter text was merely catching up, as the new policies had developed an own dynamic over a relatively short period.

The Treaty of Lisbon marks the latest innovation, and possibly presents the greatest sea change. The reform that was originally envisaged to be carried out by the Constitutional Treaty finally arrived after a few false dawns, and connected most of the remaining scattered dots at long last. An integrated, maximally coherent external policy for the EU has now visibly come within reach. Article 21 TEU unequivocally unifies the objectives of the CFSP/CSDP on the one hand, and the external policies contained in the TFEU on the other. The Union's single legal personality and the revamped procedure for concluding international agreements have paid a great service to the cause of transparency. The legal measures of the CFSP and CSDP have been streamlined and aligned with the common set of EU

CHAPTER TWO

IDENTITY AND DIFFERENCE: THE EU AND THE UN AS PART OF EACH OTHER

Geert De Baere and Esa Paasivirta

I. INTRODUCTION

Much like the EU, the UN was conceived in the aftermath of World War II,¹ with the clear objective never to allow a similar cataclysmic event to happen again. Though both are rather different international organizations, the ever-expanding range of issues that come within the purview of EU law engender an increasing amount of connection points at different levels.² The Union is quite unambiguous as regards the importance it attaches to the UN. As the European Security Strategy puts it: "The fundamental framework for international relations is the United Nations Charter."³ The EU, including its Member States, is also the single largest financial contributor to the UN system. The twenty-seven EU Member States fund 38% of the UN's regular budget, more than 40% of UN peacekeeping operations, and about 50% of all UN members' contributions to UN funds and programmes.⁴

It is therefore not surprising that the UN features prominently in the constituent Treaties of the EU. Article 3(5) TEU, which is placed within the common provisions of the EU Treaty, provides that the EU is to

¹ See, for example, Paul Kennedy, *The Parliament of Man. The Past Present, and Future of the United Nations*, New York: Vintage Books 2006, pp. 3–47; cf. Giandomenico Majone, *Europe as the Would-be World Power. The EU at Fifty*, Cambridge: Cambridge University Press 2009, p. 202.

² Koen Lenaerts and Eddy De Smijter, 'The United Nations and the European Union: Living Apart Together', in: Karel Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, The Hague-Boston-London: Martinus Nijhoff Publishers 1998, pp. 439–458, p. 439; Jan Wouters, Frank Hoffmeister and Tom Ruys, 'Introduction', in: Jan Wouters, Frank Hoffmeister and Tom Ruys (eds.), *The United Nations and the European Union: An Ever Stronger Partnership*, The Hague: T.M.C. Asser Press 2006, p. 1.

³ *A Secure Europe in a Better World. European Security Strategy*, Brussels, 12 December 2003, p. 9.

⁴ See 'About the EU at the UN', available at <http://www.eu-un.europa.eu/articles/en/article_9389_en.htm>.

contribute to the "strict observance and the development of international law, including respect for the principles of the United Nations Charter". With respect to the EU's external action, Article 21(1) TEU provides that the Union's action on the international scene is to be "guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world", which include "respect for the principles of the United Nations Charter and international law", and obliges the Union to "promote multilateral solutions to common problems, in particular in the framework of the United Nations". Article 21(2)(c) TEU further provides for the Union to define and pursue common policies and actions, and to work for a high degree of cooperation in all fields of international relations, in order to preserve peace, prevent conflicts and strengthen international security, in accordance with, inter alia, the purposes and principles of the UN Charter. Article 34 TEU outlines certain rules on Member State participation in the UN Security Council (UNSC), to which we will return below.

Article 42 TEU provides for the Common Security and Defence Policy (CSDP) to be conducted in accordance with the UN Charter. In particular, Article 42(1) TEU provides that the Union may use CSDP capacity "on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter". Article 42(7) TEU then provides that if "a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter". The eleventh recital in the preamble to the TEU explicitly connects the development of the CSDP, and the potential establishment of a common defense in accordance with Article 42 TEU, to the emergence of the Union's international identity. The progressive development of the CSDP is intended to reinforce "the European identity and its independence in order to promote peace, security and progress in Europe and in the world". That identity, as Article 42 TEU itself makes abundantly clear, inherently includes the respect for the principles of the United Nations Charter.

The TFEU contains a certain number of references to the UN Charter as well. The seventh recital in the preamble notes the intention of the Member States "to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations". Within the context of development cooperation, Article 208(2) TFEU

provides that the EU and its Member States are to "comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations". Article 214(7) TFEU further provides that the EU is to "ensure that its humanitarian aid operations are coordinated and consistent with those of international organisations and bodies, in particular those forming part of the United Nations system". Finally, Article 220(1) TFEU obliges the EU to "establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies".

In a sense, these extensive Treaty references reflect on the part of the EU a constitutional attitude towards the UN system, rather than an instrumental attitude grounded in traditional foreign policy objectives. That attitude, or so we would argue, forms an inherent part of the Union's emerging international identity. The present chapter focuses mainly on how this attitude is reflected in the role played by the EU in its cooperation with the UN.

In that regard, it should be kept in mind that the EU's global role does not exist in a vacuum. The international organizations (IOs) in which the EU wishes to play a role have their own institutions and membership structures. The EU too has its past, and its Member States have a history of participating in the UN as its members. When assessing the position of the EU within the UN, it is therefore important to distinguish carefully between the international legal dimension on the one hand, and the EU law dimension on the other hand.⁵ We shall therefore commence with a short overview of the rules governing EU external representation, followed by an exploration of the Union's internal coordination processes. Moving to the UN level, the chapter then analyses the drivers, structures, and constraints involved in EU cooperation with the United Nations, which is followed by an examination of the Union's status and its participation within the UN. It should be noted that we will not address in detail the implementation by the EU of UN obligations which, especially in the

⁵ Cf. Frank Hoffmeister and Pieter-Jan Kuijper, 'The Status of the European Union at the United Nations: Institutional Ambiguities and Political Realities', in: Jan Wouters, Frank Hoffmeister and Tom Ruys (eds.), *The United Nations and the European Union: An Ever Stronger Partnership*, The Hague: T.M.C. Asser Press 2006, p. 10; Knud Erik Jørgensen and Ramses Wessel, 'The position of the European Union in (other) International Organizations: Confronting Legal and Political Approaches', in: Panos Koutrakos (ed.), *European Foreign Policy. Legal and Political Perspectives*, Cheltenham: Edward Elgar 2011, p. 264.

light of the ongoing *Kadi* saga,⁶ merits a separate treatment that exceeds the scope of this chapter.⁷

2. EU EXTERNAL REPRESENTATION AND INTERNAL COORDINATION

As far as the EU rules are concerned, it is important to recall that the internal decision-making of the EU and its external representation are different things. This implies, for example, that it is not because one institution is responsible for external representation, for example the Commission, that the same institution also decides on the policy line to be taken in external forums. It is a question of the difference between message and messenger, which follows from Articles 16 and 17 TEU. Article 16 TEU contains an institutional description of the tasks of the Council, and provides for it to exercise legislative and budgetary functions jointly with the Parliament, and to carry out policy-making and coordinating functions as laid down in the Treaties. Article 17 provides a similar institutional description of the Commission, and lays down its basic functions. In this respect, Article 17 TEU provides that, "with the exception of the Common Foreign and Security Policy and other cases provided for in the Treaties, the Commission is to ensure the Union's external representation". In the Common Foreign and Security Policy (CFSP), the EU representation is ensured by the High Representative of the Union for Foreign Affairs and Security Policy (Article 18(2) TEU) and, "at his level and in that capacity", by the President of the European Council, without prejudice to the powers of the High Representative (Article 15(6) TEU).

⁶ Case T-315/01, *Yassin Abdullah Kadi v Council and Commission*, [2005] ECR II-33649; Case T-301/01, *Ahmed Ali Yusuf and Al Barakat International Foundation v Council and Commission*, [2005] ECR II-3533; Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakat International Foundation v Council and Commission*, [2008] ECR I-6351; Case T-85/09, *Yassin Abdullah Kadi v Commission*, [2010] ECR II-5177; Case C-584/10 P, *Commission v Yassin Abdullah Kadi*, [2011] OJ C72/9, pending; Case C-593/10 P, *Council v Kadi*, [2011] OJ C72/9, pending; Case C-595/10 P, *United Kingdom v Yassin Abdullah Kadi*, [2011] OJ C72/10, pending. In his Opinion of 19 March 2013 in Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P, A-G Bot proposes that the Court should set aside the judgment of the General Court in Case T-85/09 and dismiss the action brought by Mr. Kadi.

⁷ For further discussion, see e.g. Daniel Halberstam and Eric Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', (2009) 46 *Common Market Law Review*, p. 13; Gráinne de Búrca, 'The ECJ and the International Legal Order: A Re-Evaluation', in: Gráinne de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge: Cambridge University Press 2012, p. 105.

There exists a delicate balance between Articles 16 and 17 TEU, which requires distinguishing between different situations in international meetings. On the one hand, there are situations where the EU position is well-known, for instance due to EU legislation or earlier EU statements or Council conclusions. In these cases, the Commission (or the High Representative) can express the EU position without necessarily having to resort to further internal procedures. On the other hand, there are situations where the Union's position is not known, i.e. when the Union does not have a position (or fully developed position). In this case, there is no EU position to be represented on the external scene. It is quite another matter if, for instance, the Commission has expressed a view during the internal debate of the Union, which has however not been adopted as the EU position for external purposes. In that case, one falls back on Article 16(1) TEU, which assigns to the Council the policy-making functions, and would thus require the Council to endorse (or amend) the position that the Commission has proposed.⁸ Thus, while the EU representation is entrusted to the Commission and the High Representative (leaving the President of the European Council to one side for a moment), the balance with the policy-making functions of the Council is essential to ensure that the institutional arrangements are efficient, and that they operate in a manner that generates trust between the institutions.

Before the entry into force of the Lisbon Treaty, the Commission represented EU positions concerning the first pillar, that is to say 'Community' matters, to the extent permitted by the UN rules and practices, while the Council Presidency represented the Union in other cases, mostly pertaining to the CFSP. From time to time, both institutions switched seats in the middle of a UN meeting if the competence changed from the first to the second pillar, or vice versa.⁹

However, the Lisbon Treaty removed all explicit references in the Treaties to the role of the Council Presidency in the external representation of the EU. The new Treaty rules (Articles 17 and 27(2) TEU) set a clear framework: the external representation of the EU is ensured by the High

⁸ Esa Paasivirta, 'The EU's External Representation after Lisbon: New Rule, a New Era?', in: Panos Koutrakos (ed.), *The European Union's External Relations a Year after Lisbon*, The Hague: CLEER Working Papers 2011/3, p. 42.

⁹ Maximilian B. Rasch, *The European Union at the United Nations. The Functioning and Coherence of EU External Representation in a State-Centric Environment* (Studies in EU External Relations: 1), Leiden/Boston: Martinus Nijhoff Publishers 2008, pp. 108-109 and p. 112; Pedro Antonio Serrano de Haro, 'Participation of the EU in the work of the UN: General Assembly Resolution 65/276', *CLEER Working Papers* 2012/4, pp. 8-9.

Representative in the CFSP area, and by the Commission in other external relations matters. This is an important change, especially in CFSP matters, as well as a confirmation of the Commission's external role in other matters.

While the Lisbon Treaty thus leaves the Presidency without a formal role in the external representation of the Union, the Member States retain their sovereignty to conduct their own foreign relations, subject to the rules of the Treaty. In principle, this gives them room in the area of shared competences. These shared competences fall outside the CFSP activities and include areas such as the environment, energy and internal market, where the Member States retain competence unless the Union has already exercised its competence. The Member States are in principle free to determine their own representation when acting outside the Union institutional framework, so long as they respect the principle of loyal cooperation or sincere cooperation as laid down in Article 4(3) TEU.

Generally, the attention in defining external representation post-Lisbon has shifted from the CFSP to the notion of shared competences. While the Lisbon Treaty in general sets out a clear framework for Union representation (the Commission, the High Representative, or the EU Delegations) the area of shared competences leaves certain issues open. As is provided in Article 2(2) TFEU, when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. It is specified that the Member States exercise their competence "to the extent that the Union has not exercised its competence". Article 2(2) is a reflexive rule, in the sense that it ties Member States competences to EU legislation that evolves over time. In practice, it may be difficult to draw a clear line, as it often requires a detailed examination of the relevant EU legislation. While most competences are shared to start with, as is clear from the list of shared competences in Article 4 TFEU, once there is EU legislation in place the Member States are precluded from acting on their own, and the area becomes subject to exclusive Union competence (Article 3(2) TFEU).¹⁰ Certain differences of view have been reported with

¹⁰ This has been a source of some unease on the part of the Member States, which was already apparent during the negotiations culminating in the Lisbon Treaty, and which caused them to attach Protocol No. 25 on the exercise of shared competence to the EU and TFEU Treaties. Its Sole Article provides that, with reference to Article 2(2) TFEU, "when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area". Given that the Treaties are not readily to be divided up in areas,

regard to external representation in the areas of shared competences.¹¹ Some Member States tend to argue that the representation by EU actors (in particular the Commission and EU Delegations) is confined to areas within its exclusive competence. The wording of Article 17 TEU does not make a difference as to the nature of the competence (exclusive or shared), however. Nor does it follow from the Treaty rules that representation falls on the rotating Presidency, as pre-Lisbon practice might suggest. In this connection, it may be noted that some controversies have also arisen with regard to so-called hybrid Council decisions authorizing the negotiation and signing of international agreements. Such decisions combine, on the one hand, a regular Council decision (under Article 218 TFEU) and, on the other hand, an inter-governmental decision ('Representatives of the Governments meeting within the Council'). That combination, which would also result in regular qualified majority voting in the Council being turned into unanimity, has now been challenged by the Commission, which is seeking annulment of such hybrid acts in cases which are currently pending before the Court of Justice.¹²

The agendas of UN meetings cover a wide variety of issues which regularly involve matters falling within the (non-CFSP) shared competences areas. In that case, loyal cooperation between the EU actors and the Member States is necessary in order to maintain unity in the external representation of the Union.¹³ That also requires practical arrangements to permit the EU to address the issues at stake in a manner which is both fitting and efficient for the external context, and respectful of the internal competences. In practice, a number of statements are made "on behalf of the EU and its Member States".

and that the concept of "area" of competence in the case-law of the Court of Justice is not fully clear, the Protocol provides limited clarification, if any. Cf. Geert De Baere, 'The Basics of EU External Relations Law: An Overview of the Post-Lisbon Constitutional Framework for Developing the External Dimensions of EU Asylum and Migration Policy', in: Marleen Maes, Marie-Claire Foblets and Philippe De Bruycker (eds.), *External Dimensions of European Migration and Asylum Law and Policy*, Brussels: Bruylant 2011, p. 136.

¹¹ See *The EU External Representation in the Area of Shared Competences*, Warsaw: The Polish Institute of International Affairs 2012, pp. 7, 18.

¹² ECJ, Case C-28/12, *Commission v Council*, [2012] OJ C73/23, pending; Case C-114/12, *Commission v Council*, [2012] OJ C138/5, pending. The use of such a hybrid act was also proposed within the framework of the negotiations on a legally binding instrument on mercury within the framework of the United Nations Environment Programme (UNEP): see Geert De Baere, 'Mercury Rising: The European Union and the International Negotiations for a Globally Binding Instrument on Mercury', (2012) 37 *European Law Review*, pp. 650–655.

¹³ See ECJ, Case C-246/07, *Commission v Sweden*, [2010] ECR I-3317, par. 73, and the case-law cited there.

Given the division of competences and the institutional context just described, the Union and its Member States have developed a sophisticated process to coordinate their views in order to reach an EU position within the UN. That process has its origins in the coordination of the Benelux countries in the UN General Assembly (UNGA) that started already in the late 1940s, and was further developed with the establishment of the European Political Cooperation in 1970.¹⁴ Over the years since, the Community/Union has been active in the UN, the coordination process has intensified, and become entrenched in the diplomatic practice of EU Member States.¹⁵

That coordination takes place both in Brussels and in New York (or Geneva). Finalization of the EU interventions takes place in New York, with significant input by Member States, on the basis of positions taken in Brussels within the Council pursuant to Article 16 TEU.¹⁶ In that regard, the Political and Security Committee (Article 38 TEU) plays an important interlocutory role with respect to CFSP issues, and various Council Working Groups are of significant importance to EU action within the UN.¹⁷ For example, the Working Group on the UN (CONUN) is responsible for UN institutional and horizontal issues, while EU positions within the Third Committee are coordinated in Brussels within the Council Working Group responsible for Human Rights Policy (COHOM).¹⁸

Since the Treaty of Lisbon's entry into force on 1 December 2009, the European Commission Delegation and EU Council Liaison Office have merged into the European Union Delegation, under the authority of the High Representative for Foreign Affairs and Security Policy, and representing the EU in both the CFSP field as well as in other matters.¹⁹

¹⁴ Rasch, *supra* n. 9, p. 30 and p. 60; Davide Zaru and Charles-Michel Geurts, 'Legal Framework for EU Participation in Global Human Rights Governance', in: Jan Wouters et al. (eds.), *The European Union and Multilateral Governance. Assessing EU Participation in United Nations Human Rights and Environmental Fora*, Basingstoke: Palgrave Macmillan 2012, p. 54.

¹⁵ Jan Wouters, Frank Hoffmeister and Tom Ruys, 'Epilogue: the UN and the EU – The Road to Partnership', in: Jan Wouters, Frank Hoffmeister and Tom Ruys (eds.), *The United Nations and the European Union: An Ever Stronger Partnership*, The Hague: T.M.C. Asser Press 2006, p. 385.

¹⁶ Rasch, *supra* n. 9, p. 30.

¹⁷ *The EU External Representation in the Area of Shared Competences*, *supra* n. 11, p. 11.

¹⁸ Sudeshna Basu, 'The European Union in the Human Rights Council', in: Jan Wouters et al. (eds.), *The European Union and Multilateral Governance. Assessing EU Participation in United Nations Human Rights and Environmental Fora*, Basingstoke: Palgrave Macmillan 2012, pp. 89–91.

¹⁹ 'About the EU at the UN', *supra* n. 4.

The EU Delegation is now also in charge of coordination. Furthermore, the European External Action Service (EEAS) has progressively taken up the chairmanship of the relevant EU meetings in Brussels, so that coordination in New York mirrors that in Brussels.²⁰

The question is whether extensive internal EU coordination and EU outreach are fully compatible. It has been argued by some that the coordination process is too time-consuming, and hence, in fact part, of the problem with respect to an effective and efficient Union representation at the UN.²¹ The Maastricht Treaty's establishment of the CFSP introduced a provision in the TEU that provides for coordinated Union action in international organizations (now Article 34), which eventually sparked a culture of EU cohesion at the UN, founded on intensive common preparation, and ingrained in the habits of EU diplomats in New York. An inevitable side-effect has indeed been that the achievement of EU common positions has become more time-consuming than the eventual projection of that position within the UN,²² and that the Union's position is not easily amenable to negotiation.²³ For example, during the negotiations of a UNGA Resolution on a moratorium on the use of the death penalty, the EU's negotiating position became a matter of controversy between the nine non-EU co-authors, on the one hand, and the EU and its Member States, on the other. As the former were not prepared to accept the EU position, the Portuguese Presidency was eventually given more leeway to negotiate a practicable deal with the other co-authors.²⁴ Nevertheless, the rapidly

²⁰ Emanuele Giaufret, 'The EU in the UNGA Third Committee', in: Jan Wouters et al. (eds.), *The European Union and Multilateral Governance. Assessing EU Participation in United Nations Human Rights and Environmental Fora*, Basingstoke: Palgrave Macmillan 2012, p. 73. See in general on Brussels-based meetings chaired by the EEAS and on EU Delegations in multilateral settings: Jan Wouters et al., *The Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities*, Brussels: European Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department 2013, pp. 37–45 and pp. 77–80.

²¹ Rasch, *supra* n. 9, p. 309.

²² Esa Paasivirta and Dominic Porter, 'EU Coordination at the UN General Assembly and ECOSOC: A View From Brussels, A View From New York', in: Jan Wouters, Frank Hoffmeister and Tom Ruys (eds.), *The United Nations and the European Union: An Ever Stronger Partnership*, The Hague: T.M.C. Asser Press 2006, pp. 47–48.

²³ See in general, with respect to mixed EU-Member State action, Geert De Baere, *Constitutional Principles of EU External Relations*, Oxford: Oxford University Press 2008, p. 238.

²⁴ Robert Kissack, 'The EU in the Negotiations of a UN General Assembly Resolution on a Moratorium on the Use of the Death Penalty', in: Jan Wouters et al. (eds.), *The European Union and Multilateral Governance. Assessing EU Participation in United Nations Human Rights and Environmental Fora*, Basingstoke: Palgrave Macmillan 2012, p. 107.

evolving negotiation positions of third countries may imply that the EU comes too late to influence the decision-making process in a meaningful way.²⁵ It has been noted furthermore that the intense coordination processes leave less room for informal lobbying and limited possibility for pro-active policy development.²⁶ The coordination process, which inevitably involves compromises, may also result in statements that are not found to be persuasive.²⁷

However, the net result of such intensive coordination is that there is a common EU position on almost 95% of resolutions,²⁸ and that the EU votes unanimously on four out of five UNGA resolutions that are the subject of a vote, while split votes are mostly confined to politically or ethically sensitive issues.²⁹ Of course, votes in which the EU is unable to agree on a common line occur from time to time. In its 2003 communication ('The European Union and the United Nations: The Choice of Multilateralism'), the Commission warned that while "in the past the practical implications of such split votes have generally been marginal, their impact on the EU's credibility is disproportionate – particularly in cases where there are established CFSP Common Positions on the issues in question".³⁰

Nevertheless, it is important to bear in mind that coherence of the EU's action in a specific UN body is not dependent on the EU coordination process alone, but at least as much on the institutional culture of the UN body in question. It has been pointed out, for example, that the fact that the EU acts very coherently with regard to development cooperation is largely driven by the consensus-oriented decision-making culture of the UN body in question.³¹ Conversely, within the UNGA, the EU's internal coordination is quite successful, yet the Union often remains in a minority position.³²

3. DRIVERS, STRUCTURES, AND CONSTRAINTS OF EU PRESENCE AT THE UN

One may wonder why the EU wants to be present at the UN at all. The simple answer is that many EU policies and competences are impacted

²⁵ Communication from the Commission to the Council and the European Parliament, 'The European Union and the United Nations: The choice of multilateralism', COM(2003) 526 final, p. 21.

²⁶ Rasch, *supra* n. 9, p. 32 and p. 309.

²⁷ Jørgensen and Wessel, *supra* n. 5, pp. 282–283.

²⁸ COM(2003) 526 final, p. 16.

²⁹ Wouters, Hoffmeister and Ruys, *supra* n. 15, pp. 385–386.

³⁰ COM(2003) 526 final, p. 4.

³¹ Rasch, *supra* n. 9, p. 142.

³² Jørgensen and Wessel, *supra* n. 5, p. 283.

upon by matters decided at the UN level, for example with respect to climate change, maritime policies, and counter-terrorism. Furthermore, the desire for EU participation is particularly strong in areas that reflect its own values.³³ As the Union's actions in areas within the scope of UN activity have increased, the need for upgrading the status of the EU in the various UN bodies has become more acute.³⁴

Many international organizations dating from before the establishment of the European Communities have no provision in their constitutions to accommodate other international organizations wishing to become members. The UN is perhaps the paradigmatic example of that genus. The only way for the Union to join such an international organization would be to persuade the existing members to amend the constitution of the organization (in the case of the UN, in accordance with the onerous procedure of Article 108 of the UN Charter) in order to enable other international organizations to become members. Should that be successful, the Union and the Member States become members of the relevant international organizations alongside each other. A well-known example of such a construction is the Food and Agricultural Organization of the United Nations (FAO).³⁵ The FAO constitutional provisions, in combination with the Union's complex vertical and horizontal division of competences, were almost destined to create prohibitive difficulties, the discussion of which

³³ Sudeshna Basu, et al., 'The European Union's Participation in the United Nations Human Rights and Environmental Governance: Key Concepts and Major Challenges', in: Jan Wouters et al. (eds.), *The European Union and Multilateral Governance. Assessing EU Participation in United Nations Human Rights and Environmental Fora*, Basingstoke: Palgrave Macmillan 2012, p. 4.

³⁴ Wouters, Hoffmeister and Ruys, *supra* n. 15, p. 386.

³⁵ The FAO admitted the EEC as a member, alongside its Member States, by decision of 26 November 1991, taken under Art II(3) and (5) FAO Constitution; ECJ, Case C-25/94, *Commission v. Council*, [1996] ECR I-1469, par. 2. On EC membership of the FAO, see further Jörn Sack, 'The European Community's Membership of International Organizations', (1995) 32 *Common Market Law Review*, pp. 1243–1247. Specifically on the exercise of voting rights within the FAO, Joni Heliskoski, 'Internal Struggle for International Presence: The Exercise of Voting Rights Within the FAO', in: Alan Dashwood and Christophe Hillion (eds.), *The General Law of E.C. External Relations*, London: Sweet & Maxwell 2000, pp. 79–99; see also Article II(5) FAO Constitution; ECJ, Case C-25/94, *Commission v Council*, [1996] ECR I-1469, par. 3; XLI(2)–(3) FAO General Rules of the Organization. For more details on the participation of the Community/Union and the Member States in the FAO, see Panos Koutrakos, *EU International Relations Law*, Oxford/Portland: Hart Publishing 2006, pp. 168–172; Jørgen Mærsk Pedersen, 'FAO-EU Cooperation: An Ever Stronger Partnership', in: Jan Wouters, Frank Hoffmeister and Tom Ruys (eds.), *The United Nations and the European Union: An Ever Stronger Partnership*, The Hague: T.M.C. Asser Press 2006, pp. 63–91.

exceeds the scope of this chapter.³⁶ As with the FAO, any international organization of which both the Union and the Member States are parties will have to determine whether both the Union and the Member States get voting rights and, if so, how these are to be exercised.³⁷

True to its 1946 legacy, the UN is a state-oriented system. That is reflected in Article 4(1) of the UN Charter, which reserves membership to "all other peace-loving states".³⁸ Membership is also geographically organized. All actors are part of a regional group,³⁹ which structures the system: each have their own consultations. In essence, the UN is premised on the protection of the sovereign equality of states as one of the basic organizing principles of the international legal order, even though it does involve blocs and regional groups in its decision-making processes.⁴⁰ However, the EU is a political group rather than just a geographical group, and in fact, its Member States fall under three regional groups at the UN: the Western European and Others Group (WEOG), the Eastern European Group, and one Member State, i.e. Cyprus, falls under the Asian Group. Because the Union does not fit within a single regional group, EU officials are somewhat displaced in this group system.

There is also a constraint that stems from history. The EU participation in the work of international organizations always starts from a 'clean slate' situation: it does not have a past of participating in IOs, while in most organizations, the Member States have a history as independent actors. As the EU enters an IO, it requires adjustment of daily practices on the part of

³⁶ See Sack, *supra* n. 35, pp. 1243–1247; *The EU External Representation in the Area of Shared Competences*, *supra* n. 11, pp. 15–24. Cf. Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, The Hague: Kluwer Law International 2001, pp. 105–110, who argues that the exercise of the right to vote by either the Union or the Member States is also bound to have implications on the vertical division of competences in abstracto, or in other words in other cases relating to the same subject-matter. On the Arrangement of the Commission and the Council regarding the exercise of membership rights of the FAO, see De Baere, *supra* n. 23, p. 255.

³⁷ See, for example, as regards the Stockholm Convention on Persistent Organic Pollutants: Case C-246/07, *Commission v Sweden*, [2010] ECR I-3317, on which further Geert De Baere, "O, Where is Faith? O, Where is Loyalty?" Some Thoughts on the Duty of Loyal Co-operation and the Union's External Environmental Competences in the Light of the PFOS Case', (2011) 36 *European Law Review*, pp. 405–419.

³⁸ On which, see further Thomas Grant, *Admission to the United Nations, Charter Article 4 and the Rise of Universal Organization*, Leiden/Boston: Martinus Nijhoff Publishers 2009.

³⁹ See <<http://www.un.org/Depts/DGACM/RegionalGroups.shtml>>.

⁴⁰ Katie Laatikainen and Karen Smith (eds.), *The European Union at the United Nations: Intersecting Multilateralisms*, London: Palgrave Macmillan 2006, p. 3.

the Member States. Smaller Member States, which do not usually have the requisite diplomatic resources, mostly welcome the EU's role in international forums in general and in the UN in particular, while larger Member States with elaborate and developed diplomatic machineries are in a different position. How the Member States view the EU's presence in international organizations also depends on the organization in question. For example, there are a large number of regional fisheries organizations, and the EU alone is usually a member of them. That is of course an exception. In most other contexts, it is still difficult to imagine that the EU would entirely replace the Member States, keeping in mind that, amongst other things, it is important to keep them engaged. EU membership in the WTO and the FAO suggests that full EU membership in international organization results from well-established competences and clear operational needs.

Finally, there can be a pushback from non-EU States. The Union's presence can be perceived as additional influence from the EU on top of the Member States, which is sensitive in particular as regards voting rights. This normally requires adjustment so that either the EU or the Member States vote, but not both.⁴¹ Furthermore, within the Human Rights Council, the EU is faced with the prevalent regional bloc mentality and the strong presence of the Organization of the Islamic Conference (OIC) and the African Group.⁴² Nevertheless, cases such as the Human Rights Council's Special Session on Darfur and the EU's participation in the negotiations on the moratorium on the death penalty appear to indicate that the particular political constellation is in the end decisive on the EU's potential for significantly impacting on the decision-making process, rather than the legal and institutional architecture of the relevant UN forum.⁴³

4. THE EU'S STATUS AND PARTICIPATION

Though the Union cannot become a member of the UN, it has since early on endeavored to exert influence on UN decision-making. To that end,

⁴¹ However, the particular context needs to be assessed on a case-by-case basis. For instance, the situation appears quite different in the case of internationally established funds where the financing originates from the EU itself as well as from the Member States, both having approved it separately according to their own budgetary procedures.

⁴² Basu, *supra* n. 18, p. 97.

⁴³ Hans Bruyninckx, et al., 'The Position(s) of the EU in the UN System: The Examples of Human Rights and Environmental Governance', in: Jan Wouters et al. (eds.), *The European Union and Multilateral Governance. Assessing EU Participation in United Nations Human Rights and Environmental Fora*, Basingstoke: Palgrave Macmillan 2012, p. 257.

the Commission established in 1964 an information office in New York in order to foster relations with third states within the UN framework.⁴⁴ On 11 October 1974, the UNGA requested the UN Secretary-General "to invite the European Economic Community to participate in the sessions and work of the General Assembly in the capacity of observer",⁴⁵ making it the first non-state actor to enjoy permanent observer status at the UN.⁴⁶ That status applies as much to the UNGA's committees and sub-committees as it does to the plenary.⁴⁷ Likewise, the EU has an observer status at the ECOSOC,⁴⁸ including in most of its functional commissions, as well as in UN subsidiary organs.⁴⁹ It is also a full participant at the Commission on Sustainable Development,⁵⁰ and has been invited to participate in the Peacebuilding Commission as an "institutional donor"⁵¹ and a "relevant international organization".⁵² The Union made full use of this possibility and, through a significant investment of time and effort, both in internal coordination and in liaising with other actors in the UNGA, has become one of the key actors.⁵³

The EU therefore profits from different forms of participation and status depending on the UN body. The UN's work can broadly be divided into two segments: on the one hand the UNGA and ECOSOC, and on the other hand the UNSC.⁵⁴ The EU is an observer in the UNGA, while the UNSC

⁴⁴ Rasch, *supra* n. 9, p. 105.

⁴⁵ Status of the European Economic Community in the General Assembly, UN Doc. A/RES/3208(XXIX). Compare Art 12(2) Constitution of the International Labour Organization (ILO): "The International Labour Organization may make appropriate arrangements for the representatives of public international organizations to participate without vote in its deliberations." For further details on the Union's position in the ILO, see the contribution of Delarue to this volume.

⁴⁶ Zaru and Geurts, *supra* n. 14, p. 57.

⁴⁷ Hoffmeister and Kuijper, *supra* n. 5, p. 18.

⁴⁸ By virtue of Rule 79 of the Rules of Procedure of the Economic and Social Council, UN Doc. E/5715/Rev.2: "Representatives of intergovernmental organizations accorded permanent observer status by the General Assembly and of other intergovernmental organizations designated on an ad hoc or continuing basis by the Council on the recommendation of the Bureau, may participate, without the right to vote, in the deliberation of the Council on questions within the scope of the activities of the organization."

⁴⁹ Rasch, *supra* n. 9, p. 106.

⁵⁰ ECOSOC Decision 1995/201, 'Full Participation of the European Community in the Commission on Sustainable Development'.

⁵¹ 'The Peacebuilding Commission', UN Doc. A/RES/60/180, point 9.

⁵² A/RES/60/180, point 7(b).

⁵³ See Jan Wouters, 'The European Union as an Actor Within the United Nations General Assembly', in: Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, The Hague: T.M.C. Asser Press 2001, pp. 375–404.

⁵⁴ Paasivirta and Porter, *supra* n. 22, p. 36.

does not have observers. Furthermore, the UNGA has different grades of status: observer, enhanced observer, and member,⁵⁵ and it has about 80 observer organizations. However, neither the UN Charter nor the UNGA Rules of Procedure specifically mention observers, leaving their status to be determined through UNGA practice.

Within the UNSC, the EU can currently exercise considerable influence through the presence of its Member States that are UNSC members, either as permanent members (UK and France) or on a rotating basis. Pursuant to Article 34(2) TEU, they are under an obligation to "concert and keep the other Member States and the High Representative fully informed", and in the execution of their functions, they are to defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the UN Charter. Finally, since Lisbon, the third subparagraph of Article 34(2) TEU provides that when the Union has defined a position on a subject that is on the UNSC agenda, those Member States which sit on the UNSC are to request that "the High Representative be invited to present the Union's position". In that context, Rule 39 of the UNSC's Provisional Rules of Procedure provides for it to invite "members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence". The representative of the EU has also issued statements in the UNSC on a fairly regular basis in its public sessions.⁵⁶ The coordination by the EU Member States regarding the UNSC matters has been significantly increased over the years. However, it is well-known that the EU does not have a common view on the on-going UN consultations on the Security Council reform, particularly on the issue of membership in an enlarged UNSC.⁵⁷ The reason lies presumably in the high visibility of UNSC action and the prestige it entails.

Within the UNGA, it should be borne in mind that much of the preparatory work takes place in informal meetings. As a general rule, the more formal the session, the more difficult it is for non-members to take part in the process. Only a fraction of the time spent on meetings within the UN is spent in official or formal settings, and practically all UN resolutions

⁵⁵ Cf. Hoffmeister and Kuijper, *supra* n. 5, p. 14.

⁵⁶ See, for a recent example, '27 June 2012, New York – Statement on behalf of the European Union by H.E. Mr. Thomas Mayr-Harting, Head of the Delegation of the European Union to the United Nations, at the Security Council Debate on the situation in Afghanistan (UNAMA)', available at <http://www.eu-un.europa.eu/articles/en/article_12359_en.htm>.

⁵⁷ http://www.un.org/News/briefings/docs/2011/111201_SC_Reform.doc.htm.

are prepared by way of informal consultations. Strictly legally speaking, informal meetings are not UN meetings, though they are frequently held in a UN meeting room and in the presence of the Secretariat.⁵⁸ There are, however, no procedural rules, and the participants can speak freely rather than making formal statements. Once a resolution moves from an informal setting to the UNGA, the EU has been experiencing difficulties in having its voice heard. Formal sessions are of course important for visibility, and rank matters in the UN world. The Heads of State and Government speak at the UNGA general debate and set out the UNGA agenda for the forthcoming session, and speaking there is a matter of pride and status. In the past, the EU managed to make its voice heard through the Council Presidency, which was by far the most important EU actor within the UN framework. The Presidency represented the EU most visibly by giving statements in formal UN meetings, a practice instituted by the Italian Presidency in 1975, and taken up by the British Presidency in 1981.⁵⁹ However, as mentioned above, since the entry into force of the Lisbon Treaty, the Council Presidency does not have a formal role anymore in the external representation of the EU, which was taken over by the EU actors, i.e. the permanent President of the European Council, the High Representative, the Commission, and the EU Delegation. However, the fact that the EU actors do not represent individual countries but the Union was a risk factor in the state-centered UN world. As a key EU negotiator, Mr. Serrano de Haro, has pointed out, in that sense the Union's goal post Lisbon was not so much to seek a stronger position at the UN, but a status equivalent to the existing one, with its representatives under its proper arrangements rather than those of the EU Member State holding the Council Presidency.⁶⁰

With that goal in mind, the Union tabled a draft resolution in August 2010 intended to grant it enhanced participation rights in the UNGA.⁶¹ However, on 14 September 2010, just days after the EU had successfully negotiated the adoption of a resolution on Kosovo,⁶² which underscored

⁵⁸ Paasivirta and Porter, *supra* n. 22, p. 37.

⁵⁹ Rasch, *supra* n. 9, pp. 35 and 40.

⁶⁰ Serrano de Haro, *supra* n. 9, pp. 15–16.

⁶¹ 'Participation of the European Union in the work of the United Nations', UN Doc. A/64/L.67.

⁶² Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law', UN Doc. A/RES/64/298, which welcomed 'the readiness of the European Union to facilitate a process of dialogue between the parties; the process of dialogue in itself would

the Union's capacity to build consensus within the UNGA,⁶³ the Union was diplomatically rebuffed by a counter-resolution proposing the deferral of the resolution tabled by the Union on its participation in the work of the UN. From the EU side, 'the EU's debacle at the UN', as Jean-Claude Piris (the former Chief Legal Counsel of the EU Council) put it, was rather disturbing, though the trouble was overcome soon after.⁶⁴

Indeed, on 3 May 2011, at its 88th plenary meeting, the UNGA adopted Resolution 65/276, 'Participation of the European Union in the work of the United Nations'.⁶⁵ The Resolution applies to the participation of the representatives of the EU, in its capacity as observer, in the sessions and work of the UNGA and its committees and working groups, in international meetings and conferences convened under the auspices of the Assembly and in UN conferences.⁶⁶ It remains to be seen what impact the Resolution will have in other UN bodies, such as the Human Rights Council, or specialized agencies, such as the World Health Organization, which act under their own rules.⁶⁷ Nevertheless, it sets a recognized model and one would expect it to influence arrangements elsewhere. The right to co-sponsor resolutions and decisions was consciously never included in the EU negotiation position, as they were viewed as too closely linked to voting rights, reserved to UN members.⁶⁸ Conversely, the request to include in the Resolution the right to raise points of order was dropped by the EU at the end of the negotiation process to secure an uncontroverted adoption of the Resolution.⁶⁹ The importance of that concession is also underscored in the UN Secretary-General's Note.⁷⁰

be a factor for peace, security and stability in the region, and that dialogue would be to promote cooperation, achieve progress on the path to the European Union and improve the lives of the people' (point 2).

⁶³ Michael Emerson and Jan Wouters, *The EU's Diplomatic Debacle at the UN. What Else and What Next?*, Centre for European Policy Studies (CEPS) Commentary, 1 October 2010, p. 3.

⁶⁴ Jean-Claude Piris, *The Future of Europe. Towards a Two-Speed EU?*, Cambridge: Cambridge University Press 2012, p. 4.

⁶⁵ UN Doc. A/RES/65/276.

⁶⁶ A/RES/65/276, point 2.

⁶⁷ Jan Wouters, Jed Odermatt and Thomas Ramopoulos, *The Status of the European Union at the United Nations after the General Assembly Resolution of 3 May 2011*, Leuven: Leuven Centre for Global Governance Studies 2011, pp. 4–5.

⁶⁸ This is reflected in A/RES/65/276, Annex, point 3.

⁶⁹ Serrano de Haro, *supra* n. 9, p. 16 and 32.

⁷⁰ 'Participation of the European Union in the work of the United Nations. Note by the Secretary-General', UN Doc. A/65/856, point 12.

Resolution 65/276 takes account of UN practice and constraints, rather than proposing revolutionary steps.⁷¹ Indeed, the 'enhanced observer status' granted by the Resolution builds on earlier instances of granting the Union a similar status, for example at the 1992 Rio Summit and the 2002 Johannesburg Summit, as well as at the annual sessions of the ECOSOC functional Commission on Sustainable Development.⁷² Within the UNGA, the seating order of the Community had been adjusted on earlier occasions to place it before observers but after all states, for example in meetings of the UN Ad Hoc Working Group on Biodiversity in Areas beyond National Jurisdiction and the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS).⁷³

It has been lamented that the UNGA Resolution as adopted on 3 May 2011 bears little resemblance to the draft of August 2010, and that it was "utterly de-Europeanized".⁷⁴ Indeed, the final resolution contains no explicit references to the Lisbon Treaty. A number of UN members stressed in the course of the negotiation of the Resolution that the Lisbon Treaty was, in accordance with the long-established principle of international law *pacta tertiis nec nocent nec prosunt*,⁷⁵ neither binding for third states nor for the UN.⁷⁶ The EU Presidency at the time (Hungary) emphasized when introducing the Resolution before the UNGA that the new draft specifically addressed the request from several UNGA members to remove references to the Lisbon Treaty and to focus the draft squarely on the UN.⁷⁷

⁷¹ Cf. Hoffmeister and Kuijper, *supra* n. 5, p. 34, already noting "a trend to upgrade the observer status of the European Community to that of a full participant throughout the entire UN System"; and Glaufré, *supra* n. 20, p. 83.

⁷² Cf. in general Jochen Jesinghaus, 'EU-UN Cooperation for Sustainable Development', in: Jan Wouters, Frank Hoffmeister and Tom Ruys (eds.), *The United Nations and the European Union: An Ever Stronger Partnership*, The Hague: T.M.C. Asser Press 2006, pp. 195–210; Karoline Van den Brande, 'The European Union in the Commission on Sustainable Development', in: Jan Wouters et al. (eds.), *The European Union and Multilateral Governance. Assessing EU Participation in United Nations Human Rights and Environmental Fora*, Basingstoke: Palgrave Macmillan 2012, pp. 171–190; Simon Lightfoot, 'The EU in the World Summit on Sustainable Development', in: Jan Wouters et al. (eds.), *The European Union and Multilateral Governance. Assessing EU Participation in United Nations Human Rights and Environmental Fora*, Basingstoke: Palgrave Macmillan 2012, pp. 232–250.

⁷³ Paasivirta and Porter, *supra* n. 22, p. 46.

⁷⁴ Wouters, Odermatt and Ramopoulos, *supra* n. 67, p. 3.

⁷⁵ Recalled by the ECJ in Case C-386/08, *Brita*, [2010] ECR I-1289, par. 44–45.

⁷⁶ Serrano de Haro, *supra* n. 9, p. 24.

⁷⁷ General Assembly, Sixty-fifth session, Official Records of the 88th plenary meeting, Tuesday, 3 May 2011, 10 a.m., New York, UN Doc. A/65/PV.88, p. 4.

However, the key substance of the Lisbon Treaty is there. The Resolution now notes (seventh recital):

that the States members of the European Union have entrusted the external representation of the European Union, previously performed by the representatives of the member State holding the rotating Presidency of the Council of the European Union, to the following institutional representatives: the President of the European Council, the High Representative of the Union for Foreign Affairs and Security Policy, the European Commission, and European Union delegations, which have assumed the role of acting on behalf of the European Union in the exercise of the competences conferred by its member States.

The UN members thereby give effect to the EU Treaty reforms.

One of the important achievements of Resolution 65/276 is no doubt that EU representatives are to be allowed "to be inscribed on the list of speakers among representatives of major groups, in order to make interventions".⁷⁸ That facilitates the passing of EU messages and serves the Union's visibility as well. The EU representatives may therefore intervene in the debate with representatives of major groups, normally ahead of representatives of individual Member States, instead of at the end of the list of speakers as in the past.⁷⁹ Furthermore, the EU representatives are to be invited to participate in the general debate of the UNGA; permitted to have EU communications relating to the sessions and work of the UNGA and to the sessions and work of all international meetings and conferences convened under the auspices of the Assembly and of UN conferences, circulated directly, and without intermediary, as documents of the Assembly, meeting or conference; permitted to present proposals and amendments orally as agreed by the EU Member States; and allowed to exercise the right of reply regarding EU positions as decided by the presiding officer.⁸⁰ The EU representatives are also to be "ensured seating among the observers".⁸¹

There have been some exceedingly critical comments on Resolution 65/276, emphasizing the meager results and the harm done by the difficult

⁷⁸ A/RES/65/276, Annex, point 1(a); and UN Doc. A/65/856, point 5.

⁷⁹ Serrano de Haro, *supra* n. 9, p. 29, hailing this as "one of the major achievements of the Resolution". See contra: Wouters, Odermatt and Ramopoulos, *supra* n. 67, p. 3, arguing that UNGA practice is for its President to determine the exact order of speakers, and that in practice this implies that the EU delegation will have to negotiate each summer with the office of the UNGA President in order to secure a speaking slot.

⁸⁰ A/RES/65/276, Annex, point 1(b) to (e).

⁸¹ A/RES/65/276, Annex, point 2.

negotiation process.⁸² It is of course correct that the Resolution is a modest step forward, and certainly does not fix everything. Even so, it arguably provides a good basis to proceed, its impact depending on its practical implementation, and it may serve as source of inspiration beyond the UNGA confines. The first signs in that regard appear to be hopeful.⁸³ One immediately visible example was, of course, the address by Mr. Herman Van Rompuy, President of the European Council, to the UNGA on 22 September 2011, immediately following the British Prime Minister, Mr. David Cameron.⁸⁴ It marked the first time that a non-state representative intervened in the General Debate.⁸⁵

The question of how 'special' the EU is to justify being treated differently from other regional organizations in the UN system loomed large during the debates leading up to the adoption of Resolution 65/276. Clearly, by UN standards, the Union is an atypical organization, a regional integration organization characterized by strong supranational features and wide-ranging and deep integration. The Resolution (sixth recital) alludes to that specificity, by recalling that the European Union is a "party to many instruments concluded under the auspices of the United Nations", and an observer or participant in the work of several specialized agencies and bodies of the United Nations.⁸⁶ That reflects the EU's actor capacity, most clearly seen in the fact that it regularly participates in international treaties and conventions alongside States. Many UN members stated that other international organizations could be granted modalities such as those sought by the EU,⁸⁷ and paragraph 3 of the Resolution contemplates the possibility of granting enhanced participatory rights to other international organizations. The Arab Group pointed to the League of Arab States, and the representative of the Caribbean Community (CARICOM) was active on behalf of his organization in offering rather particular interpretations

⁸² See Bruyninckx, Wouters, Basu and Schunz, *supra* n. 43, pp. 279–280; Wouters, Odermatt and Ramopoulos, *supra* n. 67, p. 4.

⁸³ Serrano de Haro, *supra* n. 9, pp. 32–33.

⁸⁴ General Assembly, Sixty-sixth session, 15th plenary meeting, Thursday, 22 September 2011, 11 a.m., New York, UN Doc. A/66/PV.15, pp. 27–30. For an analysis of part of Mr. Van Rompuy's message (in particular on the responsibility to protect), see Geert De Baere, 'The European Union and the Responsibility to Protect', in: Bart Van Vooren, Steven Blockmans and Jan Wouters (eds.), *The EU's Role in Global Governance. The Legal Dimension*, Oxford: Oxford University Press 2013, pp. 95–109.

⁸⁵ Serrano de Haro, *supra* n. 9, p. 32.

⁸⁶ A/RES/65/276, sixth recital in the preamble. Cf. Serrano de Haro, *supra* n. 9, p. 25.

⁸⁷ A/65/PV.88, p. 4.

of which actors could represent the EU. CARICOM's long interpretative declaration prompted the EU Presidency of the Council to raise a point of order and to reject in rather terse terms such unilateral interpretations as unhelpful.⁸⁸

At any rate, in UN circles, the EU is often viewed as a cohesive group of certain UN Member States rather than an actor in and of itself. Within the Third Committee, for example, the Union is principally perceived as the expression of the political will of its Member States.⁸⁹ To some extent this is also still reflected in Resolution 65/276, which permits EU representatives to "present proposals and amendments orally as agreed by the States members of the European Union; such proposals and amendments shall be put to a vote only at the request of a Member State".⁹⁰

5. CONCLUSION

So, how does the European Union fare within the United Nations? The *tour d'horizon* offered above does not permit to draw far-reaching conclusions. The EU's coordination process is part of the daily practice of European diplomats. Coordinated EU positions contribute to a smooth functioning of the UN and ensure that the Union's Member States feel less need to dilute or qualify those positions. The EU's positions are therefore viewed as mostly balanced and well thought-out, which exercises a natural pull from third States to join them.⁹¹

The Union's well-established habit of coordination could probably be deployed more effectively, including for purposes of outreach towards other UN members and by further developing burden-sharing in that respect under the guidance of the EU Delegation. The adoption of Resolution 65/276 by the UNGA is an important step forward in that regard, and helpful for delivering a common message with improved visibility. It is as clear an illustration as can be of the EU's incrementally emerging international identity, which in turn, as was argued above, is inherently tied to the principles of the UN Charter.

⁸⁸ A/65/PV.88, p. 13. Nevertheless, CARICOM reaffirmed its interpretation of the Resolution in the Letter dated 9 May 2011 from the Permanent Representative of the Bahamas to the United Nations addressed to the Secretary-General, UN Doc. A/65/834.

⁸⁹ Glafuret, *supra* n. 20, p. 71.

⁹⁰ A/RES/65/276, Annex, point 1(d) (emphases added).

⁹¹ Rasch, *supra* n. 9, p. 32; Jørgensen and Wessel, *supra* n. 5, p. 283.

legal developments. Final remarks wrap up the discussion and sketch a brief outlook into the post-Lisbon era.

2. THE COURT OF JUSTICE: THE MASTER IN ITS OWN HOUSE

The role of the Court of Justice in creating the European legal order can hardly be overestimated. The Court has created the European legal order as we know it. Scholars speak of the "established meta-narrative" of "Europeanisation-through-case-law".⁵ Needless to discuss in detail the Court of Justice's case-law in which it not only gave European law⁶ the status of a 'new legal order'⁷ different from international law and supreme to national law, but also conferred on individuals the capacity to directly enforce their European law rights within their national jurisdictions (direct effect). As early as 1975, Toth identified "the elevation of the individual to the rank of a subject of law alongside of the Member States"⁸ as one of the distinctive features of European law. Indeed, it is purported that within the European legal order "the individual is paramount. His dignity is inviolable. His rights are inalienable."⁹ As is also well-known, the creation of the autonomous supreme European legal order and the prominent role of individuals as rights-holders went hand in hand and reinforced each other.

Besides supremacy and direct effect, the most important achievements of the Court of Justice in constructing a constitutional legal order for the European Union¹⁰ are probably the development of the general principles of European law¹¹ and the use of the duty of loyal co-operation.¹² General principles of European law have for a long time been substituting for the fact that the EU did not have a fundamental rights catalogue.¹³ Indeed, the general principles have been crucial to ensuring that national constitutional courts accepted the supremacy of European law.¹⁴ The

⁵ A. Vauchez, 'The transnational politics of judicialization. Van Gend en Loos and the making of EU polity', *European Law Journal* 2010, pp. 1-28.

⁶ In this working paper, the term 'European law' is used to refer to the law of the European Union.

⁷ ECJ, Case 26/62, *Van Gend & Loos*, *supra* note 3.

⁸ A.G. Toth, 'The Individual and European Law', *International and Comparative Law Quarterly*, 1975, pp. 659.

⁹ Berlin Declaration of the European Council Summit held in Berlin on 24/25 March 2007 in celebration of the 50th anniversary of the signature of the Treaties of Rome.

¹⁰ The Union has replaced and succeeded the Community (Article 1 (3) TEU). This working paper will use the term 'Union' including where it refers to what was pre-Lisbon the Community; except where the context requires otherwise.

¹¹ T. Tridimas, 'The Court of Justice and judicial activism', *E.L. Rev.*, 1996, pp. 199-210.

¹² J. Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC', *Fordham Int'l LJ*, 2007-2008, p. 1483 *et seq.*

¹³ See for an overview of the general principles: Takis Tridimas, *General Principles of EU Law*, Oxford: Oxford University Press, 2nd ed, 2006.

¹⁴ German Constitutional Court, Solange I-decision, BVerfGE 37, 271 (1974); Solange II-decision, BVerfGE 73, 339 (1986).

Court of Justice's case-law concerning the general principles of European law has been codified in Article 6 (3) TEU (former Article 6 (1) TEU) and in the Charter of Fundamental Rights. Recently, the Court has elevated Article 6 TEU to express the "very foundations" of the European legal order.¹⁵ These foundations are the principles of liberty, democracy, respect for human rights and fundamental freedoms, as well as the rule of law. They form part of the EU accession criteria.¹⁶

The duty of loyal co-operation (former Article 10 TEC, now Article 4 (3) TEU) has been used to create a wide variety of constitutional rules. The duty of loyal co-operation is of fundamental importance in a legal construction such as the European Union, where national law and European law have in many areas entered into an inseparable embrace and are applied by the same institutions. With some sort of federal vision in mind, the Court has interpreted the duty of loyal cooperation into an all-encompassing *effet utile* doctrine that requires national authorities, including national courts, to give full effect to European law under almost all circumstances.¹⁷ This entails for example enforceable obligations even in the absence of binding Union legislation,¹⁸ not to interfere with the operation of European law,¹⁹ and to take all practical measures to actively ensure the operation of European law.²⁰

It is fair to say that the Court of Justice in many ways took up the functions of a constitutional court within the European construction.²¹ In fact, the Treaties

¹⁵ In *Kadi* the ECJ referred to Article 6(1) TEU in this precise way [ECJ, C-402/05 P and C-415/05 P, *Kadi*, *supra*, paras 303-304].

¹⁶ They form part of the so-called "Copenhagen criteria" that were drawn up in June 1993 at the European Council meeting in Copenhagen and applied in the last three accession rounds in 1995, 2004 and in 2007.

¹⁷ See e.g.: ECJ, Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1892, para 26; Case 2/88 *Zwartveld* [1990] ECR I-3365; Case C-105/03, *Pupino* [2005] ECR I-5285. See: J. Temple Lang, 'Community Constitutional Law: Article 5 EEC Treaty' (1990) 27 *CMLRev* 645.

¹⁸ *Fisheries cases*: Case 141/78, *France v UK* [1979] ECR 2941 (The Court ruled that the duty of loyal cooperation is particularly necessary in a situation in which it has appeared impossible, by reason of divergences of interest, to establish a common policy in an area of Union competence. If a Member State adopts legislation in such a situation it first has to notify the Commission.); Case 32/79 *Commission v UK* [1980] ECR 2403 (The Court established a duty to act in the interest of the whole Union even when in the absence of Union legislation they act under their own jurisdiction.); Case 804/79, *Commission v UK* [1981] ECR 1045 (In an area of exclusive competence the Council had failed to adopt legislation proposed by the Commission. Even in the absence of legislation the Court found the Member State to be under a special duty of loyal cooperation requiring it to consult the Commission and not to jeopardize Union objectives expressed in the Commission's proposal.)

¹⁹ See e.g.: ECJ, Case 40/69, *Hauptzollamt Hamburg Oberelbe v Bollmann* [1970] ECR 69, para 4; Case 85/85, *Commission v Belgium* [1986] ECR 1149, paras 22-23; Case 281/87, *Commission v Greece* [1989] ECR 4015, paras 16-18.

²⁰ ECJ, Case C-265/95 *Commission v France* [1997] ECR I-6959; Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659.

²¹ See on the Court's constitutional role in the area of external relations: R.A. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation', *European Constitutional Law Review* 2009, pp. 117-142, in Section 4.

have given the Court of Justice these functions from the start.²² Beyond and above that, the Court has expanded its role. On the one hand, by ensuring that acts intended to have legal effects are subject to review even where the wording of the Treaty is more limited.²³ On the other hand, the Court adjudicates on the division of powers between the institutions and the Member States where the powers conferred by the Treaty are – to say the least – ambiguous.²⁴ Furthermore, the Court of Justice has for a long time used the constitutional semantics in its rulings. In 1986, the Court of Justice famously referred to the European Treaties as a ‘constitutional charter’, making a strong statement in favour of judicial protection from all acts of the European institutions.²⁵ Recently, it has introduced the terms “constitutional principle” and “constitutional guarantee”.²⁶

However, the Court of Justice’s mission continues. Despite – or even because of – the increasing constitutional language, the European Union has been described as existing in a “constitutional chaos”.²⁷ The Treaty of Lisbon attempted to codify the Court of Justice’s case-law and improve transparency and coherence. It renamed existing legal instruments, distinguished different types of competences, codified existing case-law, merged the first and the third pillar and integrated the second pillar more firmly within the single institutional framework.²⁸ At the same time, bringing order into the constitutional chaos of the EU remains an uphill struggle in the highly political environment surrounding treaty amendments.²⁹ The difficulties of making existing constitutional law visible and accessible are best demonstrated by the controversy surrounding the inclusion of a provision on primacy in the Constitutional Treaty.³⁰ It is now no longer part of the Lisbon Treaty but has now been replaced by Declaration 17.³¹ Another example would be the discussion on the consequences of the protocol on the application of the Charter of Fundamental Rights to Poland and the UK and of the unilateral declaration of

²² Now Article 19(1) TEU; Articles 263, 267, and 218(11) TFEU: ensure observance of the law in the interpretation of the Treaties; review of compatibility of legislation or an envisaged international agreement with a higher act, of the exercise of powers of organs of the Union and the Member States, and of the division of competences.

²³ ECJ, Case 294/83, *Parti Ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339; Case C-355/04 *P, Segi v Council* [2007] ECR I-1657.

²⁴ ECJ, Case C-170/96, *Commission v. Council (Airport Transit Visa case)*, [1998] ECR I-2763; Case C-176/03, *Commission v. Council (Environmental Crime Case)*, [2005] ECR I-7879; Case C-91/05, *Commission v. Council (ECOWAS)* [2008] ECR I-3651.

²⁵ ECJ, Case 294/83, *Parti Ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339, para 23; Opinion 1/91 EEA [1991] ECR I 6079, para 21.

²⁶ ECJ, *Kadi*, *supra* note 2, paras 285 and 290.

²⁷ D. Curtin, ‘The Constitutional Structure of the Union’, *Common Market Law Review*, 1993, pp. 17 et seq, at 67.

²⁸ R.H. van Ooik and R.A. Wessel (Eds.), *De Europese Unie na het Verdrag van Lissabon*, Deventer: Kluwer, 2009.

²⁹ J.-C. Piris, *The Lisbon Treaty – A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010.

³⁰ Article I-6 of the Treaty Establishing a Constitution for Europe.

³¹ ‘17. Declaration Concerning Primacy’, O.J. 2010 C 83/344.

the Czech Republic limiting the effects of the charter.³² It remains unclear whether the protocol excludes the application of fundamental rights as they are expressed in the Charter³³ as general principles beyond the limitations of the Charter’s horizontal provisions.³⁴ The lack of clarity on this issue illustrates the continuous important role of the Court of Justice to bridge the systemic flaws of European constitutional law.

In the area of foreign policy, the Court of Justice has equally played a pivotal role as constitutional court. The Court has greatly contributed to the Union’s capacity to act on the international plane through the development of its case-law on implied competences and on the above-mentioned duty of loyal co-operation. The former has its origins in the well-known *ERTA* doctrine,³⁵ which has incrementally been developed into the understanding that implied competences may be both exclusive and shared³⁶ and that even though internal and external competences run largely parallel there is no longer an ‘inextricable link’ between external and internal action. Exceptionally, an exclusive external competence can exist even in the absence of prior internal legislation.³⁷ In the area of foreign policy, the latter (duty of loyal co-operation) is particularly relevant for the exercise of shared competences.³⁸

By way of conclusion, the well-established and partially codified constitutional foundations of the European Union – which we take for granted today – are (to a large extent) the incremental achievement of many years of case-law delivered by the Court of Justice. During all these years, the Court of Justice has filled gaps in the constitutional construction of the European Union, reconciled incoherencies, and given first priority to the effectiveness of European law. At the same time, the Court has contributed to giving the Union the necessary tools to become an international player. Yet, despite the Treaty of Lisbon’s attempts to codify and structure European constitutional law the Court of Justice will need to continue playing an important role as the constitutional court of the Union.

³² Protocol 30 and Declaration 53.

³³ In a parallel to the Court’s reasoning in the case of *Mangold*, where it found the prohibition of age discrimination to be a directly effective general principle that had found expression in a directive that did not have direct effect (period of implementation had not yet expired): ECJ, Case C-144/04, *Mangold* [2005] ECR I-9981. Compare also: ECJ, Case C-555/07, *Kücükdeveci*, judgment of 19 January 2010 (directive did not have direct effect even after the period for implementation had expired).

³⁴ Articles 51 to 54 of the Charter clarifying the Charter’s scope and applicability.

³⁵ ECJ, Case 22/70, *Commission v Council (ERTA)* [1971] ECR 263.

³⁶ This was confirmed by Opinion 1/03 [2006] ECR I-1145, paras 114-115; M. Cremona, ‘External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law’, *EUI Working Paper Law* 2006/22.

³⁷ ECJ, Opinion 1/76, [1977] ECR 741, para 4 and 7; confirmed by Opinion 1/03 [2006] ECR I-1145, para 115.

³⁸ See e.g.: ECJ, Opinion 2/91 (re ILO Convention No.170) [1993] ECR I-1061, at paras 36-38; Opinion 1/94 (re WTO Agreements) [1994] ECR I-5267 at para 108 and Case C-25/94 *Commission v Council (FAO Fishery agreement)* [1996] ECR I-1469.

3. TAKING STOCK: THE COURT OF JUSTICE'S VIEW OF INTERNATIONAL LAW

The Union is party to roughly a thousand international agreements.³⁹ A considerable number of these agreements are so-called mixed agreements concluded jointly by the Union and the Member States. Additionally, Member States have concluded a large body of multilateral and bilateral agreements that could at least potentially affect European law even though the Union is not directly bound by them. Furthermore, customary international law is considered to be binding on both the Union and its Member States.⁴⁰ Whether customary law is also directly effective has not yet been fully clarified.⁴¹ However, as a matter of fact individuals can challenge Union law in the light of customary international law – at least as to the effects, this equals direct effect.⁴²

The Court of Justice has been said to take a “maximalist approach to [international] treaty enforcement” that has certain ‘parallels with the approach to internal [Union] law’.⁴³ There are a number of early examples. In the case of *Haegeman* of 1974,⁴⁴ which was the first ever reference concerning a(n) (mixed) international agreement, the Court of Justice ruled that the former Greek Association Agreement ‘form[ed] an integral part of Community law’.⁴⁵ In the case of *Bresciani* of 1976,⁴⁶ the Court of Justice established that Community [now: Union] association agreements could be used in national courts to challenge national law (direct

³⁹ Many were concluded by the Community, see: A. Rosas, ‘The European Court of Justice and Public International Law’, in J. Wouters, A. Nollkaemper and E. de Wet (Eds.), *The Europeanisation of International Law – The Status of International Law in the EU and its Member States*, The Hague: T.M.C. Asser Press, 2008, pp. 71 et seq, at 75.

⁴⁰ See e.g.: ECJ, Case C-286/90, *Anklagemyndigheden v. Poulsen and Diva Navigation* [1992] ECR I-6019.

⁴¹ ECJ, Case C-162/96 *Racke* [1998] ECR I-3655, paras 45–47. See for a detailed discussion of the potential direct effect of customary law the opinion of AG Jacobs in the same case. The ECJ referred to the direct effect of the agreement rather than of customary international law.

⁴² See also: P. Beekhout, *External Relations of the European Union: Legal and Constitutional Foundations*, Oxford: Oxford University Press, 2004, page 332.

⁴³ M. Mendez, ‘The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques’, *European Journal of International Law*, 2010, pp. 83–104.

⁴⁴ ECJ, Case 181/73, *Haegeman*, *supra* note 4. This case was cited above as an example of the Court’s case-law establishing an autonomous European legal order. The Court distinguished (some argue artificially) between the decision to conclude the agreement and the agreement itself and considered itself competent to annul the former.

⁴⁵ *Ibid.*, para 5; see most recently on the Montreal Convention for the Unification of Certain Rules for International Carriage by Air ECJ, Case C-63/09, *Axel Walz v CLickair SA*, judgment of 6 May 2010, para 20.

⁴⁶ ECJ, Case 87/75, *Bresciani / Amministrazione delle finanze dello Stato*, [1976] ECR 129; ; see also: ECJ, Case C-18/90, *Office national de l’emploi v Kziber*, [1991] ECR p. I-199 (Association Agreement between the Community and Morocco) and ECJ, Case C-268/99, *Jany and others* [2001] ECR I-8615 (Provisions of the Association Agreement between the Community and Poland and the Community and Czech Republic have direct effect notwithstanding the fact that the authorities of that State remain competent to apply to those national their own national laws and regulations regarding entry, stay and establishment.).

effect). The case of *Kupferberg* also of 1982⁴⁷ confirmed the direct effect of an ‘ordinary’ bilateral trade agreement (not an accession agreement). Finally in *Sevince*, the Court found decisions adopted by an Association Council created by an association agreement as capable of having direct effect provided they fulfil the same criteria that determine whether an international agreement has direct effect.⁴⁸

From the start, WTO law has been an exception⁴⁹ – indeed, a very controversial one.⁵⁰ This is not the place to discuss whether the Court’s reasons for treating it differently are convincing. The fact is that the Court has always given WTO law a special position.⁵¹ By creating the concept of functional succession in the case of *International Fruit Company*, the Court of Justice accepted, even before the Community had become a party, that the Community is fully bound by 1947 GATT obligations.⁵² At the same time, the Court has never given individuals the possibility to enforce on WTO law against the Union (clearly identified and limited exceptions excluded⁵³). By contrast, the Court has very well accepted other multilateral treaties to be directly effective.⁵⁴ Denial of direct effect is one way of making the acceptance of binding force of international obligations on the Union more palatable to the European institutions and the Member States.⁵⁵

More generally, the Court’s commitment to international agreements is also reflected in the terminology it uses. It is settled case-law that “the primacy of international agreements concluded by the Community [Union] over secondary [...] legislation requires that the latter be interpreted, in so far as is possible, in conformity with those agreements.”⁵⁶ Hence, international agreements concluded by the Union require consistent interpretation of secondary law. Beyond this it

⁴⁷ ECJ, Case 104/81, *Hauptzollamt Mainz / Kupferberg & Cie.*, [1982] ECR 3641.

⁴⁸ ECJ, Case C-192/89, *Sevince v Staatssecretaris van Justitie*, 1990 ECR I-3461.

⁴⁹ ECJ, Case C-149/96, *Portugal v Council*, [1999] ECR I-8395.

⁵⁰ E.-U. Petersmann, ‘The EEC as a GATT Member – Legal Conflicts between GATT Law and European Community Law’, in M. Hilf, F. Jacobs and E.-U. Petersmann (Eds.), *The European Community and GATT*, Kluwer Law International, 1989, pp. 53–59; K.J. Kuilwijk, *The European Court of Justice and the GATT Dilemma*, Beuningen: Nexed Editions, 1996.

⁵¹ A. Rosas, *op. cit.*, p. 76.

⁵² ECJ, Joined Cases 21/72, 22/72, 23/72 and 24/72 *International Fruit Company*, [1972] ECR 1219.

⁵³ Exceptionally Union law can be reviewed in the light of WTO law where the former implements or refers to the latter: ECJ, Case 70/87 *Fediol v Commission* [1989] ECR 1781; Case C-69/89 *Nakajima v Council* [1991] ECR I-2069.

⁵⁴ E.g.: Yaounde Convention of 1963: ECJ, Case 87/75, *Bresciani / Amministrazione delle finanze dello Stato*, ECR [1976] 129, paras 15–26; Fourth Lomé Convention: ECJ, Case C-469/93, *Amministrazione delle finanze dello Stato / Chiquita Italia*, ECR [1995] I-4533, paras 30–37; Montreal Convention: ECJ, Case C-344/04, *IATA and ELFAA*, ECR [2006] I-403, para 39.

⁵⁵ See also in the following Section Intertanko on the lack of direct effect of UNCLOS.

⁵⁶ ECJ, Case 335/05, *Řízení Letového Provozu ČR, s.p. v Bundesamt für Finanzen*, [2007] ECR I-4307 para 16 with reference to: Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 52; Case C-286/02 *Bellio Flli* [2004] ECR I-3465, paragraph 33; Case C-311/04 *Algemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 25; and Joined Cases C-447/05 and C-448/05 *Thomson and Vestel France* [2007] ECR I-2049, paragraph 30.

also allows the review of the legality of the latter in the light of binding international agreements concluded by the Union.⁵⁷

For international agreements binding on the Member States only, the European Treaties distinguish between anterior and posterior agreements. The former are agreements concluded before 1958 (creation of the Community) or before accession; they enjoy a special status under Article 351 TFEU. Member States are under specific conditions allowed to derogate from European law to comply with their prior obligations towards third states. The Court of Justice has interpreted Article 351 TFEU (ex-Article 307 TEC) rather restrictively.⁵⁸ The Court has in particular given the Member States' duty to give full effect to Union law (paragraph 2) an extensive reading⁵⁹ limiting the effect of Article 351 TFEU. Yet, even where Article 351 TFEU is not applicable, treaties binding on the Member States only, can have effects within the European legal order. As is well-known, the European Convention on Human Rights (ECHR), a convention to which all the EU Member States but not the Union are parties,⁶⁰ has long been used by the Court of Justice to fill the gaps in human rights protection under European law.⁶¹ But the Court has also conferred a sort of soft law status to other conventions to which only the Member States are parties⁶² (even if not all Member States are parties) and interpreted Union law consistently as a consequence of the principle of loyal cooperation (Article 4(3) TFEU).⁶³

4. DOING THINGS THE EUROPEAN WAY: RECENT CASE-LAW

Recent case-law could be seen and has been seen⁶⁴ as more restrictive than the Court's earlier case-law concerning international obligations. This section will

examine case-law of the past six years (2005 to 2010), starting with the Court of Justice decision to deny WTO dispute settlement body decisions direct effect in the case of *Van Parys*,⁶⁵ to further discuss whether the approach of the Court to international law has changed in recent years. The underlying question will be: is the Court's approach more restrictive? Obviously, much depends on the definition of what is 'restrictive' and what is 'international law friendly'. The present argument focuses on the effects of international law and on the Court's frame of legal reference. On the extreme side of 'international law friendly' are methods of interpretation that the Court of Justice uses to integrate European law into national law. Still international law friendly is the specific attempt to take the perspective of international law into account, including international law that is not directly binding on the Union. On the extreme side of 'restrictive' is an approach that does not give internal effects to international law in the European legal order and that reasons within a frame of reference that is entirely based on considerations of European law disregarding the perspective of international law.

In a number of cases concerning international obligations of the Member States, such as *Mox Plant*,⁶⁶ *Intertanko*,⁶⁷ *Commune de Mesquer*,⁶⁸ and *Bogiatzi*,⁶⁹ the Court has been said to have unduly restricted the effects of international law in the European legal order.⁷⁰ On other occasions, such as *Van Parys* and *FIAMM*,⁷¹ the Court has addressed obligations under WTO law and, arguably, taken a restrictive position. The case of *Kadi*, in which the Court of Justice refused to give effect to a United Nations (UN) Security Council resolution, has probably caused the greatest stir.⁷² These cases are all well known. It suffices to briefly recall why they were seen as 'international law unfriendly'.

In the case of *Mox Plant*, the Commission brought an infringement action against Ireland for setting up an arbitration tribunal and starting proceedings under the UN Convention on the Law of the Sea (UNCLOS). UNCLOS was concluded as a mixed agreement. It is binding on the Member States as well as on the Union and

⁵⁷ ECJ, Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079; ECJ, Case C-344/04, *IATA and ELFAA*, ECR [2006] I-403 (in both cases the secondary law instrument was found not to be incompatible to the international convention in the light of which it was reviewed).

⁵⁸ Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, *Commission v. United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria, Germany (Open Skies cases)*, [2002] ECR I-9427.

⁵⁹ See on the earlier interpretations of Article 351 (2) TFEU (ex-Article 307 (2) TEC): C. Hillion, 'Case C-62/98 Commission of the European Communities v. Portugal, and Case C-84/98 Commission of the European Communities v. Portugal', *CML Rev.* 2001, pp. 1269–1283.

⁶⁰ Pursuant to the 1993 Copenhagen criteria states can only accede to the EU if they are a contracting party to the ECHR. For further remarks on the accession of the EU to the ECHR, see section 6 below.

⁶¹ R. Uerpman, 'International Law as an Element of European Constitutional Law: International Supplementary Constitutions', *Jean Monnet Working Paper* 9/03.

⁶² Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94, *RTT and others / Ministero delle Poste e Telecomunicazioni*, ECR [1996] I-6471.

⁶³ See e.g.: ECJ, Case C-308/06, *Intertanko*, *supra* note 2, para 52; Case C-84/95, *Bosphorus Airways* [1996] ECR I-3953, para 14.

⁶⁴ For *Kadi*: G. de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*', *Jean Monnet Working Paper* No. 01/09, p. 4, criticizing the ECJ for expressing 'impor-

tant parts of its reasoning in chauvinist and parochial tones'; J. Klabbers, *Treaty Conflict and the European Union*, Cambridge: Cambridge University Press, 2009, p. 219, criticizing the ECJ to act like an 'ostrich'. See also the very critical remarks of the General Court in Case T-85/09, *Kadi v. Commission*, Judgment of 30 September 2010, paras 114–122. For *Mox Plant*: N. Lavranos, 'Protecting Its Exclusive Jurisdiction: The *Mox Plant*-judgment of the ECJ', *The Law and Practice of International Courts and Tribunals*, 2006, pp. 479–493; for *Van Parys*: P. Eeckhout, 'Does Europe's Constitution Stop at the Water's Edge?', *Fifth Walter van Gerven Lecture* (available at: <https://www.law.kuleuven.be/ccle/pdf/wvg5.pdf>), 2005, p. 15.

⁶⁵ ECJ, Case C-377/02, *Van Parys*, *supra*.

⁶⁶ ECJ, Case C-459/03, *Mox Plant*, *supra*.

⁶⁷ ECJ, Case C-308/06, *Intertanko*, *supra*.

⁶⁸ ECJ, Case C-188/07, *Commune de Mesquer*, *supra*.

⁶⁹ ECJ, Case C-301/08, *Irène Bogiatzi v. Deutscher Luftpool, Société Luxair, European Communities, Luxembourg, Foyer Assurances SA*, [2009] ECR I-10185.

⁷⁰ See e.g.: G. de Búrca, N. Lavranos and P. Eeckhout, *op. cit.*

⁷¹ ECJ, Cases C-120/06 P and C-121/06 P, *FIAMM*, *supra*.

⁷² See comprehensively: C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford: Oxford University Press, 2009.

governs areas that belong to both national and European competence spheres. In *Mox Plant*, the Court of Justice held that a Member State cannot call upon international arbitration in a dispute with another Member State where Union competences could potentially be affected. The Court made very explicit that "[...] an international agreement cannot affect the allocation of responsibilities defined in the Treaties [...]"⁷³

Intertanko concerned the enforceability of UNCLOS and Marpol 73/78 before the Court of Justice. The Court found the Union bound by UNCLOS, but Marpol only binding on the Member States.⁷⁴ It then denied UNCLOS direct effect because of the overall nature of the convention.⁷⁵ Yet, the Court saw itself obliged to 'take account' of Marpol when interpreting Union law. Besides the principle of loyal cooperation in Article 4(3) TFEU (Article 10 TEC), the Court also based this obligation on good faith, a general principle of law. Hence, the Court did not review Union law in the light of binding international law but took account of the Member States' obligations and related its reasoning to international law principles.

In *Commune de Mesquer* and in *Bogiatzi*, the Court of Justice recently delimited its long standing doctrine of functional succession. First, the Union can only be bound by international agreements to which all the Member States are parties.⁷⁶ Second, a "full transfer of powers" from the Member States to the Union must have taken place, so that Union competences cover all areas governed by the international agreement.⁷⁷ Further, in *Commune de Mesquer* the Court ended all speculations as to whether Article 351 TFEU could be applied in analogy to certain (parts of) international agreements into which the Member States enter after 1958 (or their accession): both primary and secondary European law prevails over all subsequent international treaties concluded by the Member States.⁷⁸ Moreover in 2009, the Court of Justice gave a series of rulings on Member States obligations under Article 351 (2) TFEU (ex-Article 307 (2) EC) concerning investment agreements between Member States and third countries.⁷⁹ The Court considered that the Member States in question should have taken steps to eliminate the risk of conflict with Council measures⁸⁰ because (or even though) the anterior agree-

⁷³ ECJ, Case C-459/03, *Mox Plant*, *supra*, para 123.

⁷⁴ ECJ, Case C-308/06, *Intertanko*, *supra*, para 52.

⁷⁵ Critical: P. Beekhout, Case C-308/06, *The Queen on the application of Intertanko and Others v Secretary of State for Transport*, *CMLRev* 2009, pages 2041-57, at 53 *et seq.*

⁷⁶ ECJ, Case C-188/07, *Commune de Mesquer*, para 85.

⁷⁷ ECJ, Case C-301/08, *Bogiatzi*, *supra*.

⁷⁸ See also: C. Eckes, 'Case C-188/07, *Commune de Mesquer v. Total France and Total International Ltd.*, Judgment of the Court (Grand Chamber) of 24 June 2008 [2008] ECR I-4501; Case C-301/08, *Irène Bogiatzi v. Deutscher Luftpool, Société Luxair, European Communities, Luxembourg, Foyer Assurances SA*, Judgment of the Court (Fourth Chamber) of 22 October 2009, not yet reported', *Common Market Law Review*, 2010, pp. 899 *et seq.*

⁷⁹ ECJ, Case C-205/06, *Commission v Austria*, ECR [2009] I-1301; C-249/06, *Commission v Sweden* ECR [2009] I-1335; C-118/07, *Commission v Finland*, judgment of 19 November 2009.

⁸⁰ E.g.: ECJ, Case C-249/06, *Commission v Sweden*, paras 35-45.

ments did not contain any provision reserving to the Union the possibility to restrict movements of funds. These rulings confirm the far-reaching nature of the Member States obligations under Article 351(2) TFEU.

Furthermore in the case of *Van Parys*,⁸¹ the Court of Justice ended all speculations⁸² on the enforceability of WTO law after the dispute settlement body (DSB) has declared the European measure to be inconsistent with WTO law. WTO obligations do not have direct effect even if specifically confirmed by the DSB. The Court of Justice confirmed this line in the *FIAMM* appeal.⁸³ However, the appeal decision in *FIAMM* is interesting with regard to a different point: the Court rejected the possibility of claiming compensation in the absence of unlawful conduct.⁸⁴ The conduct of the institutions can only be unlawful if WTO law has direct effect. The General Court's ruling (allowing as a matter of principle compensation for unusual damage even in the absence of unlawful conduct⁸⁵) had opened a new avenue for compensation for the breach of not directly effective WTO law obligations. The Court of Justice closed this avenue.

Finally in the *Kadi* appeal, the Court of Justice resorted to what it knows best: the European legal order as the one and only frame of reference and was strongly accused to break with its international law friendly attitude of the past by taking a more 'dualist' position.⁸⁶ *Kadi* concerned counter-terrorist sanctions imposed by the UN Security Council against private individuals. Since the Union is not a member of the UN, the Charter imposes obligations on the Member States only. After briefly recalling the Community's track record of respecting international law,⁸⁷ the Court left no doubt that "[t]he question of the Court's jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights."⁸⁸ Hence, the Court of Justice saw no legal reason *under European law* for denying judicial review,⁸⁹ and annulled the European measures adopted to give effect to UN Security Council resolutions.

⁸¹ ECJ, Case C-377/02, *Van Parys*, *supra* note 2; General Court, Case T-19/01, *Chiquita Brands International v. Commission (Chiquita)*, [2005] ECR I- 315.

⁸² Such speculations came up after the Court's ruling in: ECJ, Case C-93/02 P, *Biret International v Council (Biret)*, [2003] ECR I-10497.

⁸³ ECJ, Cases C-120/06 P and C-121/06 P, *FIAMM*, *supra* note 2.

⁸⁴ *Ibid.*, paras 161-179.

⁸⁵ General Court, Case T-69/00, *FIAMM and FIAMM Technologies v Council and Commission*, [2005] ECR II-5393, paras 155 *et seq.*

⁸⁶ See de Búrca and Klabbers, *op. cit.* Dualism indeed allows courts to ignore one another and one another's legal orders. It is 'the easiest and most drastic form of norm conflict avoidance' M. Milanovic, 'Norm Conflict in International Law: Whither Human Rights?', *Duke Journal of Comparative & International Law*, 2009, pp 69 *et seq.*, at 102.

⁸⁷ *Ibid.*, para 291.

⁸⁸ *Ibid.*, para 317.

⁸⁹ ECJ, Cases C-402/05 P and C-415/05 P, *Kadi*, *supra*, para 300.

At the same time, the Court of Justice has continued to take an international law friendly line in a number of recent cases. For instance in the case of *Brita*,⁹⁰ concerning the application of the EC-Israel Association Agreement and the EC-Palestinian Liberation Organisation Agreement (PLO) of 1997, the Court of Justice used the Vienna Convention of 1969 as a means of interpretation (the principle of good faith and the principle of the relative effect of treaties) and made for the first time the effort of explaining its recourse to this instrument.⁹¹ The Court had to decide whether products originating in the West Bank qualify for preferential customs treatment under the EC-Israel Agreement and answered this question in the negative. The Vienna Convention, even though governing agreements between states (not other subjects of international law, such as international organisations), is applicable to an agreement concluded by the Union and binding on the Union to the extent that it expresses general international customary law.⁹² Furthermore in the case of *IATA*,⁹³ the Court of Justice took an international law friendly approach despite the fact that the challenge was directed against Union law.⁹⁴ It found that the Montreal Convention qualified as a basis for review but found in the end no breach. Moreover, the Court recently ruled that Member States when the Commission has submitted a proposal to the Council intended to result in concerted action in a particular field can already fetter the Member States in their room for manoeuvre.⁹⁵ This brings in fact the effect of international treaties (that the Union might conclude) forward to the point in time when it takes the decision to act.

By way of conclusion, in the most recent period the Court of Justice has at times taken a more dualist approach. In some of these rulings (e.g. *Kadi*) it ruled from a perspective firmly rooted in European law, explicitly stating that international law could not alter the fundamentals of European law. However, this should not lead to the immediate conclusion that the Court has become less international law friendly. First, there are also cases where the Court of Justice was very open to international law, also in the past six years. Second, not compromising on the legal perspective does not necessarily mean that the Court was not willing to take international law into account. Indeed, it does so in different ways. One conclusion should perhaps be that assessing the Court's case-law in terms of 'friendliness towards international law' is prone to be too simplistic. Potentially, a distinction between attitude and outcome could help. Only because in a specific ruling international law was not given full effect does not mean that the Court of Justice has changed its attitude.

⁹⁰ Case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, judgment of 25 February 2010.

⁹¹ Case C-386/08, *Brita*, *ibid.*, paras 40-42; see also: P.J. Kuijper, 'The European Courts and the Law of Treaties: The Continuing Story', in E. Cannizzaro (Ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford: Oxford University Press, 2011 (forthcoming), section II A.

⁹² *Ibid.*, paras 40-42.

⁹³ ECJ, Case C-344/04, *IATA* [2006] ECR I-403.

⁹⁴ Mendez, 'The Legal Effect of Community Agreements', *op. cit.*, at 98.

⁹⁵ ECJ, Case C-247/07, *Commission v Sweden*, Judgment of 20 April 2010.

5. TENTATIVE EXPLANATIONS: CONTEXT, EXTENDING COMPETENCES AND JURISDICTION

It would be too simplistic to draw the general conclusion that the Court of Justice has become less international law friendly in the past six years. However, there are a number of recent rulings that have in their outcome not given effect to international law within the European legal order. These rulings also demonstrate the Court's willingness to have recourse to a certain degree of dualism. Four observations will be made that could help to explain that the recent case-law is not the result of a change in the Court of Justice's attitude as a matter of principle. The first two observations are more general and relate to the broader developments of international and European law. The latter two are more specific and relate more closely to the specific circumstances of the cases.

First, a general point concerns the sheer *quantity* of international law. An ever greater number of attempts are made to manage global challenges in a coordinated manner.⁹⁶ As a result, domestic courts, including the Court of Justice, are more often than before asked to rule on the relationship between international law on the one hand and European and/or national law on the other. This observation does not entail a value judgment of whether domestic courts are the best fora to rule on matters of international law or whether domestic judges are well equipped to do so. It is a purely factual observation. The result of this trend is that the range of international law issues with which they have to deal broadens: more and different issues arise before domestic courts and give domestic courts a greater role in defining the effects of international law (within their domestic legal orders). Furthermore, the Union has started to participate in international relations almost on a par with states. It has become an additional and active international player that concludes treaties in an ever more treaty regulated world⁹⁷ that have effects within the European legal order. This development has its roots in the international presence of the Community within certain limited contexts, such as the WTO.⁹⁸ More recently, the international law presence of the Union has extended into other less obvious areas.⁹⁹ This leads to an increasing body of international

⁹⁶ To name but selected areas: on the increasing number and influence of international tribunals: E. Benvenisti and G. W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', *European Journal International Law* 2009, pp. 59-72; on international economics: S. W. Schill, *The Multilateralization of International Investment Law*, Cambridge University Press, 2009; D. Nayyar, *Governing Globalization – Issues and Institutions*, Oxford: Oxford University Press, 2002; on the proliferation of international solutions to environmental challenges: R. Leichenko, K. O'Brien, *Environmental Change and Globalization: Double Exposures*, Oxford: Oxford University Press, 2008; on security issues: T.V. Paul, N. Ripsman, *Globalization and the National Security State*, Oxford: Oxford University Press, 2010. See further the increasing number of UN Security Council resolutions at: <<http://www.un.org/Docs/sc/>>.

⁹⁷ See the UN Treaty Database available at: <<http://treaties.un.org/>>.

⁹⁸ ECJ, Joined Cases 21/72, 22/72, 23/72 and 24/72 *International Fruit Company*, *supra*.

⁹⁹ See e.g.: R.A. Wessel, L. Marin and C. Matera, 'The External Dimension of the EU's Area of Freedom, Security and Justice', in C. Eckes and T. Konstantinides, *Crime within the Area of*

law that is directly binding on the Union. At the same time, Member States continue to conclude international agreements and join international organisations, or cooperate more informally on the international plane. An extensive interpretation of implied powers, and in particular the fact that implied Union competences can be shared, increases the interface between European and international law in areas where Member States retain competence and continue to enter into international agreements either alone or jointly with the Union. This leads to an increase of situations in which the Court faces several layers of norms (European law, international law – either binding on the Member States, the Union, or both – and potentially national law) that govern the same subject matter. These different layers of norms are not (necessarily) identical. This creates an increased potential for conflict of norms which the Court of Justice must solve in a way that does not undermine the functioning of the European legal order. Giving greatest possible effect to international law might however mean that, in the event of a conflict of norms, European law has to give way.

Second, not only the increasing quantity of international obligations leads to a greater number of (potential) conflicts, but also the changing *quality* of international law. International law conditions the lives of individuals more and more¹⁰⁰ and affects the functioning and operation of domestic legal orders. Individual sanctions (*Kadi*) are but one example of international norms that directly change the legal position of individuals. The origins of this development lie further in the past (e.g., the laws on piracy).¹⁰¹ Already in 1965, William Coplin identified the changing relation of the individual to the international legal order as one of the 'challenges of the state system'.¹⁰² However in the past twenty years, this development has considerably accelerated: international human rights law best illustrates the changing role of the individual (from being a mere object to becoming a subject).¹⁰³ However beyond this, international organisations such as the WHO and the OECD increasingly develop programmes that no longer need implementation by States to affect individuals.¹⁰⁴ Individuals have also claimed a more active role: non-governmental bodies and organizations, and herewith also their mem-

Freedom, Security and Justice – A European Public Order, Cambridge: Cambridge University Press, 2011 (forthcoming).

¹⁰⁰ Focusing on the participation of the individual in the international legal order: R. McCorquodale, 'The Individual in the International Legal System', in M. Evans (Ed.), *International Law*, Oxford: Oxford University Press, 2003, pp. 299-325.

¹⁰¹ A. Cassese, *International Law*, Oxford: Oxford University Press, 2004, Chapter 12, p. 217.

¹⁰² W.D. Coplin, 'International Law and Assumptions about the State System', *World Politics*, 1965, pp. 615-634, at 628 et seq.

¹⁰³ See notably, the individual complaint procedures to the UN HR treaty bodies. See also: R. McCorquodale, *op. cit.*

¹⁰⁴ Examples are: the Program for International Student Assessment (PISA) by the OECD; operational standards of the World Bank and decisions of the World Bank Inspection Panel; certificates for aircrafts and personnel issued by the ICAO; recommendations on quarantine and travel by the WHO; registration of trademarks by the WIPO.

bers, have become more influential in international law making.¹⁰⁵ Moreover, the International Court of Justice (ICJ) recognized in the case of *LaGrand* that individuals can be rights holders under an international agreement (the Vienna Convention on Consular Relations).¹⁰⁶ With regard to the UN in particular, it has for a long time been the understanding that European law is only indirectly affected by obligations under the UN Charter because only its Member States are directly bound. This has certainly changed with the adoption of individual sanctions and the long list of challenges against these measures.¹⁰⁷ The Union's particular nature places it in the same position as states when implementing international law.¹⁰⁸ Through implementation it constructs or at least strengthens the link between individuals and international law. With a little help of the Court of Justice,¹⁰⁹ the Union has been placed in an authoritative position capable of adopting measures that directly affect fundamental rights of individuals. More recently, also the Union's external actions have become directly relevant for individuals. This is the result of a combination of international law that becomes more and more intruding into the legal sphere of individuals and Union law, which has for a long time directly governed the rights and obligations of individuals. It also gives rise to more litigation in Luxembourg. The increase in litigation is further intensified by the fact that the Union has international organisation origins itself.¹¹⁰ This adds further potential controversies over internal competence delimitations and compatibility of European and national law.

The change in the quality of international law (direct link between international law and individuals) leads not only to more litigation, but also precludes the

¹⁰⁵ P. Schiff Berman, 'A Pluralist Approach to International Law', *The Yale Journal of International Law* 2007, pp. 301-329.

¹⁰⁶ ICJ, *Germany v USA (LaGrand)*, judgment, ICJ Reports 2001, p. 466, para 77.

¹⁰⁷ Challenges against individual sanctions giving effect to UN Security Council resolutions: General Court, Case T-315/01, *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649; Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533; Case T-49/04, *Hassan v Council and Commission* [2006] ECR II-52; Case T-253/02, *Chafiq Ayadi v Council* [2006] ECR II-2139; Case T-318/01, *Omar Mohammed Othman v Council and Commission* [2009] ECR II-1627; Most recently: Case T-135/06, *Al-Faqih v Council*, Judgment of 29 September 2010; Case T-85/09, *Kadi v Commission*, Judgment of 30 September 2010. ECJ; Case C-117/06, *Gerda Möllendorf and Christiane Möllendorf-Niehuus* [2007] ECR I-8361; Cases C-402/05 P and C-415/05 P, *Kadi*, *supra* note 2; Cases C-399/06 P and C-403/06 P, *Hassan and Ayadi v Council and Commission*, Judgment of 3 December 2009; Case C-340/08, *M and Others*, Judgment of 29 April 2010.

¹⁰⁸ As is well known, the Union has for a long time been adopting measures that directly condition the legal sphere of individuals. The effects of part of its legislation on individuals are equivalent to the effects of national law (directly applicable regulations; direct effect). The EU Courts further refers to the European legal order as domestic legal order (see e.g. ECJ, C-402/05 P and C-415/05 P, *Kadi*) and Article 216-218 TFEU regulate whether and how international law acquires effects within the European legal order as most national constitutions do.

¹⁰⁹ See above Section 2 'The Court of Justice: The Master in Its Own House'.

¹¹⁰ As is well known, the Union is created by international agreements. See more specifically on the consequences. C. Eckes, Commentary on Articles 48 and 50 TEU, in: Smit and Herzog (eds.), *Commentary on the Law of the European Union* (2011, forthcoming).

Court of Justice from applying some of the tested methods of reconciling international and European law, such as consistent interpretation. Usually, the European Courts make an attempt to interpret Union law in the light of international law in order to avoid a conflict between the two.¹¹¹ Or, as Advocate-General Maduro put it: the EU constitutes a “new legal order”, beholden to, but distinct from the existing legal order of public international law [...] [with its own] basic constitutional charter”.¹¹² Yet, this “does not mean [...] that the Community’s municipal legal order and the international legal order pass by each other like ships in the night”.¹¹³ While this may be so, consistent interpretation might not be possible where international law directly regulates the right of individuals in a very precise way. This is the case where the international law obligation is so precise that there is simply no room for interpretation. Individual sanctions giving effect to UN Security Council resolutions constitute one of the most well-known examples of the Court’s more restrictive recent case-law. Here, the Member States’ obligations under the UN Charter were so specific (freeze specific assets of singled out individuals) that there was no room to opt for a form of consistent interpretation.¹¹⁴ Either the Union gave effect to these very specific obligations or it did not.

By way of conclusion, the qualitative change of international law places the Court of Justice in a position where it cannot reconcile different layers of law through receptive methods of interpretation. It has to take a decision which of the different obligations it gives effect to. This may at times result in a denial of effect of international law.

Third, some differences between earlier cases and the more recent cases might be explained by adopting a conceptual perspective. This perspective is based on three distinctions. First, the status and binding force of obligations of the Union (*Intertanko*, *Van Parys*) differ in effect from those of the Member States (*Kadi*, *Commune de Mesquer*). In principle only the former bind the Union while the latter have the same status as national law within the European legal order. Second, a distinction is in order between challenges to Union law (*Kadi*, *Intertanko*) and challenges to national measures (*Bresciani*). Even though it might be too simplistic to say that the Court of Justice will always favour the Union at the expense of the Member States¹¹⁵ it appears to make a difference in whether the case concerns a challenge to a Union measure or to a Member State measure.¹¹⁶ The Court

¹¹¹ General Court, Case T-45/06, *Reliance Industries v. Council and Commission* [2008] ECR II-2399, paras 100 *et seq.* See a discussion of the General Court’s methods of interpretation at: P.J. Kuijper, ‘The European Courts and the Law of Treaties: The Continuing Story’, *op. cit.*, section II B.3. ECJ, Case C-310/06, *FTS International* [2007] ECR I-6749; see M. Bronckers, ‘From “Direct Effect” to “Muted Dialogue”: Recent Developments in the European Courts’ Case-law on the WTO and Beyond’, *Journal of International Economic Law*, 2008, p. 885.

¹¹² ECJ, Opinion of AG Maduro in: C-402/05 P and C-415/05 P, *Kadi*, *supra* note 2, paras 21-22.

¹¹³ *Ibid.*

¹¹⁴ See also C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights*, *op. cit.*, Chapter 5, p. 247 *et seq.*

¹¹⁵ T. Tridimas, ‘The Court of Justice and judicial activism’, *E.L. Rev.* 1996, pp. 199-210, at 202.

¹¹⁶ Mendez, ‘The Legal Effect of Community Agreements’, *op. cit.*

of Justice has shielded Union law better from review in the light of international agreements than national law. However, in the light of the Court of Justice’s broader case-law this is unsurprising. The Court of Justice has long been seen to make a difference between obligations of the Union institutions and of the Member States.¹¹⁷ Applying international law more strictly (and hence being more international law friendly) in challenges against national measures than in challenges against Union law is well in line with applying rules of European law more strictly to Member States than to the Union institutions. Third, the binding force on the Union should be distinguished from the question of whether international obligations are directly effective. The latter is particularly relevant for WTO law. Yet, the Court of Justice’s approach to WTO law in *Van Parys* and *FIAMM* is neither new nor surprising. The judgments only re-emphasized the Court’s commitment to a clear separation between WTO law and Union law. At the same time, despite or because of the lack of direct effect, the Court of Justice has for a long time given WTO law great relevance when interpreting European law – both to the point of deviating from the traditional methods of legal reasoning used by the Court¹¹⁸ and deviating from the usual substantive interpretation of European law.¹¹⁹ Factual and legal differences require also a differentiation in the Court’s approach to international law, e.g. WTO has always been seen as different from other bilateral or multilateral agreements and there are reasons for this – whether one agrees with the outcome or not.

Fourth, the Court of Justice’s case-law on the binding force and status of international law cannot easily be placed within a systematic framework. The precise conditions under which international agreements or their provisions are (a) binding upon the Union and (b) have direct effect (serve as yardstick for review of Union law) have not been fully and finally established.¹²⁰ Certain parameters are well known.¹²¹ However, the Court of Justice’s position on other issues continues to require further refinement. For instance, the concept of functional succession was created long ago in the case of *International Fruit Company* in 1971; yet, it has only been applied to the exceptional case of the GATT. It still needed further qualifications. The qualifications in *Intertanko*, *Commune de Mesquer* and *Bogiatzi* (all Member States need to be parties and full transfer of powers must have occurred) might be limiting. However, they are not surprising and appear to have always been implicitly part of the concept. Another question that still remains open concerns the requirements of direct effect. Do international agreements need

¹¹⁷ E.g. participation requirements are interpreted more restrictively when applied to Member States: J. Mendes, *Participation in EU Rulemaking – A Rights-Based Approach*, Oxford: Oxford University Press, 2011 (forthcoming), Chapter 4, Section 4.1.3. More implicitly: P. Craig, *EU Administrative Law*, Oxford: Oxford University Press, 2006, p. 323 *et seq.*

¹¹⁸ P.J. Kuijper, ‘The European Courts and the Law of Treaties: The Continuing Story’, *op. cit.*, section II B.3.

¹¹⁹ M. Bronckers, *op. cit.* at 889-890.

¹²⁰ Mendez, ‘The Legal Effect of Community Agreements’, *op. cit.*, at p. 94 *et seq.*

¹²¹ See above Section 3 ‘Taking Stock: The Court of Justice’s View of International Law’.

to confer rights upon individuals in order to be directly effective (invocable)? On the one hand, there is evidence that the Court of Justice appears to see the conferral of rights on individuals as a crucial criterion. This was for example the case in *Intertanko*¹²² or in the body of case-law dealing with WTO law. On the other hand, the Court of Justice has ruled in the *Biotech* case that '[e]ven if [...] the CBD [Convention on Biological Diversity] contains provisions which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement'.¹²³ This might require further qualifications in the future. This includes qualifications that, by falling short of what scholars and litigants hoped for, might appear as new limitations.

6. CONCLUSIONS AND OUTLOOK

Arguably, the Court of Justice has at occasions ruled decisively more international law friendly in the past than it did in *Van Parys*, *Mox Plant*, *Kadi*, and *Intertanko*. The previous section has outlined some of the factors that may have influenced the Court's decisions in these rulings. Moreover, in the light of the first section there is a different way of looking at the Court's recent and more restrictive rulings: they form a logical part of the Court of Justice's vision of the European legal order and of its understanding of its own role in making this vision reality. In the 1960s, the Court of Justice acted as the midwife of the European legal order, declaring it autonomous from both national and international law.¹²⁴ Until today, the Court continues to take a crucial role in the European legal order's coming-of-age. It continues to prioritise the integration and autonomy of European law over the interests of individual Member States. Recently, the increasing relevance of international law requires the Court more often to reconcile international obligations either of the Union or its Member States with its autonomous vision of the European legal order.

Kadi for instance confirmed the *status quo* of the autonomous European legal order by agreeing to review the internal lawfulness of the contested regulation in the light of principles of European law. Indeed, the Court took the same domestic outlook as Advocate-General Maduro, using "the landmark ruling in *Van Gend en Loos*"¹²⁵ as the 'logical starting point' and emphasizing that the role and function of the Court was "...first and foremost, to preserve the constitutional framework

¹²² ECJ, Case C-308/06, *Intertanko*, *supra* note 2, paras 59-64. See critical: Beekhout, *CMLRev*, *op. cit.*

¹²³ ECJ, Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079, para 54.

¹²⁴ ECJ, Case 26/62, *Van Gend & Loos*, *supra* note 3; Case 6/64, *Falminio Costa v. ENEL* [1964] ECR 585.

¹²⁵ Opinion of AG Maduro, in: para 21.

created by the Treaty."¹²⁶ The Court of Justice defended the Community's autonomy, both at the institutional and at the substantive level, by stating that obligations under international agreements can neither "affect the allocation of powers fixed by the Treaties",¹²⁷ nor can they "have the effect of prejudicing the constitutional principles of the EC Treaty".¹²⁸ For support the Court cited both its more recent case-law (*Mox Plant*¹²⁹) and older case-law (*Germany v. Council (Banana Agreement)*¹³⁰). The Court could have equally turned to different older cases, such as *Opinion 1/91*,¹³¹ *1/92*¹³² or *1/00*,¹³³ to make its argument on the importance of the autonomy of the European legal order; or to its case-law on the effects of WTO law.¹³⁴ Albeit in a slightly different context and arguably in very specific circumstances, with regard to the WTO the Court of Justice has always prioritised the political autonomy of the European Union and its margin for negotiation over the integration of the EU into an overarching international legal system.¹³⁵ Hence, the Court of Justice's focus on ensuring and protecting the autonomy of the European legal order is far from new.¹³⁶

More than before the EU's external actions contribute to shaping its identity and polity.¹³⁷ This gives the Court's approach towards international law and the Union's external actions additional relevance. Indeed, the opening up of international law towards individuals by accepting them as duty-bearers and rights-holders¹³⁸ in combination with the increasing external presence and competences of the Union,¹³⁹ will render the Court's approach towards international law decisive for the functioning and coherence of the Union.

Additionally, the entering into force of the Lisbon Treaty could further increase litigation in the European Courts that relates to international law. The Union's external presence and its capacity to act on the international plane has been one of the central considerations in the long process cumulating in the entering into force of the Lisbon Treaty. Despite the criticism that its amendments concerning foreign

¹²⁶ *Ibid.*, para 24.

¹²⁷ ECJ, *Kadi*, *supra* note 2, para 282.

¹²⁸ *Ibid.*, para 285.

¹²⁹ ECJ, Case C-459/03, *Commission v Ireland* [2006] ECR I 4635, para 123 and Opinion 1/91 EEA [1991] ECR I 6079, paras 35 and 71.

¹³⁰ ECJ, Case C-122/95 *Germany v Council* [1998] ECR I-973.

¹³¹ ECJ, Opinion 1/91, *Draft Treaty on European Economic Area* [1991] ECR I-6079.

¹³² ECJ, Opinion 1/92, *EEA Agreement* [1992] ECR I-2821.

¹³³ ECJ, Opinion 1/00, *Common Aviation Area* [2002] ECR I-3493.

¹³⁴ E.g.: ECJ, Case C-149/96, *Portugal v Council*, *supra*.

¹³⁵ R. Uerpman-Witzack, 'The Constitutional Role of International Law', in A. von Bogdandy and J. Bast (Eds.), *Principles of European Constitutional Law*, Hart, 2009, 2nd ed., p. 147.

¹³⁶ B. de Witte, 'European Union Law: How Autonomous is its Legal Order?', *ZÖR*, 2010, 141-155.

¹³⁷ C. Bickerton, *European Union Foreign Policy: From Effectiveness to Functionality*, Palgrave, 2011 (forthcoming), Chapter 4.

¹³⁸ See above Section 5 'Tentative Explanations: Context, Extending Competences and Jurisdiction'.

¹³⁹ See below.

policies are not as significant as some claim,¹⁴⁰ it is likely that the Court of Justice will play an important role in defining the scope and meaning of the new Treaty provisions. To give but one example, Article 3 (2) TFEU sets out the *exclusive* competences of the Union to conclude international agreements, while Article 216 (1) TFEU provides for Union competences to conclude international agreements without specifying whether these competences are exclusive. The two articles differ but both appear to codify the case-law on exclusive external competences.¹⁴¹ Also, the Court of Justice has now been given slightly more jurisdiction over issues of Common Foreign and Security Policy (CFSP). It has the power to rule on the legality of counter-terrorist measures against individuals (Article 275 (2) TFEU). Article 40 TEU, the successor of former Article 47 TEU, no longer prioritizes former-Community policies but has set CFSP and other policies on equal footing. The Lisbon Treaty further makes clear that the general principles of European law as they are set out in Title I of the TEU apply to the whole of European law.¹⁴² Within the scope of its limited jurisdiction over CFSP matters, this will require new consideration by the Court of Justice.¹⁴³ Furthermore, the great constitutional effect of the ECHR, as a human rights treaty to which only the Member States but not the Union are parties, might decrease as a result of the binding force of the Charter of Fundamental Rights. This would then be a consequence of a change of law and not a change in attitude of the Court of Justice towards international law. Accession of the Union to the ECHR would again change the situation.¹⁴⁴ It would make the Convention directly binding on the Union which would place the Union and its institutions under external (human rights) review. The general principles of Union law expressed in the now binding Charter of Fundamental Rights do not completely but largely align with general principles of international law.¹⁴⁵ Where they differ from international law new room for litigation and for 'less international law friendly' interpretation will develop.

¹⁴⁰ P. Koutrakos, 'Primary Law and Policy in EU External Relations: Moving Away From the Big Picture', *E.L. Rev.* 2008, pp. 666-686.

¹⁴¹ Examples are the concept of necessity in Opinion 1/76, *Draft Agreement on the establishment of European Laying-up Fund for Inland Waterway Vessels* [1977] ECR 741 that is reflected in both provisions.

¹⁴² This was still controversial for the second and third pillar before the entering into force of the Lisbon Treaty.

¹⁴³ See on the potential for litigation on the scope of Article 40 TEU: P. van Elsuwege, 'EU External Action After the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency', *Common Market Law Review*, 2010, pp. 987-1019, particularly Section 4.

¹⁴⁴ This is not to be expected too soon. Even though Protocol 14 to the ECHR has entered into force and accession is rooted in the European Treaties, it remains subject to ratification by all 27 Member States (Article 218 TFEU). We have seen in the context of the adoption of the Constitutional Treaty and the Lisbon Treaty to how much delay this requirement can lead.

¹⁴⁵ R. Uerpman-Witzack, *op. cit.*, p. 132.

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THE SECURITY COUNCIL'S TARGETED SANCTIONS IN THE LIGHT OF RECENT DEVELOPMENTS OCCURRING IN THE EU CONTEXT

The shift from economic sanctions against whole nations to sanctions targeted at individuals brought a new dimension to the focus of international law: the contradiction between (procedural) standards of human rights protection and the authority of the UN Security Council acting pursuant to the UN Charter Chapter VII. The encounter of the UNSC targeted sanctions with the EU and ECHR system of human rights protection, as articulated in recent ECJ decisions, not only affirms the EU as a gradually appearing sovereign legal system with strong human rights safeguards, but also clarifies the authority of the UNSC with respect to maintaining peace and security in the world.

Key Words: *Economic sanctions. – Targeted sanctions. – Resolution 1267. – Yusuf and Kadi case.*

1. INTRODUCTION

The United Nations Security Council (referred to herein as "UNSC") has gradually adopted targeted financial and travel sanctions¹ against individuals in the past decade, which has widely been regarded as a step forward from economic sanctions² that it had been using against certain nations.

¹ Such individually targeted sanctions have also been referred to as "smart" or "designer", due to the fact their negative effects are limited to the very group of individuals from which a certain threat originates, instead to a nation as a whole.

² The UN Charter does not contain the term "sanctions" at all, but refers to measures that may be adopted in response to identified threats to the peace, breaches of the peace and acts of aggression.

However, the narrowing of the scope of UN sanctions and putting individuals into the sanctions' crosshairs instead of whole nations has given room to wide spread criticism from the perspective of human rights protection.

For the benefit of addressing the global, and still growing, threat of international terrorism in accordance with the level of political and legal standards pertinent to developed democracies, certain distinctions among the arguments raised in connection with the targeted sanctions need to be put forth from the perspective of international law. A particular attention is paid to differentiating the objections to targeted sanctions coming from the human rights perspective between those that question of the validity of these acts *per se*, on the international law level, and those that are grounded in the standards of human rights protection of sovereign supranational and national legal systems.

2. ECONOMIC SANCTIONS

Economic sanctions can be defined as a political act which uses economic tools to exert a pressure on a third State in order to obtain a change of its behavior.³

Within the United Nations framework, economic sanctions have been implemented by the Security Council⁴ with the aim of maintaining peace, pursuant to the Chapter VII of the UN Charter. Though effectiveness of the Security Council was limited during the Cold War, the 1990s saw a great expansion in its activity.⁵ Since 1990 the UN Security Council has imposed ten arms embargoes in an effort to limit local conflicts,⁶

³ See: M. Milojević, "Sankcije u međunarodnom pravu", *Analiz Pravnog fakulteta u Beogradu*, 4-6/97, 435-440; T. de Wilde d'Estamel, "The Use of Economic Tools in Support of Foreign Policy Goals: the Linkage between EC and CFSP in the European Union Framework", Discussion Paper prepared for the ECSCA's Fifth Biennial International Conference, Seattle, 29 May 1997, 5; G. C. Hufbauer, B. Oegg, "Targeted Sanctions: A Policy Alternative?" <http://www.iie.com/publications/papers/paper.cfm?ResearchID=371>, last visited 15 October 2009.

⁴ M. Kreća, S. Avramov, *Međunarodno javno pravo*, Beograd 1997, 11.

⁵ S. Chesterman, "The UN Security Council and the Rule of Law", Public Law & Legal Research Paper Series Working Paper No. 08-57, November 2008, <http://ssrn.com/abstract=1279849>, last visited 15 October 2009. Between 1946 and 1989 the Security Council met 2,903 times and adopted 646 resolutions, averaging fewer than 15 per year; in the following decade it met 1,183 times and adopted 638 resolutions, an average of about 64 per year. In its first 44 years, 24 Security Council resolutions cited or used the enforcement powers contained in Chapter VII of the UN Charter; by 1993 the Council was adopting that many such resolutions every day. *Ibid.*

⁶ Iraq (1990), Yugoslavia (1991), Somalia (1992), Libya (1992), Liberia (1992), Haiti (1993), Angola (1993), Rwanda (1994), Sierra Leone (1998) and again against the Federal Republic of Yugoslavia (1998) over the Kosovo conflict.

and in total has imposed sanctions on 16 countries: Afghanistan, Angola, Eritrea, Ethiopia, Haiti, Iraq, Liberia, Libya, Rwanda, Sierra Leone, Somalia, South Africa, Southern Rhodesia (now Zimbabwe), Sudan, the Federal Republic of Yugoslavia (FRY) and the Socialist Federal Republic of Yugoslavia.⁷

Economic sanctions against whole nations have been widely criticized as both ineffective and disproportional, i.e. as inflicting too much collateral damage while producing too few results.⁸ Such economic sanctions have been found to harm civilian population of the targeted country instead of the leaders of the regime in power.⁹ The inadequacy of such general approach is intensified whenever sanctions are targeted at a country whose political system lacks democratic transmission of electorate's will upon political leadership, since it is hard to justify infliction of harm upon population that lacks capacity to influence the behavior of its political leaders. Oftentimes even a contrary effect can take place, so that broad economic sanctions in fact "may play into the hands of 'hardliners' in the target country....The effect would tend to entrench the target's objectionable policy."¹⁰ Another argument against broad economic sanctions, this time grounded in legitimate interests outside the target country, would be that such sanctions put a heavy burden on international commerce, harming the international companies that transact with the target country.¹¹

Criticism of the broad economic sanctions, grounded on their non-discriminative character, ineffectiveness and arbitrariness of the UNSC, led to the formation of the UN Working Group on General Issues of Sanctions, with the aim of defining a framework for imposing sanctions by the UNSC. A draft report was presented to group members in February 2001, who then decided to defer the consideration of the report by the UNSC indefinitely. The report nevertheless influenced the practice of the UNSC in several important respects, e.g. by the fact that time-limited sanctions have been introduced, excluding arbitrariness of the UNSC with respect

⁷ I. Anthony, "Sanctions applied by the European Union and the United Nations", *SIPRI Yearbook 2002: Armaments, Disarmament and International Security*, 204.

⁸ In his 1997 report on the work of the United Nations, Secretary General Kofi Annan stressed the importance of economic sanctions: the Security Council's tool to bring pressure without recourse to force. At the same time, Annan expressed concern because of the harm economic sanctions inflict upon civilian population, as well as for the collateral damage to third states. He acknowledged that "it is increasingly accepted that the design and implementation of sanctions mandated by the Security Council need to be improved, and their humanitarian costs to civilian populations reduced as far as possible." Annual Report of the Secretary-General on the Work of the Organization (1997), A/52/1.

⁹ M. D. Evans, *International Law*, Oxford University Press, 2003, 526.

¹⁰ W.H. Kaempfer, A.D. Lowenberg, "Targeted Sanctions – Motivating Policy Change", *Harvard International Review*, Fall 2007, 69.

¹¹ W.H. Kaempfer, A.D. Lowenberg, 68.

to indefinite prolongation of the staying in force of sanctions against a particular country.¹²

3. TARGETED SANCTIONS

Partly in response to criticism aimed at general economic sanctions, and partly due to specific historical circumstances (impossibility to target any particular nation in retribution for terrorist attacks of 11 September 2001), targeted sanctions have appeared with greater frequency in the past decade. Their main aim has been to put pressure on specific individuals and limit their ability to undermine international peace and security, while limiting the collateral impact on general population of the country at hand. The specific forms through which the individuals who have so far been targeted by UN Security Council sanctions had threatened international peace have been financing of terrorism and proliferation of weapons of mass destruction.¹³ Targeted sanctions can include travel bans, arms embargoes, or financial sanctions such as the freezing of assets.¹⁴ Application of targeted sanctions has been intensified particularly after the terrorist attacks on the US soil on 11 September 2001.¹⁵

The first targeted sanctions were introduced in 1997 and 1998 against the UNITA political party in Angola. The most comprehensive system of targeted sanctions so far was put in place by UNSC Resolution 1267 of 1999, that established a sanctions regime against individuals and entities associated with *Al-Qaida*, Osama bin-Laden and/or the Taliban

¹² I. Anthony, "Sanctions applied by the European Union and the United Nations", *SIPRI Yearbook 2002: Armaments, Disarmament and International Security*, 206–210.

¹³ Resolutions 1373 of 28 September 2001 on the fight against terrorism, 1540 of 28 April 2004 on the non-proliferation of weapons of mass destruction; L. Van Den Herik, "The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual", *Leiden Journal of International Law*, 20/2007, 798.

¹⁴ Travel restrictions and/or freezing of financial assets concerning persons designated ('listed') by a Committee of the Security Council have been imposed by a number of UNSC resolutions in the following cases: Sierra Leone, resolutions 1132 of 8 October 1997 and 1171 of 5 June 1998; Afghanistan; Taliban, *Al-Qaida*, resolutions 1267 of 15 October 1999, 1333 of 19 December 2000, 1390 of 16 January 2002, 1455 of 17 January 2003, 1526 of 30 January 2004, 1617 of 29 July 2005, 1735 of 22 December 2006; Iraq, Resolution 1483 of 22 May 2003; Liberia, resolutions 1521 of 22 December 2003, 1532 of 12 March 2004; Côte d'Ivoire, resolutions 1572 of 15 November 2004, 1584 of 1 February 2005, 1643 of 15 December 2005; Sudan (Darfur), Resolution 1591 of 29 March 2005; DRC, resolutions 1596 of 18 April 2005, 1649 of 21 December 2005, 1698 of 31 July 2006; Lebanon, Resolution 1636 of 31 October 2005; North Korea, Resolution 1718 of 14 October 2006; Iran, resolutions 1737 of 23 December 2006, 1747 of 24 March 2007.

¹⁵ I. Anthony, "Sanctions applied by the European Union and the United Nations", *SIPRI Yearbook 2002: Armaments, Disarmament and International Security*, 203.

wherever located. The system has since been modified by more than 10 UNSC resolutions.

Two modalities may be observed in respect of how UNSC resolutions that have introduced targeted sanctions so far have been structured: the above mentioned UNSC Resolution 1276 comprised a list of targeted individuals drafted by a special UNSC Committee, whereas the UNSC Resolution 1373, of 2001, adopted in the wake of terrorist attacks on 11 September 2001, did not comprise such a list, leaving the determination of the targeted individuals' identities up to the will of member states, as well as to the results of their cooperation in fighting terrorism, and at the same time verbing the member states with certain monitoring and reporting obligations. The latter model, called by some authors as "autonomous listing at the lower level",¹⁶ has not been repeated however, and may be regarded as an exception that had been provoked by the gravity of the threat of terrorism in 2001.

Another important benchmark within the body of targeted sanctions was the UNSC Resolution 1390 of January 2002, which renewed the Taliban and *Al-Qaida* blacklists started by the Resolution 1267, and which was and so far has remained the only one without direct territorial connection.

A general agreement with respect to effectiveness of targeted sanctions so far has not been reached.¹⁷

4. CONFLICTING PERSPECTIVES ON TARGETED SANCTIONS

It has been widely acknowledged that targeted sanctions in general successfully reduce negative humanitarian consequences of sanctions as a tool of international relations, but this regime has been receiving criticism for the manner in which individuals may come to be selected for such coercion without either transparency or the possibility of formal review.

The repositioning of the sanctions' cross hairs from nations to individuals has thus raised a chorus of criticism on the grounds of human rights, both from the academic perspective, as well as from the perspective of national and supranational legal systems required to implement such UNSC resolutions.

Leaving aside the paradoxicality of the phenomenon that targeting specific (and only few) individuals has raised considerably more theoretical

¹⁶ M. Bothe, "Security Council's Targeted Sanctions Against Presumed Terrorists", *Journal of International Criminal Justice*, 6/2008, 545.

¹⁷ I. Cameron, "UN Targeted Sanctions, Legal Safeguards, and the European Convention on Human Rights", *Nordic Journal of International Law*, 72/2003, 160.

objections than targeting whole nations by economic sanctions, such objections need to be understood from the perspective of international law.

The shift in targeting from whole nations to individuals meant that the theatre of the sanctions' operations moved in many cases from the purely international law environment to more complex ones, because the targeted individuals very often were nationals of states with strong standards of human rights protection. As a consequence, conflicts have been arising, both in intellectual perception and in the course of practical enforcement, between the UNSC resolutions on targeted sanctions and sovereign supranational and national legal systems required to implement such sanctions.

Besides criticism from the perspective of sovereign legal systems and their human rights protection mechanisms, a wide stream of academic thought declared the targeted sanctions inappropriate at the UN level as well.¹⁸

The core of the arguments pointed to the lack of due process safeguards in the UNSC treatment of individuals.¹⁹ This line of thought is

¹⁸ "The structure and competences of the Security Council, on the basis of the Charter, as well as of the practice, makes it impossible for the Council to deal with specific concrete cases concerning individuals. The Council is too distant from day-to-day reality in the field, and its mandate is essentially to deal with fundamental political choices relating to a situation, to an inter-state scenario; it has to deal with broader general interests and cannot decide over issues concerning one specific individual...", "There is little doubt that the Security Council is entitled and has the ability to take policy decisions which entail more progressive or more restrictive policies concerning fundamental rights – what it cannot and should not do is to engage in actions of concrete and specific balancing of interests (and even less individual rights) in cases concerning individuals – this for two reasons: 1. there are no procedures which allow the Council to gather details about the specificities of each individual case; 2. there is no mechanism whereby individuals can exercise their rights before the Council. Of course, if such mechanisms were to be created the evaluation could be different and the prospects for human rights protection vis-a-vis Security Council measures could improve", S. Zappala, "Reviewing Security Council Measures under International Human rights Principles", *Course on Human Rights Law, Academy of European Law Twentieth Session, 24–25 June 2009, Reading Materials*, 1–4.

¹⁹ 1. Cameron, 173; three reports to the UNSC and Assembly General are of particular importance:

i. The European Convention on Human Rights, Due Process and UN Security Council Counter-Terrorism Sanctions, Report prepared by Iain Cameron, Council of Europe, Restricted Document, 6 February 2006;

ii. Targeted Sanctions and Due Process. The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter, Report by Bardo Fassbender, Institute of Public International Law at the Humboldt University, Berlin, Study commissioned by the United Nations Office of Legal Affairs, 20 March 2006;

iii. Strengthening Targeted Sanctions through Fair and Clear Procedures, White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30 March 2006, 21; for a detailed outline of academic and international organizations' papers

grounded in the opinion that the UNSC is bound by certain standards of human rights protection that have become part of international law – *jus cogens*, and/or that it is bound by the standards of human rights protection that form part of the “purposes and principles of the United Nations Charter”, since the Charter in Article 24(2) expressly stipulates the obligation of the UNSC to act in accordance with the latter.²⁰ Some authors claim that human rights standards from two UN covenants on human rights limit the UNSC although UN itself is not a party to these covenants, as well as that UNSC is bound by constitutional values and traditions common to UN members.²¹

By the same token, the apex of the criticism is usually aimed at arguing for establishment of an independent administrative mechanism for reviewing both the listing and de-listing decisions made by the UNSC. Certain authors claim even that states exist who have been showing increasing hesitation in co-operating with the *Al Qaeda*/Taliban Sanctions Committee and submitting new names for listing, precisely because of the procedural flaws.²²

calling for the reforms of the system of targeted sanctions in the direction of greater human rights protection see M. Bothe, 546–547; See: M. Kreća, “Apsolutno obavezujuće norme (*jus cogens*) u međunarodnom javnom pravu”, Beograd 1989; B. M. Rakić, “Fragmentation of International Law and European Law – Something new on the Western front”, *Analiti Pravnog fakulteta u Beogradu* 1/2009, 122–147.

²⁰ An excellent example of this line of approach to interpreting the UN Charter is given by D. Halberstam and E. Stein who, after pointing out to the presence of human rights protection in the purposes and principles of the Charter, admits that “Security Council has considerable leeway under Chapter VII to compromise certain interests generally protected under international law”, but then proceeds to argue in favor of introduction of an evolving approach to the UN Charter: “The UN Charter, which was meant to govern in the wake of the development of stronger international legal regimes, including human rights, must be interpreted with an evolving human rights referent in mind”, concluding that this means that even though there is some truth in the idea that “peace takes precedence over justice” under the Charter, Chapter VII measures cannot legally disregard the concerns embodied in basic international human rights and humanitarian law.” D. Halberstam, E. Stein, “The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order”, *Jean Monnet Working Paper* 02/2009, www.jeanmonnet-program.org, last visited 15 October 2009. A similar dynamical view on the Charter is proposed by B. Fassbender: “Following the adoption of the Charter, human rights, which at the international level in 1945 were still moral postulates and political principles only, have become legal obligations of States under international treaty and customary law.” B. Fassbender, “Targeted Sanctions Imposed by the UN Security Council and Due Process Rights”, *International Organizations Law Review*, 3/2006, 472.

²¹ “Arguably, the core contents of the two covenants on human rights are authoritative interpretations of the UNC and are in effect binding on the Security Council as such, but this is naturally open to debate.” I. Cameron, 167.

²² L. Van Den Herik, “The Security Council’s Targeted Sanctions Regimes: In Need of Better Protection of the Individual”, *Leiden Journal of International Law* 20/2007, 804.

A palpable outcome of the plethora of criticisms originating from the human rights perspective was the call to the UNSC, contained in a 2005 General Assembly resolution, “to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.”²³ The relative insecurity surrounding the question of what is exactly the content of the human rights standards that bind the UNSC is visible from further developments in connection with the cited General Assembly call. The study commissioned thereupon found that the UNSC should provide for the individuals’ right to be informed, right to be heard, right to an effective remedy and for a periodical review of the sanctions imposed. The Secretary General, in its letter to the UNSC in June 2006, adopted the framework proposed by the study, though considerably weakening its crucial point by replacing the third right by “the right to review by an effective review mechanism”. The UNSC however, in the Presidential Statement of 22 June 2006, simply reiterated the need for “fair and clear procedures.”²⁴

A contrasting view on the matter would be that maintenance of peace is the primary purpose of the UN Charter and the protection of human rights only a secondary one, and that the standards of human rights protection as part of customary international law cannot be deemed as having been accepted by members as subsequent practice amending the Charter.²⁵ This view goes hand in hand with the claim that actions of the UNSC are political in nature, which makes it sufficient that they may be addressed by employing diplomatic remedies before the Sanctions Committee and the UNSC, instead by raising legal remedies that can be brought before the UNSC.²⁶

5. IMPROVEMENTS IN THE PROCEDURAL FRAMEWORK FOR ENACTMENT OF TARGETED SANCTIONS BY THE UN

Several adjustments may be noticed in more recent UNSC resolutions, all leaning towards adoption of recommendations and criticisms coming from the human rights perspective.

²³ World Summit Outcome Document, UN General Assembly Resolution 60/1, paragraph 109

²⁴ B. Fassbender, “Targeted Sanctions Imposed by the UN Security Council and Due Process Rights”, *International Organizations Law Review* 3/2006, 437–438.

²⁵ G. Lysen, “Targeted UN Sanctions: Application of Legal Sources and Procedural Matters”, *Nordic Journal of International Law* 72/2003, 295.

²⁶ G. Lysen, 303.

A specific reference to human rights considerations was first made in Resolution 1456 of 2003, stating that “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular, international human rights, refugee, and humanitarian law.”

Thereafter a number of resolutions established a method of review of listing decisions, as well as de-listing procedures: Resolution 1617 of 2005, Res. 1730 of 2006 and Res. 1735 of the same year. The Sanctions Committees have elaborated guidelines for such procedures: Guidelines for the Guidelines of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning *Al-Qaida* and the Taliban, adopted on 7 November 2002, as amended; and Guidelines of the Committee Established Pursuant to Resolution 1636 (2005).

The importance of the Resolution 1617 (2005) is that it was the first one that contained criteria on how the term “associated with” (*Al-Qaida*/the Taliban) should be interpreted.

Resolution 1730 (2006), because it obliged the Secretary General to establish a “Focal Point” within the Secretariat – an address to which concerned individuals can direct their request for delisting. Furthermore, Resolution 1735 (2006), among other elaborations of listing and de-listing procedures, required that a state proposing listing of an individual should state the case and provide specific information in what way the concerned individual met the criteria from the Res. 1617.²⁷

6. IMPORTANT RECENT DECISIONS OF THE CFI AND ECJ

By far the most exciting encounter that the UNSC targeted sanctions resolutions experience in the course of their implementation is the one with the legal system of the European Union. Not only is the EU the focal point of the enforcement of the European Human Rights Convention, but it is also a supranational legal system right in the midst of claiming sovereignty in its own right.

Having in mind the two possible structurings of UNSC targeted sanctions that have appeared so far – one with the list of targeted individuals enacted by the UNSC and the open-ended one, which leaves the drawing of the list to member states – two groups of cases appeared on the horizon of the EU courts’ practice.

²⁷ L. van den Herik, “The Security Council’s Targeted Sanctions Regimes: In Need of Better Protection of the Individual”, *Leiden Journal of International Law* 20/2007, 804–805; M. Bothe, 546–547.

A somewhat easier task the European Court of First Instance (hereinafter referred to as “CFI”) faced in cases *Mujaheddeen* and *Sison*²⁸, in which it decided upon claims by the *Mujaheddeen* organization and a Dutch resident of Philippine nationality *Sison* for delisting from lists established by the Council of the European Union pursuant to the open-ended Resolution 1373. The CFI annulled the Council’s acts on grounds of failure to disclose reasons for de-listing, as well as for the deprivation of the right to fair hearing. The EU Council thereafter improved its procedure in line with the court’s opinion and had the same entities listed again.²⁹ Since the disputed listings had been put in place by the EU Council and not the UNSC, the court in these cases was never in position to review a UNSC decision.

Consequently, more complex issues have been faced by the EU courts in two cases which involved individuals listed originally by the UNSC – *Yusuf* and *Kadi*³⁰ – two Swedish nationals who were both placed on the list adopted by UNSC Resolution 1333 (2000) and subsequently on an EU list annexed to Regulation (EC) No 467/2001. The theoretical approaches and actual findings of the CFI and the European Court of Justice (hereinafter referred to as “ECJ”) in these cases crisscrossed each other. While the CFI held that the UNSC is bound human rights standards that form part of *jus cogens*, and that thus review of its decisions on such grounds is possible, it found that no violations of these standards have been committed in the cases at hand. Conversely, the ECJ failed to tackle the question of the enforceability of *jus cogens* either to UNSC resolutions or to EU Council decisions, but held that the EU Council’s decisions, notwithstanding their grounding in UNSC resolutions, were subject to human rights standards of the EU law. Consequently, the ECJ annulled the listings, but left them in force for three additional months so that EU Council would have time to comply with the procedural requirements set forth as grounds for annulment and repeat the listings. The finding of the ECJ was that the EU Council decisions breached certain basic rights of the plaintiffs that form part of basic rights of community law – right to be heard in a fair

²⁸ CFI, *Organisation des Modjahedines du peuple d’Iran v. Council of the European Union*, Case T-228/02, Judgment, 12 December 2006; CFI, *Jose Maria Sison v. Council of the European Union*, Case T-47/03, Judgment, 11 July 2007.

²⁹ L. van den Herik, 803.

³⁰ CFI, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T 306/01; *Yassin Abdullah Kadi v. Council and Commission*, Case T 315/01, 21 September 2005; ECJ, *Yassin Abdullah Kadi v. Council*, Appeal against Judgment of the Court of First Instance of 21 September 2005, Case C-402/05 P, 24 November 2005; ECJ, *Yusuf and Al Barakaat International Foundation v. Council and Commission*, Appeal against Judgment of the Court of First Instance of 21 September 2005, Case C-415/05 P, 1 December 2005; R. A. Wessel, “Editorial: The UN, the EU and *Jus Cogens*”, *JOLR* 3/2006, 1.

trial, right to property, principle of proportionality, right to an effective remedy.³¹

7. CONCLUSION

Notwithstanding the first impression that the ECJ in *Kadi* has affirmed the validity of human rights standards in the context of international law and UNSC practice, it may be argued that in fact this decision also reaffirmed the present system by preserving the practice of “indirect review” on EU, or any other sub-UN level for that matter by way of analogy – which was in the case at hand done on the grounds of human rights protection on the EU, at the same time formally leaving the proper UNSC decisions free from review on such grounds.

Such a perspective effectively prolongs the traditional understanding of the role of the UNSC as the political body primarily in charge of maintaining international peace and security, while at the same time it contributes to gradual affirmation of the procedural human rights standards by affirming their applicability even to UNSC-originating acts by way of indirect review on sub-UN levels, as within the legal system of the EU in *Kadi* case.

Moreover, it should be noted that none of the EU courts has at any point implied that substantive review of the EU acts enacted in the course of implementation of UNSC resolutions was imaginable.

Since the standards of human rights protection within the Council of Europe and the EU spearhead the development of this area of law globally, it is inevitable that the adjustments made within EU legal system to UNSC acts in the course of their implementation will have strong bearing on the procedural standards that UNSC will adhere to in the future. The practical implication of such approach, consisting in the need that the UNSC acts comply with basic standards of due process if they are to be

³¹ See more in: B. M. Rakić, “Evropski sud pravde između ljudskih prava i borbe protiv terorizma”, *Analiz Pravnog fakulteta u Beogradu* 2/2009, forthcoming; M. T. Karayigit, “The *Jusuf* and *Kadi* Judgments: The Scope of the EC Competences in Respect of Restrictive Measures”, *Legal Issues of Economic Integration* 33(4), *Kluwer Law International*, Leiden 2006, 379–404; M. Bulterman, “Fundamental Rights and the United Nations Financial Sanctions Regime: The *Kadi* and *Jusuf* Judgments of the Court of First Instance of the European Communities”, *Leiden Journal of International Law* 19/2006, 753–772.; E. de Wet, “Holding the United Nations Security Council Accountable for Human Rights violations through Domestic and Regional Courts: A Case of “Be careful What You Wish For?””, expert lecture on invitation of the University of Oxford Public International Law Discussion Group, 24 April 2008, Oxford; A. Ciampi, “Individual remedies Against Security Council Targeted Sanctions”, *Italian Yearbook of International Law* 2008, 55–77.

implemented within legal systems with reliable human rights safeguards, can only be beneficial for the growth of scope, efficiency and acceptance of future UNSC targeted sanctions aimed at eradicating international terrorism, proliferation of weapons of mass destruction and other threats to world peace and security.

In other words, the probable influence of the EU position on the need to have procedural human rights safeguards in place when issuing targeted sanctions, coupled with already undertaken improvements of listing and delisting procedures, shall probably lead to a system that with the same level efficiency in combating global threats, but with increased transparency, accountability and compliance with human rights standards that form part of customary international law.

An Unsteady Middle Ground: Joined Cases
C-584/10 P, C-593/10 P and C-595/10 P
*Commission and United Kingdom versus Yassin
Abdullah Kadi (No. 2)* [2013] ECR 00000
(18 July 2013)

Hayley J. HOOPER*

The decision of the Grand Chamber of the Court of Justice of the European Union (CJEU) in Commission and United Kingdom v. Kadi (No. 2) is important in several respects. First of all, it represents the first opportunity of the Grand Chamber to clarify the meaning of key passages in their landmark ruling in C-402/05 P and C-415/05 Yassin Abdullah Kadi v. Commission (No. 1) relating to terrorist asset-freezing measures pursuant to United Nations Security Council Measures. Second, it reasserts the CJEU's position that Regulations implementing United Nations Measures are not immune from the jurisdiction of the European judicature. This comment takes the view that the judgment takes an appropriate line between legal principle and pragmatism, but nonetheless important questions remain unanswered about the future of balancing security sensitive information with the rights of the defence and the right to effective judicial protection in EU law.

1 INTRODUCTION

This case was an appeal by the United Kingdom and the European Commission against the judgment of the General Court in *Yassin Abdullah Kadi v. Commission (No. 2)*¹ which controversially held that European Union law, including its general principles, demanded review of the evidence used by the United Nations Security Council (UNSC) to freeze assets pursuant to UNSC Resolution 1267 (1999) and relevant subsequent Resolutions.

Mr Kadi is a Saudi Arabian businessman who has never been tried for, nor convicted of, a terrorist offence anywhere in the world. However, all his monetary and proprietary assets have been frozen pursuant to United Nations Security

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¹ Case T-85/09 *Yassin Abdullah Kadi v. Commission (No. 2)* [2010] ECR 00000 30 Sep. 2010.

Hooper, Hayley J. 'An Unsteady Middle Ground: Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and United Kingdom versus Yassin Abdullah Kadi (No. 2)* [2013] ECR 00000 (18 July 2013)'. *European Public Law* 20, no. 3 (2014): 409–420.

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Council Resolutions for over ten years. The EU froze his assets in compliance with Resolution 1267 on 20 October 2001. In *Kadi (No. 1)* the Grand Chamber of the CJEU asserted the independence of the EU as a constitutional order with jurisdiction to review the legality of European Union law, even when the impetus for such legislation came from the UNSC.² This was controversial because the Charter of the United Nations Article 103 declares that where two treaties conflict, the UN Charter shall be considered supreme. Although the EU was not a signatory to the UN Charter, individual Member States were.

In order to comply with the Grand Chamber ruling in *Kadi (No. 1)*, a 'narrative summary of reasons for listing'³ Mr Kadi was published on the UN Sanctions Committee Website. The narrative summary is reproduced in the present judgment at paragraph 28 and details a series of six allegations against Mr Kadi, including *inter alia* that employees of Mr Kadi had met with the deceased Osama Bin Laden with his knowledge, and that Mr Kadi had been the major shareholder in a Bank where meetings of Al Qaeda extremists had taken place.

Unsatisfied with this level of disclosure, Mr Kadi returned to the General Court in *Kadi (No. 2)*, putting forward five separate pleas in law, to argue that the allegations in the UN summary were insufficient to allow him to effectively exercise either his rights of defence, or the right to effective judicial review. The General Court upheld Kadi's claim, and ruled that the correct interpretation of the Grand Chamber's ruling in *Kadi (No. 1)*, and the meaning of the term 'in principle the full review'⁴ meant that Regulations implementing UNSC Resolutions were not immune from the jurisdiction of the EU judiciary. Moreover, the principle of effective judicial protection amounted to an obligation upon the competent European Union authority to seek out and communicate the evidence upon which the 'narrative summary of reasons for listing' was based and communicate it to Kadi. The General Court made this rule in full knowledge of the fact that the Commission did not hold all of the relevant evidence (some of it was held by the UNSC and some by Member States).⁵ In doing so, the General Court drew inspiration from the decision of the European Court of Human Rights (ECtHR) in *A v. United Kingdom*, which held that disclosure must place an individual in a position to effectively challenge the allegations against him.⁶

² C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v. Council and Commission 'Kadi (No. 1)'* [2008] ECR I-6351.

³ UNSC Resolution 1822 (2008), para. 13 (adopted 30 Jun. 2008).

⁴ C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v. Council and Commission (Kadi No. 1)* [2008] ECR I-6351 [326].

⁵ For a detailed enumeration of the facts, procedure, and analysis of the General Court's decision see H.J. Hooper, 'Liberty before Security: Case T-85/09 *Yassin Abdullah Kadi v. Commission (No. 2)*' [2012] 18(3) *European Public Law* 457-469.

⁶ *A and Others v. United Kingdom* [2009] ECHR 301 (2009) 49 EHRR 29.

Kadi was removed from the UN Sanctions Committee List (the 1267 Consolidated List) on 5 October 2012 after consideration by that Committee of both Mr Kadi's request and the report of the UNSC Ombudsman. Nonetheless, the present case was heard because it raises important issues of principle relating to procedural fairness in European Union law, and the relationship between the United Nations Sanctions Regime, and the European Union's own counter-terrorism sanctions regime.⁷ This comment argues that the ruling of the Grand Chamber correctly upholds the principles and spirit of the General Court's ruling, whilst also tempering it in the language of practicality. However, important questions remain about the treatment of security sensitive information in EU law which could not be dealt with by the court within the confines of this ruling, but nonetheless must be addressed.

2 GROUNDS OF APPEAL AND RULING

The Commission, the Council, and the United Kingdom put forward three grounds of appeal. The first ground argued that the General Court erred in law in failing to hold that the contested Regulation enjoyed immunity from the jurisdiction of the EU judiciary. The second ground was that the General Court had made errors of law in respect of the intensity of judicial review applicable determined in the judgment. Third and finally, the Council, Commission, and United Kingdom argued that the General Court had erred in law with respect to its examination of Kadi's pleas concerning the infringement of his rights of defence, his right to effective judicial protection, and as to the conclusion that the freezing of his assets represented a disproportionate interference with his right to property. The challenges relating to immunity from jurisdiction and evidence disclosure both failed. However, the Grand Chamber (CJEU) did not adopt the reasoning of the General Court in relation to the level of disclosure required to satisfy the rights of the defence and the right to effective judicial protection in EU law. The Grand Chamber also held, contrary to the General Court, that annexing Mr Kadi to Council Regulation (EC) No. 881/2002 and freezing his proprietary and monetary assets did not represent a disproportionate interference with his right to property.⁸

⁷ Council Common Position (EC) 2001/931/CFSP of 27 Dec. 2001 on the application of specific measures to combat terrorism [2001] OJ L 344/93 implementing UNSCR 1373 and Council Regulation (EC) No. 2580/2001 of 27 Dec. 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism [2001] OJ L 344/70.

⁸ *Kadi (No. 2)*, Grand Chamber [138].

3 OPINION OF THE ADVOCATE GENERAL

This case is of further interest because it represents a rare instance of disagreement between an Advocate General and the Grand Chamber.⁹ The Advocate General's opinion endorsed the General Court's position on immunity from jurisdiction, and this was in turn endorsed by the Grand Chamber. But Advocate General Bot¹⁰ had formed the view that the General Court had erred in requiring disclosure of the evidence for listing for several reasons. First, the Advocate General formed the view that the General Court was incorrect insofar as it treated 'a limited judicial review as equivalent to no review'.¹¹ The Advocate General went on to express the opinion that requiring evidence disclosure resulted in making 'the judgment of the Court of Justice in *Kadi* say something that it does not say'.¹² The meaning of the term 'in principle a full review' for the Advocate General (referring also to the French language judgment of the Grand Chamber) did not speak to the *intensity of review*, instead it meant that whilst all acts of EU law were in principle subject to review:

The true position is that...the Court expressed clearly and concisely the idea that its review, however broad it is, is full only in principle and that there are therefore possible exceptions. If there is an area in which an exception is appropriate, it is, for the reasons set out above, in the area of the fight against terrorism, which includes prevention, seen from the perspective of global coordination.¹³

In respect of this exception, the Advocate General drew attention to the potential ramifications of the General Court's position on intensity of review, in particular:

Should intelligence analyses and sources be subject to the EU courts? Furthermore, to adopt such a standard of review would, it seems, be to forget that inclusion on an autonomous list is based largely on the assessment made by the competent national authorities of the existence, the reliability and the sufficiency of evidence or serious and credible clues of the involvement of the person concerned in terrorist activities. The question would therefore have to be raised whether, in a system based largely on the confidence which the EU institutions place in the evaluation conducted by the competent national authorities of the seriousness of the evidence or clues to support a freezing measure, an intensive review of that evidence by the EU judiciary is in fact appropriate.

⁹ R. Greaves, *A Commentary on Selected Opinions of Advocate General Jacobs*, 29 *Fordham Int. L. J.* 690–715 (2005): 'In general, the ECJ does not often disagree with the opinion of the Advocates General', p. 691, note 7. For a more detailed statistical analysis of the role of the Advocates General see C. Ritter, *A New Look at the Role and Impact of the Advocates General – Collectively and Individually*, 12 *Colum. J. Eur. L.* 751–774 (2005–2006), in particular 'IV. Statistics on Advocates-General', pp. 764–769.

¹⁰ Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and United Kingdom v. Yassin Abdullahi Kadi* (No. 2) [2013] ECR 00000, Opinion of Advocate General Bot (19 Mar. 2013).

¹¹ *Kadi* (No. 2), Opinion of Advocate General Bot (19 Mar. 2013) [56].

¹² *Kadi* (No. 2), Opinion of Advocate General Bot (19 Mar. 2013) [57].

¹³ *Kadi* (No. 2), Opinion of Advocate General Bot (19 Mar. 2013) [61].

[It] is difficult to conceive of a more important and more complex policy area which involves assessments concerning the protection of international security.¹⁴

The Advocate General was also keen to distinguish the present case from cases occurring under Council Regulation (EC) No. 2580/2001, which implements UNSC 1373(2001). Unlike the UNSC 1267 Consolidated List which Mr Kadi was named on, the UNSC 1373 (2001) regime requires states parties to set up their own autonomous terrorist asset-freezing and organization proscription regimes. The EU set up such a regime under Council Regulation (EC) No. 2580/2001. This regime is administered solely by the EU and its legality was the subject of the cases brought by the People's Mujahedeen Organisation of Iran (PMOI).¹⁵ Advocate General Bot observed that the Grand Chamber in *Kadi* (No. 1) did not explicitly refer to or approve the standard of review adopted in *OMPI*, nor was it appropriate in the present case.¹⁶ The intensive standard of review favoured in *OMPI* was inappropriate due to the marked distinction in the operation of the asset-freezing regime to which Mr Kadi was subject, and to the asset-freezing regime administered internally by the EU, pursuant to UNSC Resolution 1373 (2001).¹⁷ Advocate General Bot took the view that the 'marked procedural differences' between the two regimes meant that the intensity of review associated with the autonomous regime under Council Regulation (EC) No. 2580/2001 was both impractical and unsafe to apply. It was impractical insofar as under the regime to which Mr Kadi was subject the UN took primary responsibility for international peace and security, and the decisions to list individuals. By contrast, decisions under the other regime are taken internally by a committee of the Council known as the CP 931 Working Party. This made judicial review in this instance judicial review of an entirely EU act.¹⁸ Second, the Advocate General took the view that applying the standard of review favoured in *OMPI* risked encroaching on the powers of the Security Council and thus damaging the EU's foreign relations.¹⁹

¹⁴ AG Bot [66]–[78].

¹⁵ Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council* [2006] ECR II-4665; Case T-256/07 *People's Mojahedin Organization of Iran v. Council* [2008] ECR II-3019; and Case T-284/08 *People's Mojahedin Organization of Iran v. Council* [2008] ECR II-3487.

¹⁶ Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council and United Kingdom* [2006] ECR II-4665. *Kadi* (No. 2), Opinion of Advocate General Bot (19 Mar. 2013) [63]–[64].

¹⁷ *Kadi* (No. 2), Opinion of Advocate General Bot (19 Mar. 2013) [38].

¹⁸ *Kadi* (No. 2), Opinion of Advocate General Bot (19 Mar. 2013) [75].

¹⁹ *Kadi* (No. 2), Opinion of Advocate General Bot (19 Mar. 2013) [71].

4 DECISION OF THE GRAND CHAMBER: REASONING AND IMPLICATIONS

The Grand Chamber rejected the Opinion of Advocate General Bot, in respect of his conclusion that judicial review of evidence was wholly inappropriate, and sought to reiterate the principles upon which the General Court's judgment was based, albeit tempering its conclusions with a measure of practicality and deference to the complexities of foreign relations. The Grand Chamber reemphasized the ruling in *Kadi* (No. 1) and clarified that the principle of effective judicial protection meant that:

judicial review cannot be restricted to an assessment of the abstract cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.²⁰

In doing so the Grand Chamber drew upon its decision in *France v. PMOI* and Article 47 of the EU Charter which entitles a person to the reasons upon which a decision is based.²¹ Furthermore, the Court stated that it was for the EU judicature, and courts applying EU law to review whether or not disclosure to affected persons was sufficient.²² Therefore, it is not immediately clear whether or not evidence is required, or if detailed allegations would be sufficient. In Mr Kadi's case specifically, the Grand Chamber took the view that the last of the four reasons presented in the UN Sanctions Committee summary of reasons for listing (relating to Mr Kadi's role as a shareholder in the now closed Bosnian bank Deposita Banka) was 'insufficiently detailed', but the 'same cannot be said of the other reasons stated in the summary provided by the Sanctions Committee'.²³

Furthermore, when an affected person makes representations in light of the material disclosed the present judgment also makes it the duty of the relevant EU institution to carry out a careful and impartial examination of the information in its possession in order to determine whether the individual or entity should continue to be annexed to the relevant EU Regulation. In doing so it is for the EU authority to assess whether or not it is required to contact the UN Sanctions Committee for further disclosure.²⁴ This is a pragmatic method of balancing fundamental rights in EU law with the need to preserve external and foreign relations of the relevant institutions, but it also places very considerable emphasis on finding a court procedure to navigate this complex situation.

As the judgment progressed, further clarification was offered. The Grand Chamber took the view 'that the information or evidence produced should support

²⁰ *Kadi* (No. 2), Grand Chamber [119].

²¹ Case C-27/09 P *France v. People's Mojahedin Organization of Iran* [2011] ECR. 00000.

²² *Kadi* (No. 2), Grand Chamber [120].

²³ *Kadi* (No. 2), Grand Chamber [141]–[142].

²⁴ *Kadi* (No. 2), Grand Chamber [115].

the reasons relied on against the person concerned'.²⁵ The court also recognized that there would inevitably also be situations where evidence or information (notice the court did not settle on a particular term) could not be disclosed, either because it was too sensitive, or the competent authority was not in possession of it. In that situation 'it is then the duty of those Courts to base their decision solely on the material which has been disclosed to them'.²⁶ However, if this creates a situation whereby:

that material is insufficient to allow a finding that a reason is well founded, the Courts of the European Union shall disregard that reason as a possible basis for the contested decision to list or maintain a listing.²⁷

In respect of disclosure, the Grand Chamber made clear that 'overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations may preclude the disclosure of some information or some evidence to the person concerned'.²⁸ In a situation of this type it was suggested that striking a balance between fairness and the protection of the interests described above made it 'legitimate to consider possibilities such as the disclosure of a summary outlining the information's content or that of the evidence in question'.²⁹

In drawing a line between the principled (if somewhat impractical) approach of the General Court, whilst acknowledging the reality that some of the relevant information used in decisions to list an individual and freeze his assets will be security sensitive, the Grand Chamber formed the view that:

In such circumstances, it is none the less the task of the Courts of the European Union, before whom the secrecy or confidentiality of that information or evidence is no valid objection, to apply, in the course of the judicial review to be carried out, techniques which accommodate, on the one hand, legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process. [In] order to strike such a balance, it is legitimate to consider possibilities such as the disclosure of a summary outlining the information's content or that of the evidence in question.³⁰

However, the Grand Chamber did not offer much more in the way of guidance as to how such a process might work. The picture is further complicated by *ZZ v. Home Secretary*.³¹ Here the Grand Chamber issued a preliminary ruling on the

²⁵ *Kadi* (No. 2), Grand Chamber [122], emphasis added.

²⁶ *Kadi* (No. 2), Grand Chamber [123].

²⁷ *Kadi* (No. 2), Grand Chamber [123].

²⁸ *Kadi* (No. 2), Grand Chamber [125].

²⁹ *Kadi* (No. 2), Grand Chamber [129].

³⁰ *Kadi* (No. 2), Grand Chamber [125]–[129].

³¹ *ZZ v. Secretary of State for the Home Department* [2013] WLR (D) 218.

interpretation of Article 30(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. ZZ was a dual Algerian and French national who had been excluded from the United Kingdom on the grounds that he was a danger to national security. In seeking further disclosure of the case against him before the Special Immigration Appeals Commission (SIAC), ZZ relied on the Directive to argue that national authorities applying EU law were bound by the principles of the *Kadi* case. SIAC operates a Closed Material Procedure (CMP), discussed below, which means that some evidence is 'open' and some 'closed'. Moreover, ZZ and his own lawyers were prevented from seeing the closed evidence. SIAC initially heard ZZ's appeal in 2008 and concluded that 'little of the case against' ZZ had been disclosed to him and that which had been disclosed did not concern 'the critical issues'.³² The Grand Chamber's preliminary ruling held that ZZ was entitled to 'the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence'.³³ In short, the preliminary ruling does not suggest that the CMP or the use of Special Advocates is *prima facie* incompatible with EU law.

Closed Material Proceedings are divided into 'open' and 'closed' sessions. In open sessions all parties are present and everyone has access to all the evidence. By contrast, in closed session the claimant and his own lawyer are excluded, and the claimant is represented by a Special Advocate. A Special Advocate in the United Kingdom is a security cleared lawyer appointed on behalf of the court in which he operates. Unlike the claimant's own lawyer, who represents his client's interest, the Special Advocate represents the court's interest and is prevented from communicating with the claimant (save at the discretion of the court) once he has seen the 'closed' i.e., security sensitive evidence.

There is further suggestion that an adoption of something akin to the British system may lie in the future for counter-terrorism hearings in EU law. Moreover, in an earlier Opinion in *France v. PMOI*³⁴ Advocate General Sharpston mentioned that the European Court of Human Rights (ECtHR) in *A v. United Kingdom*³⁵ had considered the legality of the United Kingdom's use of Special Advocates and the CMP in relation to administrative counter-terrorism detention. Sharpston noted that the ECtHR had ruled that there was a 'perceived need to protect the population of the United Kingdom from a terrorist attack meant that there was a

"strong public interest" in maintaining the secrecy of sources of information concerning Al-Qaida and its associates. It did not find that the system [of Special Advocates] in question was, of itself, non-compliant'.³⁶ Eckes also suggests that the British system could be a source of inspiration.³⁷ In particular, she notes that the 'difficulties arising from a CMP would have to be studied in detail and rules to anticipate any illegitimate restrictions would have to be put in place'.³⁸

Unlike the decision of the General Court, no specific reference was made to the case of *A v. United Kingdom* which concerned the minimum acceptable disclosure under Article 5(4) ECHR in respect of civil national security proceedings using closed evidence and Special Advocates.³⁹ The General Court adopted a generously broad interpretation of what type of disclosure should take place, effectively concluding that all available evidence should be disclosed. The *ratio decidendi* in *A v. United Kingdom* says that:

[T]he special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions. [W]here all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them...Where, however, the open material consisted purely of general assertions and based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.⁴⁰

In other words, disclosure proceeds on a case-by-case basis and is not necessarily as cut and dried as the General Court ruling would have had it. The Grand Chamber recognizes that disclosure of actual evidence may sometimes be necessary and possible, but at other times would be impractical or even harmful. In that situation disclosure may well be limited to 'information' or 'summaries'.

However, the issues relating to compromises in procedural fairness and open justice which surround special advocates and the CMP are well documented. Although they are not explicitly contrary to Convention rights serious issues have been identified, leading the United Kingdom Joint Committee on Human Rights (JCHR) to describe the procedure as 'kafkaesque'.⁴¹ One particular cause for

³² *ZZ v. Secretary of State for the Home Department* [2013] WLR (D) 218 [30].

³³ *ZZ v. Secretary of State for the Home Department* [2013] WLR (D) 218 [69].

³⁴ Case C-27/09 P *France v. People's Mojahedin Organization of Iran* [2011] ECR 00000, Opinion of Advocate General Sharpston.

³⁵ *A and Others v. United Kingdom* [2009] ECHR 301 (2009) 49 EHRR 29.

³⁶ Case C-27/09 P *France v. People's Mojahedin Organization of Iran* [2011] ECR 00000, Opinion of Advocate General Sharpston. [244].

³⁷ C. Eckes, *Decision-Making in the Dark – Autonomous EU Sanctions and National Classification*, in *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* 170–220 (I. Cameron ed., Intersentia 2013).

³⁸ *Ibid.* at p. 190.

³⁹ *A and Others v. United Kingdom* [2009] ECHR 301 (2009) 49 EHRR 29.

⁴⁰ *A and Others v. United Kingdom* [2009] ECHR 301 (2009) 49 EHRR 29 [220].

⁴¹ Joint Committee on Human Rights '19th Report: Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning' (2006/2007) HL 157/HC 790 [210].

concern, which may be exacerbated at EU level, was described by Dinah Rose QC:

I have had experience of closed material procedures in acting for the Home Office, acting as a special advocate and acting for an appellant. One of the things that has always struck me from contrasting these roles is how different an open case may look from a closed case. The case that an appellant thinks they are meeting may not be simply different in extent but wholly different in kind from the case they are actually meeting. You just cannot tell; it is a classic iceberg situation, where two-thirds is underwater.⁴²

These concerns might well be exacerbated in the present case because of the way information is held in respect of UNSCR 1267 (1999) international terrorist asset-freezing and due to the role accorded to the EU institutions by the present judgment. Information pertaining to a listing decision can be held by the UNSC, a Member State, or by the EU Commission in any variety of combinations. Moreover, this judgment held that the General Court erred in requiring the Commission to disclose information which was not in its possession.⁴³ This may mean that very little information would be accessible if a CMP were instituted and the inculpatory information happened to be located in a variety of sources.

5 CONCLUSION

The ruling in *Kadi* (No. 2) trends a sensible line between principle and practicality, albeit outstanding issues remain which were neither possible nor legitimate for the court to address in the present context. In short this judgment rightly confirms that Regulations implementing UN counter-terrorism Sanctions do not enjoy immunity from jurisdiction. We also now know that EU institutions must take three steps to protect the rights of the defence and facilitate effective judicial protection when operating the sanctions regime: (1) disclose the summary of reasons provided by the Sanctions Committee which form the basis for listing or maintaining that person's name in Annex I to Regulation No. 881/2002, (2) let the person concerned make his observations on the summary of reasons known (including making an opportunity to produce exculpatory evidence); then (3) the institution must examine, carefully and impartially, in light of the person's observations whether the reasons for listing are well founded.⁴⁴ What remains to be seen, however, is whether this decision will prompt the EU judicature to institute a system of Special Advocates similar to that which currently operates in

⁴² Dinah Rose QC, uncorrected transcript of oral evidence taken before the Joint Committee on Human Rights (24 Jan. 2012).

⁴³ *Kadi* (No. 2), Grand Chamber [138].

⁴⁴ *Kadi* (No. 2), Grand Chamber [135].

the United Kingdom. If this is to be the case caution is urged; the mere fact that a regime can be Strasbourg-compatible in principle does not obviate the serious issues of fairness and justice which underlie it. The Grand Chamber's middle ground is unsteady and the next steps require serious thought on the part of all participants.

Another major problem that ought to be dealt with for a proper understanding of attribution of conduct and responsibility is the concept of dual attribution. In a globalising world, where international organisations are increasingly involved in world governance or states have become more active beyond their own territories, a regime of dual attribution of conduct and plurality of responsibility is desirable. However, the legal basis for such a possibility in international law is not well founded. This is also the case in peace support operations, particularly in peacekeeping operations. Draft Article 7 has left the meaning of the 'effective control' criterion unclear, which is the test to be applied to the assessment of responsibility in peacekeeping operations. While there has been a lack of consensus as to how this standard should be understood in legal literature and jurisprudence, The Hague Court of Appeal and the Supreme Court of the Netherlands – to the extent that the latter did not conflate the notion of dual attribution of conduct with that of (dual or) multiple attribution of responsibility – delivered an exemplary judgment in the cases emanating from Srebrenica. Although they have a domestic character, the Dutch Courts' rulings, ascribing a broad meaning to the effective control principle and applying it in light of the concrete circumstances on the case at hand, have certainly made a considerable contribution to clarifying the meaning of the 'effective control' criterion. As suggested by Boutin, these cases should be a source of inspiration for courts that may be faced with the application of the 'effective control' test in the future.⁸⁰

80. Boutin, *supra* n. 65, p. 535.

THE KADI SAGA AS A TALE OF 'STRICT OBSERVANCE' OF INTERNATIONAL LAW: OBLIGATIONS UNDER THE UN CHARTER, TARGETED SANCTIONS AND JUDICIAL REVIEW IN THE EUROPEAN UNION

by Joris Larik*

1. Introduction: Kadi and the conundrum of compliance
2. Discerning discourses: The parochial saviour of universal rights
3. Retracing reality: 'Strict observance' throughout
4. Conclusion: The triumphant tribunal

Abstract

This article addresses the question whether the European Union defaulted on the 'strict observance' of international law and 'respect' for the UN Charter, which are now express objectives of the EU following the Lisbon reform, in the course of the famous Kadi cases. With the final appeals judgment having been handed down by the Court of Justice of the European Union in July 2013, this question can now be conclusively answered in the negative. Despite the general tension these legal challenges created between EU law and international law, the EU managed, in the course of twelve years, to weave a seamless coat of compliance with international law. The article contrasts this finding with the general academic discourse on this case law, which tends to depict Kadi as a 'sacrifice' of compliance with international law for the benefit of fundamental rights (as well as the autonomy of the EU legal order). By retracing the entirety of this string of cases, the article demonstrates that, all rhetoric aside and for all practical purposes, the EU courts and other institutions managed to avoid any violations of international legal obligations towards the UN Security Council in this matter. The EU discontinued its own sanctions against Mr Kadi only after he had been delisted by the UN by means of a political decision, not by virtue of judicial intervention.

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1. INTRODUCTION: KADI AND THE CONUNDRUM OF COMPLIANCE

The *Kadi* saga, next to the important constitutional questions it raises for the European Union,¹ shines the spotlight on the question of the 'tormented'² relationship between the EU and international law, in particular the United Nations. In the by now famous Opinion preceding the 2008 *Kadi* judgment, Advocate General Miguel Maduro noted that the legal order of the EU and international law do not 'pass by each other like ships in the night'.³ He continued by asserting that, on the contrary, the EU has 'traditionally played an active and constructive part on the international stage'.⁴

This traditional sentiment of seeing the EU as *völkerrechtsfreundlich* (a German term meaning 'friendly towards international law')⁵ has now found prominent expression in the EU Treaties, following the entry into force of the Treaty of Lisbon. The 'strict observance and the development of international law, including respect for the principles of the United Nations Charter'⁶ is now one of the codified objectives of the Union.⁷ Indeed, the UN Charter commands 'respect'

1. These concern, on the one hand, the competence of the EU to adopt sanctions against individuals under the EU Treaties preceding the Lisbon reform, and on the other, the safeguarding of fundamental rights within the EU in this particular context. See, from among the vast amount of literature, respectively, M. Cremona, 'EC Competence, "Smart Sanctions", and the *Kadi* Case', 28 *Yearbook of European Law (YEL)* (2009) p. 559; and E. Cannizzaro, 'Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the *Kadi* Case', 28 *YEL* (2009) p. 539; and discussing both aspects, D. Halberstam and E. Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', 46 *CML Rev.* (2009) p. 13 at pp. 36-61.

2. J. Wouters, 'The Tormented Relationship between International Law and EU Law', in P. Bekker, R. Dolzer and M. Waibel, eds., *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge, Cambridge University Press 2010) p. 198.

3. Joined Cases C-402/05 P and C-415/05 P *Kadi v. Council and Commission*, Opinion of Advocate General Poiras Maduro [2008] ECR I-06351, para. 22.

4. *Ibid.*

5. See in this vein, e.g., F. Hoffmeister, 'The Contribution of EU Practice to International Law', in M. Cremona, ed., *Developments in EU External Relations Law* (Oxford, Oxford University Press 2008) p. 37; and C. Timmermans, 'The EU and International Public Law', 4 *EFA Rev.* (1999) p. 181; contesting this sentiment, J. Klabbbers, 'Völkerrechtsfreundlich? International Law and the Union Legal Order', in P. Koutrakos, ed., *European Foreign Policy: Legal and Political Perspectives* (Cheltenham, Edward Elgar 2011) p. 115.

6. Art. 3(5) Treaty on European Union (TEU); note also Art. 21(1), first subpara., TEU, which highlights 'respect for the principles of the United Nations Charter and international law' as founding principles of the EU and guidance for its external action; and Art. 21(2)(b) and (c) TEU, according to which the EU shall 'consolidate and support ... the principles of international law' and 'preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, ...'.

7. This is part of a wider trend of the 'dynamic internationalization' of EU primary law, which can also be observed in many national constitutions, see J. Larik, 'Shaping the International Order as an EU Objective', in F. Amtenbrink and D. Kochenov, eds., *The European Union's Shaping of the International Legal Order* (Cambridge, Cambridge University Press 2013) p. 62.

given that it situates itself at the apex of all international agreements, stipulating that whenever states face a conflict between their obligations 'under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.⁸ The obligations include compliance with the resolutions adopted by the UN Security Council (UNSC) as the primary organ for the safeguarding of international peace and security.⁹

The entire *Kadi* saga, which has preoccupied the EU, the UN and legal scholarship for more than a decade, has become emblematic of the EU being torn between being compliant with the international law, on the one hand, and upholding fundamental rights as enshrined in its own legal order, on the other. This saga was – finally – concluded in July 2013, when the Court of Justice of the European Union (CJEU, before the Lisbon Treaty known as the European Court of Justice (ECJ)) handed down its appeals judgment, commonly known as *Kadi II*. Already in October 2012, however, Mr Kadi had been taken off the UN 'blacklist'. The EU had followed suit shortly thereafter by taking him off its respective list (see *infra* 3).

Bruno Simma once remarked *en passant* on the *Kadi* judgment of 2008: 'I cannot avoid the impression that, maybe, once the dust has settled, the decision will share the reputation of quite a few ECJ leading cases of being grandiose on principles without being of much help to the individual claimant.'¹⁰ With Mr Kadi having been delisted, the *Kadi* cases off the docket in Luxembourg and the dust having settled, this article revisits this seminal string of case law in light of one straightforward question: All 'grandiose' rhetoric aside, did the EU at any point violate its, or its Member States', international obligations towards the United Nations? Regardless of causing a considerable scholarly stir, instead of passing by each other 'like ships in the night', did EU and international law actually graze each other in the course of these events? The answer provided here is, for all practical purposes, 'no'. Even though the discourse has come to celebrate the judgments of the CJEU as a valiant defence of fundamental rights and the rule of law through judicial review in the EU, it is argued here that for the past twelve years, the EU was in fact living up to its objective of observing its international legal obligations, thus sewing a seamless coat of compliance with international

8. Art. 103 UN Charter. Note in this respect also Art. 30(1) Vienna Convention on the Law of Treaties (VCLT); Art. 30(6) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO); further on the special significance of this provision for the international legal order, A. Paulus and J. Leiß, 'Article 103', in B. Simma, et al., eds., *The Charter of the United Nations: A Commentary*, Vol. 2, 3rd edn. (Oxford, Oxford University Press 2012) p. 2110 (and at pp. 2131-2132 in particular on its effect on the EU and its Member States).

9. Art. 25 UN Charter. That the supremacy of Art. 103 extends to Security Council resolutions was confirmed in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, *ICJ Reports* (1992) p. 3, para. 42.

10. B. Simma, 'Universality of International Law from the Perspective of a Practitioner', 20 *EJIL* (2009) p. 265 at p. 294, fn. 122.

law. This fabric remains under considerable strain, with numerous questions on the interaction between the UN and EU levels still unresolved. It may yet tear in future litigation. In the *Kadi* cases, however, the EU institutions, including the CJEU, certainly ensured that it stayed intact.

In order to elaborate on this argument, this article first sketches out the mainstream discourse regarding *Kadi* and the EU's compliance with international law. It subsequently confronts the main sentiments from this discourse with the incontrovertible fact, as retraced here, that the EU did actually comply with its international duties. It concludes with a note of caution as to rhetoric and reality, as well as with a reflection on the real winners and losers in the *Kadi* saga.

2. DISCERNING DISCOURSES: THE PAROCHIAL SAVIOUR OF UNIVERSAL RIGHTS

Ever since the CJEU was called upon to rule on Mr Kadi's legal challenges against the sanctions imposed against him by virtue of UNSC resolutions, which were implemented faithfully by the EU, the Court was very closely followed by scholarship as well as by the UN. Two principal sentiments run through the ensuing academic commentary and the reports of the responsible UN monitoring body: Either that compliance with international law is being sacrificed for the, arguably more noble, cause of safeguarding fundamental rights and the rule of law in the EU; or that a regional court is on the brink of casting the EU and its Member States into a state of non-compliance with obligations under the UN Charter, which potentially may undermine the UN and its system of collective security as a whole.

Regarding the UN, the latter sentiment, unsurprisingly, is the prevalent one. The Monitoring Team set up under the UNSC to keep track of the implementation of its targeted anti-terror sanctions regime has always kept a close watch on the *Kadi* litigation. Following the 2005 decision of the Court of First Instance (CFI, after the Lisbon reform renamed the General Court), which was the first judgment by an EU court in these cases, it noted in its report to the relevant Security Council Committee that while the court had 'denied all the applicants' claims and upheld the sanctions, as well as the primacy of the Security Council when acting under Chapter VII of the Charter of the United Nations', it had 'also ruled, apparently for the first time, that courts could review Security Council decisions to ensure that they comply with internationally recognized fundamental norms of human rights from which neither Member States nor the United Nations may derogate'.¹¹

Subsequently, in reaction to the Opinion of Advocate General Maduro in early 2008, the Monitoring Team report remarked that if the CJEU was to follow him

11. Letter dated 8 March 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), 4th report of the Monitoring Team, 10 March 2006, S/2006/154, p. 46, para. 5.

in its appeals judgment 'there is a real possibility that the regulation used by the 27 member States of the European Union to implement the sanctions will be held invalid'¹² and that, furthermore, this would in all likelihood 'trigger similar challenges that could quickly erode enforcement'.¹³ The Monitoring Team perceived the risk that 'the precedent of a decision that invalidated the sanctions, especially one affecting so many States, might lead to similar problems in other States outside the European Union'.¹⁴ On the *Kadi I* judgment as such, the Team remarked that it represented 'arguably the most significant legal development to affect the regime since its inception'.¹⁵ The report acknowledged, though, that despite the judgment, the measures against Mr Kadi continued to be implemented (see further *infra* 3), noting also that new legal challenges may arise in the future.¹⁶

Such a challenge took shape in the *Kadi II* series of cases. Commenting on the judgment of the General Court of September 2010, the Monitoring Team report stated that here the former Court of First Instance now maintained the position of the Court of Justice, that being in the words of the report 'that European Union law is distinct and equal in authority to Chapter VII resolutions adopted by the Security Council'.¹⁷ This, according to the Monitoring Team, 'challenges the legal authority of the Security Council in all matters, not just in the imposition of sanctions'.¹⁸

In awaiting the final appeals judgment in *Kadi II*, the Monitoring Team continued to refer to the ruling of the CJEU as one of the 'outside factors [which] might upset' the 'stable, if temporary, equilibrium with respect to due process issues' which the sanction regime was said to have reached after reforms effected up to that point in time.¹⁹ The Monitoring Team seemed to have had a brief moment of hopefulness following Advocate General Bot's Opinion in *Kadi II*, which was overall more deferential to the UN level. Given that he acknowledged changes that had been effected in the UN sanctions regime in the course of time (see further *infra* 3), notably the work of the Office of the Ombudsperson,²⁰ the report

12. Letter dated 13 May 2008 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), 8th report of the Monitoring Team, 14 May 2008, S/2008/324, p. 17, para. 40.

13. *Ibid.* (footnote omitted).

14. *Ibid.*

15. Letter dated 11 May 2009 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), 9th report of the Monitoring Team, 13 May 2009, S/2009/245, p. 10, para. 19.

16. *Ibid.*, p. 11, para. 20.

17. Letter dated 13 April 2011 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), 11th report of the Monitoring Team, 13 April 2011, S/2011/245, p. 14, para. 30.

18. *Ibid.*

19. Letter dated 31 December 2012 from the Chairman of the Security Council Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), 13th report of the Monitoring Team, 31 December 2012, S/2012/968, p. 9, para. 17.

20. The Office of the Ombudsperson was established in late 2009 by virtue of UN Security Council Res. 1904 (2009), S/RES/1904, 7 December 2009, para. 20.

of the Monitoring Team saw this as 'potentially paving the way for the European Court of Justice to accommodate the Al-Qaida sanctions regime from a due process perspective'.²¹ However, these hopes remained unfulfilled, as the Team noted in its subsequent report, in commenting on the *Kadi II* decision, that the CJEU had not been 'persuaded by arguments that improvements to delisting procedures since 2008 diminished the need for such searching review by European courts'.²² The report looked to the future by noting in vague and inconclusive terms that the Monitoring Team 'will continue to engage with European Union officials on listing challenges at the European Union level and on due process issues more broadly'.²³

In terms of scholarly appraisal, the *Kadi* saga has spawned a substantial amount of literature.²⁴ This is not least due to the fact that the case is situated at the intersection of both the relationship between EU and international law as well as the balance between pursuing international security and the safeguarding of individual rights and due process, both topics being prone to great academic popularity. Hence, unsurprisingly, each stage of this case law was extensively scrutinized and commented upon by academic observers.

Overall, according to a survey conducted by Sara Poli and Maria Tzanou, the 2005 judgment of the CFI 'has been considered disappointing since the Court has chosen to defend fundamental rights as being protected by *jus cogens* rather than applying the higher standard of protection guaranteed within the EC legal order'.²⁵ Moreover, the assertion of this court that the (then) European Community was bound by the UN Charter because it had succeeded in the obligations of the Member States much in the same way as it happened with the GATT was met with fierce criticism.²⁶

The scorn that this judgment received from a human rights perspective was not compensated by praise from general public international lawyers. On the contrary, given the rather strange manner in which the Court construed the notion of *jus cogens*, the judgment was deemed to 'add to the argument that national and regional courts are in fact *not* the proper place for the review of Security Council

21. Letter dated 2 August 2013 from the Chairman of the Security Council Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), 14th report of the Monitoring Team, 2 August 2013, S/2013/467, p. 12, para. 29.

22. Letter dated 22 January 2014 from the Chairman of the Security Council Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), 15th report of the Monitoring Team, 23 January 2014, 22 January 2014, p. 12, para. 28.

23. *Ibid.*, p. 12, para. 29.

24. See, e.g., S. Poli and M. Tzanou, 'The *Kadi* Rulings: A Survey of the Literature', 28 *YEL* (2009) p. 533; and the collection of references in R. Streinz, 'Does the European Court of Justice Keep the Balance between Individual and Community Interest in *Kadi*?', in U. Fastenrath, et al., eds., *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford, Oxford University Press 2011) p. 1118 at p. 1121, fn. 21.

25. Poli and Tzanou, *supra* n. 24, p. 548.

26. *Ibid.*, pp. 548-549.

measures'.²⁷ The fact that the Court of First Instance had introduced a standard of review according to which it deemed itself competent to rule on the lawfulness of the contested measures was considered to have the potential of 'undermining the system of collective security' of the UN,²⁸ as it gave domestic courts the power of 'ordering the state to act contrary to the sanctions committee's lists'.²⁹ In this way, it really seemed to combine the worst of both worlds: Throwing overboard the protection of individual rights guaranteed in the EU legal order as well as the supremacy of the UN Charter in international law. As I argued in an earlier article, by trying to please all, the CFI ended up being a 'false friend' of international law,³⁰ and indeed became quite unpopular with the academic community.

In 2008, in contrast, it was the moment for those emphasising the importance of human rights as well as the autonomy of the EU legal order to rejoice. It has been observed that 'overall positive assessments were more conspicuous than those on the CFI's ruling'.³¹ Some commentators, such as Martin Scheinin, argued that there was even support in the judgment also from an international law perspective: 'On the whole, and also in respect of institutional United Nations law, the CJEU did the right thing in *Kadi*'.³² Praise even came from Strasbourg in the form of a Concurring Opinion by Judge Malinverni of the European Court of Human Rights (ECtHR) in the *Nada v. Switzerland* case.³³ The Judge described the judgment 'as historic, as it made the point that respect for human rights formed the constitutional foundation of the European Union, with which it was required to ensure compliance, including when examining acts implementing resolutions'.³⁴ For him, the CJEU is clearly the trailblazer, raising the question whether the ECtHR 'as guarantor of respect for human rights in Europe, [should] not be more

27. L. van den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual', 20 *Leiden JIL* (2007) p. 797 at p. 801 (emphasis in the original). Note also J. D'Aspremont and F. Dopagne, '*Kadi*: The ECJ's Reminder of the Elementary Divide between Legal Orders', 5 *IOJLR* (2008) p. 371 at p. 378, who call the judges' application of international law in this case 'adventurous'.

28. Van den Herik, *supra* n. 27, p. 801.

29. *Ibid.*, p. 799.

30. J. Larik, 'Two Ships in the Night or in the Same Boat Together? Why the European Court of Justice Made the Right Choice in the *Kadi* Case', College of Europe EU Diplomacy Paper No. 3/2009, June 2009, p. 6, available at <https://www.coleurope.eu/system/files_force/research-paper/edp_3_2009_larik.pdf?download=1>, visited 17 January 2014.

31. Poli and Tzanou, *supra* n. 24, p. 540.

32. M. Scheinin, 'Is the ECJ Ruling in *Kadi* Incompatible with International Law?', 28 *YEL* (2009) p. 637 at p. 650.

33. Note that the ECtHR also quoted from *Kadi* approvingly in the judgment, in *Nada v. Switzerland*, Appl. No. 10593/08, 12 September 2012, para. 212. Further on the interaction between the two European courts in matters of targeted sanctions, F. Fabbrini and J. Larik, 'Dialoguing for Due Process: *Kadi*, *Nada*, and the Accession of the EU to the ECHR', Leuven Centre for Global Governance Working Paper No. 125, November 2013, available at <http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp121-130/wp125-larik-fabbrini.pdf>.

34. ECtHR 12 September 2012, *Nada v. Switzerland*, Appl. No. 10593/08, Concurring Opinion of Judge Malinverni, para. 18.

audacious than the European Court of Justice ... when it comes to addressing and settling the sensitive issue of conflict of norms that underlies the present case'.³⁵ Faced with such conflict and charged with upholding human rights, according to Judge Malinverni, requires the recasting of the primacy of the UN Charter, or at least the Security Council resolutions adopted under its authority, 'in relative terms'.³⁶

Others, however, abhorred the fact that the CJEU had arrogated to itself the power to question the full implementation of UNSC resolutions by the EU. From a scholarly perspective focussed on the UN, the judgment was seen as 'a hardly veiled threat to use quasi-constitutional principles of the law of the European Union to disregard the obligations of EU Member States under the UN Charter'.³⁷ Most vocally, Gráinne de Búrca criticized the CJEU for what she called the 'chauvinist and parochial tones' of its judgment.³⁸ According to De Búrca, the Court adopted 'a strongly pluralist approach which emphasized the internal and external autonomy and separateness of the EC's legal order from the international domain', and went on to compare the judgment to that of the United States Supreme Court in *Medellin*.³⁹ In doing so, she noted that the CJEU not only provided

'a striking example for other states and legal systems that may be inclined to assert their local constitutional norms as a barrier to the enforcement of international law, but more importantly it suggests a significant paradox at the heart of the EU's relationship with the international legal order, the implications of which have not begun to be addressed'.⁴⁰

The 2010 judgment, in which Mr Kadi challenged the follow-up measures adopted against him in the wake of the *Kadi I* judgment, can be seen as a judicial endorsement by the General Court (the former Court of First Instance) of the approach adopted by the Court of Justice. Even though the Court did not fail to highlight that its reasoning had arguably received some support elsewhere,⁴¹ it did align itself with the 'in principle full review' standard of the Court of Justice.⁴²

35. Ibid., para. 20.

36. Ibid., para. 22.

37. Paulus and Leiß, *supra* n. 8, p. 2113.

38. G. de Búrca, 'The European Court of Justice and the International Legal Order after Kadi', 51 *Harv. ILJ* (2010) p. 1 at p. 4.

39. *Medellin v. Texas*, 552 US 491 (2008). This case concerned a Mexican citizen on death row in Texas, his consular rights under the Vienna Convention of Consular Relations, the application of that convention as well as decisions of the International Court of Justice in the US legal order.

40. De Búrca, *supra* n. 38, p. 49. Less outspoken, but raising the concern of the fragmentation of international law, K. Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights', 9 *Human Rights L. Rev.* (2009) p. 288.

41. Case T-85/09 *Kadi v. Commission* [2010] ECR II-5177, paras. 112-22.

42. Ibid., para. 126. See further A. Cuyvers, 'The Kadi II judgment of the General Court: The ECJ's Predicament and the Consequences for Member States', 7 *EuConst* (2011) p. 481 at p. 509.

Even if, according to one observer, 'an international legal meltdown' is not impending,⁴³ he concludes that the General Court put the Court of Justice under pressure to find a 'balanced approach that does not escalate the conflict with the UN but also does not backpedal its commitment to fundamental rights too much, or too visibly'.⁴⁴ Another commentator lauded the 'clear and welcome presumption in favour of a broad, entitlements-based conception of liberty over deference to considerations of security in the judgment of the General Court'.⁴⁵ Overall, one could say that the 2010 judgment is seen as cementing a victory for human rights, protected by the EU and its courts, over international security, as pursued by the UNSC.

In the 2013 *Kadi II* judgment, which concludes this series of legal challenges, the CJEU confirmed the annulment of the measures due to persisting violations of fundamental rights (see further *infra* 3).⁴⁶ As Niamh Nic Shuibhne notes, 'while the Court rejected aspects of the reasoning applied by the General Court, it upheld the annulment of the contested Regulation on the grounds that the rights of the defence protected under EU law had not been adequately respected'.⁴⁷ Thus far, the scholarly assessment of this decision seems to continue the overall series of praise as standing up for human rights and the rule of law. According to Filippo Fontanelli, the value of the judgment resides 'in its systemic impact, as it incarnates the idea that certain fundamental rights cannot be silenced under the cover of generic security concerns, or of knee-jerk deference to the UN Security Council's action'.⁴⁸ Notes of caution, nonetheless, continue to be issued as well with regard to other, less beneficial 'systemic' consequences. Erika de Wet, for instance, stresses that 'the approach of the CJEU carries with it the risk of the devaluation of international human rights law, as well as of legal uncertainty'.⁴⁹ According to her, this 'fuels the perception that an irreconcilable norm conflict exists between a UNSC sanctions regime and domestic or regional regimes that value the protection of human rights',⁵⁰ with a possible ensuing 'fragmentary effect on the unified system foreseen in the United Nations Charter for the maintenance of international peace and security'.⁵¹

43. Cuyvers, *supra* n. 42, p. 501.

44. Ibid., p. 510.

45. H.J. Hooper, 'Liberty before Security: Case T-85/09 Yassin Abdullah Kadi v. Commission (No. 2) [2010] ECR 00000 (30 September 2010)', 18 *European Public Law* (2012) p. 457 at p. 469.

46. Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v. Kadi (Kadi II)*, judgment of 18 July 2013, not yet reported.

47. N. Nic Shuibhne, 'Being Bound' (Editorial), 38 *European L. Rev.* (2013) p. 435 at p. 436. See extensively on the *Kadi II* judgment, M. Avbelj, F. Fontanelli and G. Martinico, eds., *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment* (London, Routledge, forthcoming 2014).

48. F. Fontanelli, 'Kadiou: Connecting the Dots - From Resolution 1267 to Judgment C-584/10 P - The Coming of Age of Judicial Review', in M. Avbelj, F. Fontanelli and G. Martinico, eds., *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment* (London, Routledge, forthcoming 2014).

49. E. de Wet, 'From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions', 12 *Chinese JIL* (2013) p. 787 at p. 799.

50. Ibid.

51. Ibid.

In sum, an overarching and prevalent theme of the *Kadi* saga was the disruptive potential of the decisions of the EU Courts regarding compliance with international law, more particularly obedience to resolutions of the UNSC, adopted under the UN Charter as the supreme document of the international legal order. Consequently, in the various scholarly assessments of this case law, criticisms were directed at the CJEU for disrespecting obligations under international law. In the watchful eyes of the Monitoring Team of the Security Council, this carried a disconcerting threat for overall compliance with UN targeted sanctions around the world. Praise, by contrast, was framed in academic commentary in terms of defending human rights and judicial review against an overzealous Security Council. Such defiance was then acknowledged as condoning non-compliance, yet cast as a worthwhile cause. Respect for international law was sacrificed for the sake of an arguably 'higher end'. Yet others then even attempt to justify the reasoning of the CJEU by reference to breaches by the UNSC of its own obligations under international law.⁵² There is, however, another way to look at this case law, which corresponds to the actual compliance of the EU and its Member States with international law.

3. RETRACING REALITY: 'STRICT OBSERVANCE' THROUGHOUT

Compliance with international law is a cherished principle in the EU. There is long-standing case law of the CJEU on the Union being bound by general international law and on giving preference to interpretations of its own laws that are consistent with international law.⁵³ After the Lisbon reform, the 'strict observance' of international law has been enshrined as a general objective of the EU in the primary law.⁵⁴ The CJEU, subsequently, has taken cognizance of this textual foundation.⁵⁵

Nevertheless, the preparedness of the EU to abide by international law is not boundless.⁵⁶ As a matter of principle, the *Kadi* case law clarified that while the

52. Scheinin, *supra* n. 32, pp. 650-653; for an elaborate framing of non-compliance with such resolutions as legitimate countermeasures against the UNSC see A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford, Oxford University Press 2011).

53. See, e.g., Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 9; Case 104/81 *Kupferberg* [1982] ECR 3641; and Case 181-73 *Haegeman* [1974] ECR 449; and reiterated in *Kadi*, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat v. Council and Commission* [2008] ECR I-6351, para. 291. See further extensively E. Cannizzaro, P. Palchetti and R. Wessel, eds., *International Law as Law of the European Union* (Leiden, Martinus Nijhoff 2012).

54. Art. 3(5) TEU.

55. Case C-366/10 *The Air Transport Association of America and Others* [2011] ECR I-13755, para. 101.

56. See Klabbers, *supra* n. 5.

EU is 'beholden to'⁵⁷ international law, within its autonomous legal order, 'constitutional' principles such as effective fundamental rights protection through judicial review trump compliance with international law. This is after all what prompted the general tenor of scholarly commentary referred to above: The CJEU drew the line on where compliance with international law should end and beyond which it would defend human rights as part of EU law against any outside threats.⁵⁸ Even in times of global emergencies such as international terrorism, according to the common narrative, Luxembourg spoke up for individual rights, the rule of law and judicial review.

But now that the *Kadi* saga has been concluded, it is worthwhile to take a step back and ask: Did the CJEU at any point put the EU or its Member States in a real state of non-compliance with international law? By carefully retracing this case law and the institutional responses to it, the answer must and can only be: *No*.

It is undeniable that in *Kadi* the CJEU asserted the autonomy of the EU legal order and its constitutional credentials. It furthermore professed itself to be the guarantor of fundamental rights and the rule of law, standing up against the 'Kafkaesque'⁵⁹ sanctions machinery at the UN. What it carefully avoided for more than a decade, however, was to violate international law, i.e., not to practice the 'strict observance' of international law under Article 3(5) TEU. Even though Mr Kadi had been successful thrice in a row with his judicial challenges at the EU Courts ever since his first appeal (i.e., in 2008, 2010 and 2013), the measures deemed unlawful by the CJEU were only effectively annulled *after* he had been delisted by the UN and subsequently by the European Commission concerning the implementation of these sanctions in the EU. His financial assets, therefore, were unfrozen by virtue of a political decision, and with the help of the Office of the Ombudsperson at the UN '1267 Sanctions Committee'. They were not undone by judicial intervention, which took place only after that fact.

Let us rewind the story and go back to the beginning. On 17 October 2001, the UNSC added Mr Kadi to a so-called 'blacklist', requiring his assets to be frozen in view of his suspected involvement in the financing of international terrorism.⁶⁰ On 19 October 2001, the EU responded by implementing the measures of the Security Council by adding Mr Kadi to its own list and thus subjecting him to restrictive measures within the EU.⁶¹ Mr Kadi subsequently lodged an action for

57. *Kadi v. Council and Commission*, Opinion of Advocate General Poiras Maduro, *supra* n. 3, para. 21.

58. See N. Lavranos, 'Protecting European Law from International Law', 15 *EPA Rev.* (2010) p. 265. Wouters, *supra* n. 2, p. 221 notes that in *Kadi*, 'the ECJ adopted a strongly dualist vision of the relationship between EC/EU law and international law, emphasising the autonomy, authority and separateness of the EC legal order'.

59. I. Ley, 'Legal Protection Against the UN-Security Council Between European and International Law: A Kafkaesque Situation?', 8 *German LJ* (2007) p. 279.

60. 'Security Council Committee concerning Afghanistan issues a further addendum', Press Release SC/7180, 19 October 2001, available at <www.un.org/News/Press/docs/2001/sc7180.doc.htm>, visited 15 January 2014.

61. Commission Regulation (EC) No. 2062/2001 of 19 October 2001 amending, for the third time, Council Regulation (EC) No. 467/2001 prohibiting the export of certain goods and services to

the annulment of these measures before the EU courts on grounds of violations of his fundamental rights as well as lack of competence.⁶²

Four years later, the General Court 'discovered' in its 2005 judgment a *jus cogens* standard which allowed it to review the EU implementing measures as well as, vicariously, UNSC measures. It concluded, however, that against such a standard no fundamental rights breaches could be detected and rejected Mr Kadi's challenge. In view of this dismissal, the measures, of course, stayed in effect. As controversial as the reasoning of the CFI was (see *supra* 2), it certainly maintained the Union in a state of 'strict observance' of international law. While the *jus cogens* argument was in conflict with mainstream international legal opinion, a conflict with the UN Charter was not created.

Subsequently, Advocate General Maduro, in his Opinion of January 2008, employed a very different approach by departing from the autonomy of the Union legal order and emphasizing the effective protection of fundamental rights. In the Opinion, he avowed himself to be fully aware that such an approach, if followed through to its logical conclusion, would lead to violating obligations under international law. This, however, would be international law's problem, according to the Advocate General:

'To the extent that such a ruling would prevent the Community and its Member States from implementing Security Council resolutions, the legal consequences within the international legal order remain to be determined by the rules of public international law.'⁶³

Even though, he continued, this may 'inconvenience the Community and its Member States in their dealings on the international stage',⁶⁴ the application of such constitutional principles by the Court of Justice within the autonomous legal order of the EU 'is without prejudice to the application of international rules on State responsibility or to the rule enunciated in Article 103 of the UN Charter'.⁶⁵ Had the Court of Justice followed him all the way, this would have led to the 'zero hour' of non-compliance with international law.

The Court of Justice, in its landmark judgment of September 2008, followed the Advocate General in terms of reasoning, in particular with regard to the autonomy of the Union legal order, the paramount nature of fundamental rights and

Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan and repealing Regulation (EC) No. 337/2000, *OJ* 2001, L 27/25.

62. On the intricate question of (pre-Lisbon) EU competence to adopt such targeted restrictive measures, see Cremona, *supra* n. 1. The Lisbon reform has resolved this issue, as Art. 215(2) Treaty on the Functioning of the European Union (TFEU) now grants the EU such an explicit power.

63. *Kadi v. Council and Commission*, Opinion of Advocate General Poiares Maduro, *supra* n. 3, para. 39.

64. *Ibid.*

65. *Ibid.*

the necessity of judicial review. Recalling its ruling in *Les Verts*,⁶⁶ it underlined that the EU

'is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.'⁶⁷

Consequently, it deemed it to be incumbent on itself to 'ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights',⁶⁸ including those acts which 'are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations'.⁶⁹

Crucially, however, it did not go as far as to invalidate the challenged EU measures right away. Even though it concluded that the measures ought to be annulled given their inconsistency with fundamental rights as protected within the Union legal order, the Court acknowledged that annulment with immediate effect 'would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures'.⁷⁰ In other words, since it did not know whether Mr Kadi actually deserved to be blacklisted as a financier of terrorism, unfreezing his funds was deemed imprudent. Instead, the Court ruled that the effects of the contested measures should be maintained 'for a period that may not exceed three months running from the date of delivery of this judgment'.⁷¹ This should then allow the European Commission to remedy the situation from the point of view of protecting fundamental rights. As the judgment was rendered on 3 September 2008, compliance with international law was thus assured at least until 3 December 2008.

In the wake of the judgment, the Commission sent Mr Kadi a letter containing a brief summary as to why it thought he should remain blacklisted. Having awaited a reply from Mr Kadi, in which the latter unsurprisingly again contested his listing, the Commission decided to re-list him nonetheless by virtue of a new implementing measure in the form of a Commission regulation.⁷² This regulation would 'enter into force on 3 December 2008',⁷³ i.e., exactly on the day when the previous measures were effectively annulled in accordance with the judgment of

66. Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339.

67. *Kadi and Al Barakat v. Council and Commission*, *supra* n. 53, para. 281.

68. *Ibid.*, para. 326.

69. *Ibid.*

70. *Ibid.*, para. 373.

71. *Ibid.*, para. 376.

72. Commission Regulation (EC) No. 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, *OJ* 2008, L 322/25.

73. *Ibid.*, Art. 2(1).

The judgment of the Court of Justice, delivered on 18 July 2013, however, did not follow the Advocate General. Instead, it clarified the ways in which the EU courts are to handle classified information. In essence, it endorsed the principle of 'disclose or delist',⁸⁶ which puts the onus of furnishing the Court with probative information on the institutions that implemented the restrictive measures at issue.⁸⁷ Thus, in addition to its assertion of fundamental rights and the autonomy of the EU legal order, in this final judicial episode of the *Kadi* saga, the CJEU elaborated on the procedures to be followed to safeguard such rights in practice in judicial proceedings. In the case at hand, after correcting the General Court on points of law concerning this aspect,⁸⁸ it confirmed its conclusion, i.e., the annulment of the measures.⁸⁹ Hence, the annulment already issued by the General Court, given that the appeal was dismissed, became effective on the day of the *Kadi II* judgment of the CJEU.

The annulment itself had no practical legal impact on Mr Kadi. Of course, clarifying issues pertaining to the treatment of classified information is of general relevance and useful regarding future cases. As Advocate General Bot rightly pointed out, the fact that Mr Kadi had been delisted 'after the present appeals were lodged, does not ... remove the interest in bringing proceedings on the part of the Commission, the Council and the United Kingdom or that of Mr Kadi in the context of his application for annulment'.⁹⁰ For future sanctions-related cases, it will certainly be interesting to observe how the EU institutions will manage to provide sensitive information to the courts. This remains a quintessentially multilevel problem, as such information will need to be obtained from the UNSC, which in turn relies on classified information furnished by UN members.⁹¹

With regard to Mr Kadi, however, the annulment came too late in terms of serving as an 'effective remedy' to unfreeze his assets, which had been – as had been confirmed by the courts several times – unlawfully frozen for all these years. The right to an effective legal remedy is a general principle of EU law,⁹² and finds

86. See for a more in-depth explanation of the operation of this rule, F. Fabbrini, 'Global Sanctions, State Secrets and Supranational Review: Seeking Due Process in an Interconnected World', in D. Cole, et al., eds., *Secrecy, National Security and the Vindication of Constitutional Law* (Cheltenham, Edward Elgar 2013) p. 284 at pp. 299–300.

87. *Commission, Council and United Kingdom v. Kadi (Kadi II)*, *supra* n. 46, paras. 111 et seq.

88. *Ibid.*, paras. 135–149. Essentially, contrary to what the General Court had found, the CJEU actually deemed most of the reasons based on which Mr Kadi had been listed to be detailed and specific enough. The violations of fundamental rights were, according to the CJEU, due to an insufficient substantiation of these reasons.

89. *Ibid.*, para. 164.

90. *Commission, Council and United Kingdom v. Kadi (Kadi II)*, Opinion of Advocate General Bot, *supra* n. 82, para. 42.

91. The Court stressed in *Kadi II* the need for EU authorities to cooperate with the UN Sanctions Committee and other UN members in this respect, *Commission, Council and United Kingdom v. Kadi (Kadi II)*, *supra* n. 46, para. 115, referring to Art. 220(1) TFEU, according to which the EU 'shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies'.

92. Starting with Case 222/84 *Johnston* [1986] ECR 1651; and reiterated later in, among others, Case C-50/00 *Unión de Pequeños Agricultores* [2002] ECR I-6677.

expression in the Charter of Fundamental Rights of the EU.⁹³ It is inspired by Article 13 of the European Convention on Human Rights. In the words of the ECtHR, effectiveness signifies

'not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.'⁹⁴

Of course, Mr Kadi could avail himself – repeatedly – of the remedies offered in the EU legal order. Eventually, he prevailed over the Commission and the Council and he successfully had the measures imposed against him annulled. However, his successive victories in court were all rather theoretical in the end. As was shown in this section, in 2008 and 2010, the judgments ruling that the measures adversely affecting him should be annulled did not have the result of effectively delisting him. In 2013, the effects of the measures had already ceased to apply by the time the Court of Justice intervened. From this vantage point, the *Kadi II* judgment was not the *grand finale* of the saga, but rather an epilogue, a postscript. For the EU institutions, on the contrary, the avenues of judicial recourse offered in EU law (especially their appeal against the 2010 judgment of the General Court) were quite useful, as they kept Mr Kadi on the EU blacklist, not as a matter of theory but of practice. In doing so, they effectively maintained compliance with international law.

4. CONCLUSION: THE TRIUMPHANT TRIBUNAL

After having, firstly, sketched out the general sentiments in the scholarly discourse on the *Kadi* saga as the legal epitome of the EU's implementation of targeted sanctions hailing from the UNSC, and, secondly, having retraced this string of cases from the point of view of actual compliance with international law, the following conclusions emerge. The clamour on the autonomy of the Union legal order and the majesty of human rights aside, in reality, the EU and its Member States successfully cloaked themselves in a seamless coat of compliance with their international obligations, covering the entire period from October 2001 until Mr Kadi's delisting. While vocally upholding human rights as constitutional principles of the EU legal order, also against attacks from the UNSC bolstered by the supremacy of the UN Charter, what the institutions of the EU achieved in fact was living up, all this time, to the objective of strictly observing international law as stipulated in Article 3(5) TEU.

By the same token, a conflict with the UN Charter was avoided. At no point in time did the EU Member States face opposing obligations, with the UN demand-

93. Art. 47 Charter of Fundamental Rights of the EU.

94. ECtHR 13 May 1980, *Artico v. Italy*, Appl. No. 6694/74, para. 33.

ing one thing and the EU requiring the opposite. Only in a rather unworldly retrospective sense, with the annulment of the 2008 regulation being effective thanks to the dismissal of the appeal in the 2013 *Kadi II* judgment, could Mr Kadi be conceived of as not having been on the EU's list, while he remained on the UN list. In the words of the CJEU, 'the contested measure is retroactively erased from the legal order and is deemed never to have existed'.⁹⁵ However, bearing in mind the preventive nature of the sanctions regime, the historical fact remains that Mr Kadi's assets were frozen during this entire period, even though we now know in hindsight that they should not have been, according to EU law. While this conjures up a retroactive conflict between obligations, for all practical purposes, the EU, including its courts, did cover this period in this seamless coat of compliance with international law, which was only lifted once the obligation under international law had already lapsed.

This prompts a final reflection as to the real winner in this legal marathon. For Mr Kadi, certainly, his repeated victories in court retain a Pyrrhic character. He had to wait almost twelve years before his judicial successes became effective. Now that the dust has indeed settled, Bruno Simma's prescient words could not ring truer in that *Kadi* is among the cases of the CJEU which are 'grandiose on principles without being of much help to the individual claimant'.⁹⁶ However, an option that remains open to Mr Kadi is to lodge a claim for damages against the EU under Article 340 TFEU. Such a claim, the success of which is not entirely unlikely,⁹⁷ would turn his thus far rather Pyrrhic victory into a more tangible one.

For the Council and the Commission, as well as the EU Member States, the end of the *Kadi* saga may well be the beginning of new legal battles. While a conflict between the EU Treaties and the UN Charter was avoided in this particular series of cases, the principles established by the CJEU therein are prone to place them in a difficult situation in the future. According to the *Kadi II* decision, while the Union institutions did not fail to satisfy the duty to state reasons, the crux is the burden of proof, which now unequivocally rests on them to furnish the substantiating information justifying the blacklisting of targeted individuals in EU courts. Whenever the institutions have to defend their acts and legislation in Luxembourg, it has become clear that justifications based solely on 'the Security Council said so' are clearly not good enough in a Union 'based on the rule of law'.⁹⁸

How they can achieve that remains, for the time being, an unresolved issue. There exists thus far no agreement between the EU and the UN to the effect of sharing sensitive information for the purpose of court proceedings in the area of targeted sanctions. Already at the UN level, including after recent reforms, it is difficult to obtain such information. States are merely encouraged, not obliged,

95. *Commission, Council and United Kingdom v. Kadi (Kadi II)*, *supra* n. 46, para. 134.

96. Simma, *supra* n. 10, p. 294, fn. 122.

97. See Fontanelli, *supra* n. 48.

98. *Kadi and Al Barakat v. Council and Commission*, *supra* n. 53, para. 281.

'to provide all relevant information to the Ombudsperson, including providing any relevant confidential information'.⁹⁹ Hence, as Scheinin and Ginsborg observe, 'access to information by the Ombudsperson still depends on the willingness of States to disclose information' which 'may still choose to withhold any information which they deem appropriate to safeguard their security or other interests'.¹⁰⁰ In order to avoid future conflicts, the EU and the Member States (not least France and the UK as permanent members of the Security Council) will have to do their utmost to help obtain such information, its sensitive and classified nature notwithstanding, and continue to work on an arrangement to give courts sufficient access to such information.

A less obvious winner, but still a winner, is the UNSC. Despite all the judicial questioning and second-guessing from Luxembourg, it saw its targeted sanctions being applied against Mr Kadi throughout until it, through its '1267 Committee', decided to delist him. Instead of creating an immediate conflict, the judgments from Luxembourg, together with other vocal criticisms of the UN targeted sanctions regime,¹⁰¹ gave the UN time to adapt. Even though a judicial remedy at the UN level remains wanting for blacklisted individuals,¹⁰² as the case of Mr Kadi shows, the Ombudsperson now contributes to an effective delisting. In this respect, it is disappointing that the CJEU all but completely ignored the impact of the work of the Office of the Ombudsperson in its *Kadi II* decision. For the future, if the Security Council wants to remain on the winning side, it should strongly consider facilitating the provision of information justifying the sanctions to its members, lest courts in the EU put a spoke in the wheels of its sanctions machinery after all.

The most unequivocal winner, however, can only be the CJEU. While keeping the UNSC and its monitoring body in a constant state of alert, and while being celebrated as the brave and ultimate guardian of fundamental rights by many in legal scholarship, in *Kadi* it also asserted the autonomy of the EU legal order, over which it looms as the supreme judicial body. As the retracing of this remarkable legal saga has shown, this assertion of its power, largely perceived as a norma-

99. UN Security Council Res. 1989 (2011), S/RES/1989, 17 June 2011, para. 25. Note also UN Security Council Res. 2083 (2012), S/RES/2083 (2012), 17 December 2012, which welcomes 'national arrangements entered into by Member States with the Office of the Ombudsperson to facilitate the sharing of confidential information'.

100. L. Ginsborg and M. Scheinin, 'You Can't Always Get What You Want: The Kadi II Conundrum and the Security Council 1267 Terrorist Sanctions Regime', 8 *Essex Human Rights Rev.* (2011) p. 7 at p. 12.

101. Such as B. Fassbender, 'Targeted Sanctions and Due Process', Study commissioned by the United Nations Office of Legal Affairs, 20 March 2006, available at <www.un.org/law/counsel/Fassbender_study.pdf>, visited 17 January 2014; I. Cameron, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, Report commissioned by the Council of Europe, 6 February 2006, p. 4, available at <www.coe.int/t/dlapil/cahdi/Source/Docs%202006/CAHDI%20_2006_%2022%20E%20Cameron%20report.pdf>, visited 17 January 2014.

102. Ginsborg and Scheinin, *supra* n. 100, pp. 11-12.

tively desirable state of affairs, came at a very small price. Throughout the entirety of the *Kadi* cases, the Court of Justice achieved this feat while successfully avoiding any breach of the kind of law from which it endeavours to set EU law apart so ferociously: international law.

CHINA, THE INTERNATIONAL CRIMINAL COURT, AND INTERNATIONAL ADJUDICATION

by Zhu Dan*

1. Introduction
2. China's engagement with international judicial bodies
3. China's traditional concerns regarding international adjudication
4. The human rights dimensions of China's concerns regarding the ICC
 - 4.1 Crimes against humanity and human rights issues
 - 4.1.1 Human rights law and international criminal law
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 - 4.2 Complementarity and appeals court
 - 4.3 *Proprio motu* power and the individual petition system
5. Concluding remarks

Abstract

China has long supported the establishment of a permanent international criminal court, but it cast a negative vote at the end of the Rome conference in 1998 due to certain concerns that had not been addressed to its satisfaction. The specific Chinese concerns regarding the Rome Statute to some extent echo China's traditional position with respect to international judicial bodies. This article investigates the ways in which China has characterized the International Criminal Court (ICC) as a human rights court of the traditional kind. It examines the substance of the articulated Chinese concerns regarding the ICC in light of China's engagement with international judicial bodies, and some of the traditional concerns that have had an impact on that engagement. This article argues that the ICC is distinct from the UN human rights treaty bodies, and that China's progressively wider engagement with international adjudication should not be hindered by putting the ICC in a 'human rights box'.

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which immediately flowed from that. These claims were raised in the domestic courts and settled, definitively. The applicants' attempts to pursue matters further in more recent years must be regarded, as held by the House of Lords, to be part of an overall campaign to bring pressure to bear on Government policy rather than disclosing any new situation giving rise to fresh claims under the Convention. Having regard to the facts submitted by the parties and the complaints raised by the applicants, the Court finds that no separate issues concerning the applicants' substantive rights under the Convention have been shown to arise nor any arguable claims of breaches of such rights engaging Article 13 of the Convention.

4. Access to court and fair trial issues (Article 6)

84. As concerns any remaining issues that might arise under Article 6 due to the procedures before the courts over recent years (see paragraph 66 above), the Court considers that there are two principal strands of argument advanced by the applicants: firstly, that the 2004 orders constituted an act of the executive which deprived the unappealed judgment in *Bancoult I* of its intended effect (with reference, *inter alia*, to *Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII; *Hornsby v. Greece*, 19 March 1997, Reports of Judgments and Decisions 1997-II); and secondly that the refusal to grant a substantive hearing of their claim to civil damages constituted an unjustified impediment to their access to court in particular due to the application of domestic rules of limitation.

85. As to the first strand of argument, the Court has found no trace of such complaint being raised in the subsequent domestic proceedings, in the most recent of which Convention arguments could have been directly ventilated. In any event, the situation in this case is not comparable to that in the *Brumărescu* line of cases, where a Government officer had a final decision re-opened and re-decided. In the present application, there was no re-opening or re-deciding of the validity of the 1971 immigration ordinance; that remained invalid. Nor does the *Hornsby* case lend assistance to the applicants' argument, since the decision in *Bancoult I* which declared the 1971 ordinance invalid contained no operative elements which required action or enforcement by the Government. While in the immediate aftermath of the decision the authorities explored the feasibility of resettlement, the House of Lords had found that they had been under no legal obligation to take any action, and that

they had not given the islanders any legitimate expectation that their return would be facilitated. The situation evolved meanwhile, with various studies and reports highlighting the prohibitive cost of providing infrastructure and a means of livelihood for any new settlement and with the changing dimensions of the strategic role of the islands. Thus, when the new orders barring immigration were litigated in light of these new circumstances, they were upheld. Against this background, the Court perceives no appearance of depriving the applicants of the benefit of a final, enforceable decision.

86. Turning to the second strand of argument which asserts an unjustified failure by the courts to address the merits of the applicants' claims for compensation, the Court notes that the High Court, upheld on appeal, thoroughly examined the applicants' claims in a lengthy judgment, addressing their arguments and giving clear and detailed reasons for not accepting them, including reasons founded on abuse of process based on the past settlement and waivers of future claims, on prescription or on the lack of a cause of action. Further, the prescription period applied was not of such duration as to have been practically impossible to comply with; after hearing both parties and assessing the documentary evidence, the domestic court also reached the conclusion that the applicants' allegations that they had been prevented from making their claims earlier as the Government had concealed relevant information had not been made out. There is no indication of any arbitrariness or unfairness in these proceedings which could be construed as a denial of access to court.

87. It follows that these complaints are manifestly ill-founded and to be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

5. Conclusion

Having regard to the above, this application must therefore be rejected pursuant to Article 35 §§ 1, 3 and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

The Court (Fourth Section) was composed of the following judges: Mr D.T. Björgvinsson (Icelandic), President, Mr L. Garlicki (Polish), Mr N. Bratza (British), Mrs P. Hrvěla (Finnish), Mr G. Nicolaou (Cypriot), Mr L. Bianku (Albanian), Mr N. Vučinić (Montenegrin), and also Mr L. Early, Section Registrar

Court of Justice of the European Union (ECJ), Luxembourg

Judgment of 18 July 2013 (Grand Chamber) – C-584/10 P et al. – Three Appeals under Article 56 of the Statute of the Court of Justice of the European Union, brought on 10 December 2010, *European Commission and United Kingdom of Great Britain and Northern Ireland*, appellants, supported by: *Bulgaria, Italy, Luxembourg, Hungary, f the Netherlands, Slovakia, Finland*, interveners in the appeals in Cases C-584/10 P and C-593/10 P;

Council of the European Union, appellant, supported by: *Bulgaria, Czech Republic, Denmark, Ireland, Spain, Italy, Luxembourg, Hungary, the Netherlands, Austria, Slovakia, Finland*, interveners in the appeal in Case C-593/10 P;

the other parties to the proceedings being: *Yassin Abdullah Kadi*, applicant at first instance, *France*, intervener at first instance

Information and evidence produced by the UN Sanctions Committee regarding involvement in terrorist activities do not justify in the present case, at European level, the maintenance of restrictive measures (freezing of funds and economic resources) / Rights of the defence / Judicial review of deListing request / Kadi II

Appeal – Common Foreign and Security Policy (CFSP) – Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban – Regulation (EC) No 881/2002 – Freezing of funds and economic resources of a person included in a list drawn up by a body of the United Nations – Listing of that person's name in Annex I to Regulation (EC) No 881/2002 – Action for annulment – Fundamental rights – Rights of the defence – Principle of effective judicial protection – Principle of proportionality – Right to respect for property – Obligation to state reasons

(full text)*

1. By their appeals, the European Commission, the Council of the European Union and the United Kingdom of Great Britain and Northern Ireland seek to have set aside the judgment of the General Court of the European Union of 30 September 2010 in Case T-85/09 *Kadi v Commission* [2010] ECR II-5177 ('the judgment under appeal'), by which that Court annulled Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban (OJ 2008 L 322, p. 25; 'the contested regulation'), in so far as that measure concerns Mr Kadi.

Legal context

The Charter of the United Nations

2. Under Article 1(1) and (3) of the Charter of the United Nations, signed at San Francisco (United States of America) on 26 June 1945, the purposes of the United Nations are *inter alia* to 'maintain international peace and security' and to 'achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.

3. Under Article 24(1) of the Charter of the United Nations, the United Nations Security Council ('the Security Council') is given primary responsibility for the maintenance of international peace and security. Article 24(2) thereof provides that, in discharging those duties, the Security Council is to act in accordance with the purposes and principles of the United Nations.

4. Under Article 25 of the Charter of the United Nations, the Members of the United Nations [UN] agree to accept and carry out the decisions of the Security Council in accordance with that Charter.

5. Chapter VII of the Charter of the United Nations, headed 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression', defines the action to be taken in such cases. Article 39 of that Charter,

which introduces Chapter VII, provides that the Security Council is to determine the existence of any such threat, any such breach or any such act and is to make recommendations, or decide what measures are to be taken, in accordance with Articles 41 and 42 of the Charter, to maintain or restore international peace and security. Under Article 41 of that Charter, the Security Council may decide what measures, not involving the use of armed force, are to be employed to give effect to its decisions and it may call upon the Members of the United Nations to apply such measures.

6. By virtue of Article 48(2) of the Charter of the United Nations, the decisions of the Security Council for the maintenance of international peace and security are to be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

7. Article 103 of the Charter of the United Nations states that in the event of a conflict between the obligations of the Members of the United Nations under that Charter and their obligations under any other international agreement, their obligations under that Charter are to prevail.

Actions of the Security Council against international terrorism and the implementation of those actions by the European Union

8. Since the late 1990s, and even more since the attacks of 11 September 2001 in the United States, the Security Council has adopted a number of resolutions under Chapter VII of the Charter of the United Nations in order to combat terrorist threats to international peace and security. Initially directed solely against the Taliban of Afghanistan, those resolutions were subsequently extended to include Usama bin Laden, Al-Qaeda and persons and entities associated with them. The resolutions provide, *inter alia*, for the freezing of assets of the organisations, entities and persons identified by the committee established by the Security Council, in accordance with Resolution 1267 (1999) of 15 October 1999 ('the Sanctions Committee') on a consolidated list ('the Sanctions Committee Consolidated List').

9. In order to deal with delisting requests made by organisations, entities or persons named on that list, Security Council Resolution 1730 (2006) of 19 December 2006 provided for the establishment of a 'focal point' within the Security Council, responsible for examination of such requests. That focal point was established in March 2007.

10. Under paragraph 5 of Security Council Resolution 1735 (2006) of 22 December 2006, when States propose names of organisations, entities or persons to the

* Language of the case: English.

Sanctions Committee for inclusion on the Consolidated List, they must 'provide a statement of case; the statement of case should provide as much detail as possible on the basis(es) for the listing, including: (i) specific information supporting a determination that the individual or entity meets the criteria above; (ii) the nature of the information; and (iii) supporting information or documents that can be provided'. Under paragraph 6 of that resolution, States are requested 'at the time of submission, to identify those parts of the statement of case which may be publicly released for the purposes of notifying the listed [on the Sanctions Committee Consolidated List] individual or entity, and those parts which may be released on request to interested States'.

11. Under paragraph 12 of Security Council Resolution 1822 (2008) of 30 June 2008, States must, *inter alia*, 'for each such proposal [of names to the Security Council for inclusion on the Consolidated List] identify those parts of the statement of case that may be publicly released, including for use by the [Sanctions] Committee for development of the summary described in paragraph 13 below or for the purpose of notifying or informing the listed individual or entity, and those parts which may be released upon request to interested States'. Paragraph 13 of that resolution provides, first, that the Sanctions Committee, when it adds a name to its Consolidated List, is to make accessible on its website 'a narrative summary of reasons for listing' and, secondly, that that committee is to make accessible on the same site, 'narrative summaries of reasons for listing' names on that list before the adoption of Resolution 1822/2008.

12. As regards delisting requests, Security Council Resolution 1904 (2009) of 17 December 2009 established an 'Office of the Ombudsperson', whose task, under paragraph 20 thereof, is to assist the Sanctions Committee in the consideration of such requests. Under that same paragraph, the person appointed to be the Ombudsperson must be an individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, including law, human rights, counter-terrorism, and sanctions. The mandate of the Ombudsperson, as described in Annex II to that resolution, covers a stage of gathering information from the State concerned and a stage of consultation, in the course of which dialogue may be engaged with the organisation, entity or person requesting delisting from the Sanctions Committee Consolidated List. Following those two stages, the Ombudsperson must draw up a 'comprehensive report' and present it to the Sanctions Committee, which must then consider the delisting request, with the assistance of the Ombudsperson, and after doing so decide whether to approve that request.

13. Since the Member States considered, in a number of Common Positions adopted under the Common Foreign and Security Policy, that European Union action was required in order to implement the Security Council Resolutions on combating international terrorism, the Council adopted a series of regulations providing for, *inter alia*, the freezing of the assets of organisations, entities and individuals identified by the Sanctions Committee.

14. In parallel with the regime described above, which is aimed solely at organisations, entities and individuals designated by name by the Sanctions Committee as being associated with Usama bin Laden, the Al-Qaeda network and the Taliban, there exists a wider regime of sanctions provided for by Security Council Resolution 1373 (2001) of 28 September 2001, which was likewise adopted in response to the terrorist attacks of 11 September 2001.

That resolution, which also provides for asset-freezing measures, differs from the resolutions mentioned above in that the identification of the organisations, entities or persons which it is intended to cover is left entirely to the discretion of the States.

15. At European Union level, Resolution 1373 (2001) was implemented by Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93) and by Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70, and corrigendum, OJ 2010 L 52, p. 58). Those measures contain a list, which is regularly reviewed, of organisations, entities and persons suspected of being involved in terrorist activities.

Background to the proceedings

The case which gave rise to the Kadi judgment

16. On 17 October 2001 Mr Kadi, identified as being an individual associated with Usama bin Laden and the Al-Qaeda network, was listed on the Sanctions Committee Consolidated List.

17. Mr Kadi's name was subsequently added to the list in Annex I to Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No 337/2000 (OJ 2001 L 67, p. 1), by Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001 (OJ 2001 L 277, p. 25). He was subsequently listed in Annex I to Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001 (OJ 2002 L 139, p. 9).

18. On 18 December 2001 Mr Kadi brought before the General Court an action seeking the annulment, initially, of Regulations No 467/2001 and No 2062/2001, then of Regulation No 881/2002, in so far as those regulations concerned him. The grounds for annulment were, respectively, infringement of the right to be heard, the right to respect for property and the principle of proportionality, and also of the right to effective judicial review.

19. By judgment of 21 September 2005 in Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649, the General Court dismissed that action. In essence, the General Court held that it followed from the principles governing the relationship between the international legal order under the United Nations and the European Union legal order that Regulation No 881/2002, being designed to implement a Security Council resolution leaving no latitude in that regard, could not be the subject of judicial review of its internal lawfulness and thus enjoyed immunity from jurisdiction, except as regards its compatibility with rules falling within the ambit of *jus cogens*, understood as a body of rules of public international law binding on all subjects of international law, including the bodies of the UN, and from which no derogation is possible.

20. Accordingly, the General Court, applying the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*, ruled out, in

the given case, any infringement of the rights relied on by Mr Kadi. As regards, in particular, the right to effective judicial review, the General Court stated that it was not for it to review indirectly whether Security Council Resolutions are compatible with such fundamental rights as are protected by the European Union legal order, nor to verify that there had been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it had taken, nor, again, to review indirectly the appropriateness and proportionality of those measures. The General Court added that any such lacuna in the judicial protection available to Mr Kadi is not in itself contrary to *jus cogens*.

21. By its judgment of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 = 29 HRLI 373 (2008) ('the Kadi judgment'), the Court set aside the judgment of the General Court in Case T-315/01 *Kadi v Council and Commission* and annulled Regulation No 881/2002 in so far as it concerned Mr Kadi.

22. In essence, the Court held that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all European Union acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by that treaty. The Court held further that, notwithstanding the fact that undertakings given in the UN context must be observed when implementing Security Council resolutions, it does not follow from the principles governing the international legal order under the United Nations that an act adopted by the European Union such as Regulation No 881/2002 thereby enjoys immunity from jurisdiction. The Court added that there is no basis for such immunity in the EC Treaty.

23. In those circumstances the Court held, in paragraphs 326 and 327 of the Kadi judgment, that the Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all European Union acts in the light of fundamental rights, including where such acts are designed to implement Security Council resolutions, and that the General Court's reasoning was consequently vitiated by an error of law.

24. Ruling on the action brought by Mr Kadi before the General Court, the Court held, in paragraphs 335 to 341 of the Kadi judgment, that the effectiveness of judicial review means that the competent European Union authority is bound to communicate the grounds for the contested listing decision to the person concerned and to provide that person with the opportunity to be heard in that regard. The Court stated that, as regards a decision that a person's name should be listed for the first time, for reasons connected with the effectiveness of the restrictive measures at issue and with the objective of the regulation concerned, it was necessary that that disclosure and that hearing should occur not prior to the adoption of that decision but when that decision was adopted or as swiftly as possible thereafter.

25. In paragraphs 345 to 349 of the Kadi judgment, the Court added that, since the Council had neither communicated to Mr Kadi the evidence relied on against him to justify the restrictive measures imposed on him nor afforded him the right to be informed of that evidence within a reasonable period after those measures were enacted, Mr Kadi had not been in a position effectively to

make known his point of view in that regard, with the consequence that the rights of defence and the right to effective judicial review had been infringed. The Court also stated, in paragraph 350 of that judgment, that that infringement had not been remedied before the Courts of the European Union, given that the Council had not adduced before them any such evidence. In paragraphs 369 to 371 of that judgment, the Court concluded, on the same grounds, that Mr Kadi's fundamental right to respect for property had been infringed.

26. The effects of the annulled regulation in so far as it concerned Mr Kadi were maintained for a maximum period of three months in order to allow the Council to remedy the infringements found.

The response of the European Union institutions to the Kadi judgment and the contested regulation

27. On 21 October 2008 the Chairman of the Sanctions Committee communicated the narrative summary of reasons for Mr Kadi's listing on that committee's Consolidated List to France's Permanent Representative to the UN, and authorised its transmission to Mr Kadi.

28. That summary of reasons is worded as follows: 'The individual Yasin Abdullah Ezzedine Qadi ... satisfies the standard for listing by the [Sanctions Committee] because of his actions in (a) participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; (b) supplying, selling, or transferring arms and related material to; (c) recruiting for; or (d) otherwise supporting acts or activities of; Al-Qaeda, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof (see United Nations Security Council Resolution 1822 (2008), paragraph 2) ...'

Mr Qadi has acknowledged that he is a founding trustee and directed the actions of the Muwafaq Foundation. The Muwafaq Foundation historically operated under the umbrella of Makhtab Al-Khidamat/Al-Kifah (QE.M.12.01), an organisation founded by Mr Abdullah Azzam and Mr Usama Muhammed Awad bin Laden (Q.L.B.8.01), and the predecessor to Al-Qaeda (Q.E.A.4.01). Following the dissolution of Makhtab Al-Khidamat/Al-Kifah in early June 2001 and its absorption into Al-Qaeda, a number of NGOs formerly associated with Makhtab Al-Khidamat/Al-Kifah, including the Muwafaq Foundation, also joined with Al-Qaeda.

In 1992, Mr Qadi hired Mr Shafiq Ben Mohamed Ben Mohamed Al-Ayadi (Q.L.A.25.01) to head the European offices of the Muwafaq Foundation. During the mid-1990s, Mr Al-Ayadi also headed the Muwafaq Foundation branch in Bosnia and Herzegovina. Mr Qadi hired Mr Al-Ayadi on the recommendation of known Al-Qaeda financier Mr Wa'el Hamza Abd Al-Fatah Julaidan (Q.L.J.79.02), who fought with Mr bin Laden in Afghanistan in the 1980s. At the time of his appointment by Mr Qadi as the Muwafaq Foundation's European director, Mr Al-Ayadi was operating under agreements with Mr bin Laden. Mr Al-Ayadi was one of the principal leaders of the Tunisian Islamic Front, went to Afghanistan in the early 1990s to receive paramilitary training, and then went to Sudan with others to meet Mr bin Laden, with whom they concluded a formal agreement regarding the reception and training of Tunisians. They later met with Mr bin Laden a second time, securing an agreement for bin Laden collaborators in Bosnia and Herzegovina to receive Tunisian mujahidin from Italy.

In 1995, the leader of Al-Qama'at Al-Islamiya, Mr Talad Fuad Kassem, said that the Muwafaq Foundation had provided logistical and financial support for a

mujahidin battalion in Bosnia and Herzegovina. In the mid-1990s, the Muwafaq Foundation was involved in providing financial support for terrorist activities of the mujahidin, as well as arms trafficking from Albania to Bosnia and Herzegovina. Some involvement in the financing of these activities was provided by Mr bin Laden.

Mr Qadi was also a major shareholder in the now closed Sarajevo-based Deposita Banka, in which Mr Al-Ayadi also held a position and acted as nominee for Mr Qadi's shares. Planning sessions for an attack against a United States facility in Saudi Arabia may have taken place at this bank.

Mr Qadi further owned several firms in Albania which funnelled money to extremists or employed extremists in positions where they controlled the firm's funds. Mr Bin Laden provided the working capital for four or five of Mr Qadi's companies in Albania.

29. That summary of reasons was also published on the website of the Sanctions Committee.

30. On 22 October 2008 France's Permanent Representative to the European Union transmitted that summary of reasons to the Commission, which sent it to Mr Kadi on the same day, informing him that, for the reasons set out in that summary, it envisaged maintaining his listing in Annex I to Regulation No 881/2002. The Commission gave Mr Kadi until 10 November 2008 to comment on those reasons and to provide it with any information that he might consider relevant before it took its final decision.

31. On 10 November 2008 Mr Kadi sent his comments to the Commission. He argued, on the basis of documents certifying that the Swiss, Turkish and Albanian authorities had decided not to pursue criminal investigations against him concerning his alleged support of terrorist organisations or involvement in financial crime, that, whenever he had been given the opportunity to express his point of view on the evidence said to inculcate him, he had been able to demonstrate that the allegations made against him were unfounded, and he requested the production of the evidence in support of the claims and assertions made in the summary of reasons relating to his being listed on the Sanctions Committee Consolidated List and the relevant documents in the Commission's file, and asked that he be allowed to submit comments on that evidence. While drawing attention to the vagueness and generality of a number of the allegations contained in that summary of reasons, he disputed, with supporting evidence, that any of the reasons relied on against him were well founded.

32. On 28 November 2008 the Commission adopted the contested regulation.

33. According to recitals 3 to 6, 8 and 9 of the preamble to that regulation:

'(3) In order to comply with [the *Kadi* judgment], the Commission has communicated the ... [summary] of reasons provided by the ... Sanctions Committee, to Mr Kadi ... and given [him] the opportunity to comment on these grounds in order to make [his] point of view known.

(4) The Commission has received comments by Mr Kadi ... and examined these comments.

(5) The list of persons, groups and entities to whom the freezing of funds and economic resources should apply, drawn up by the ... Sanctions Committee, includes Mr Kadi ...

(6) After having carefully considered the comments received from Mr Kadi in a letter dated 10 November 2008, and given the preventive nature of the freezing of funds and economic resources, the Commission considers that the listing of Mr Kadi is justified for

reasons of his association with the Al-Qaida network.

(8) In view of this, Mr Kadi ... should be added to Annex I.

(9) This Regulation should apply from 30 May 2002, given the preventive nature and objectives of the freezing of funds and economic resources under Regulation ... No 881/2002 and the need to protect legitimate interests of the economic operators, who have been relying on the legality of [the regulation annulled by the *Kadi* judgment].

34. In accordance with Article 1 of the contested regulation and the annex thereto, Annex I to Regulation No 881/2002 was amended to that effect, *inter alia*, by the addition of the following entry under the heading 'Natural persons':

'Yassin Abdullah Ezzedine Qadi (alias (a) Kadi, Shaykh Yassin Abdullah; (b) Kahdi, Yasin; (c) Yasin Al-Qadi). Date of birth: 23.2.1955. Place of birth: Cairo, Egypt. Nationality: Saudi Arabian. Passport number: B 751550, (b) E 976177 (issued on 6.3.2004, expiring on 11.1.2009). Other information: Jeddah, Saudi Arabia.'

35. The contested regulation, in accordance with Article 2 thereof, entered into force on 3 December 2008 and is applicable from 30 May 2002.

36. By letter of 8 December 2008, the Commission replied to Mr Kadi's comments of 10 November 2008.

The procedure before the General Court and the judgment under appeal

37. By application lodged at the Registry of the General Court on 26 February 2009, Mr Kadi brought an action for annulment of the contested regulation in so far as it concerns him. In support of his claims, he put forward five pleas in law. The second plea alleged breach of the rights of the defence and of the right to effective judicial protection, and the fifth plea alleged a disproportionate restriction on the right to property.

38. In the judgment under appeal, the General Court, relying on paragraphs 326 and 327 of the *Kadi* judgment, first held, in paragraph 126 of the judgment under appeal, that its task was to ensure 'in principle the full review' of the lawfulness of the contested regulation in the light of the fundamental rights guaranteed by the European Union. It added, in paragraphs 127 to 129 of the judgment under appeal, that, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection, the review carried out by the Courts of the European Union of Union measures to freeze funds can be regarded as effective only if it concerns, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying them.

39. The argument of the Commission and the Council concerning the Court of Justice's failure to comment, in the *Kadi* judgment, on the scope and intensity of such judicial review was held, in paragraph 131 of the judgment under appeal, to be clearly wrong.

40. In that regard, the General Court held in essence, in paragraphs 132 to 135 of the judgment under appeal, that it is obvious, particularly from paragraphs 326, 327, 336 and 342 to 344 of the *Kadi* judgment, that it was the intention of the Court of Justice that judicial review, in principle full review, should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in that measure are based.

41. The General Court further stated, in paragraphs 138 to 146 of the judgment under appeal, that, by repeating the essence of its reasoning, in connection with the regime

mentioned in paragraphs 14 and 15 of this judgment, in its judgment of 12 December 2006 in Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II-4665, the Court of Justice approved and endorsed the standard and intensity of judicial review determined in that judgment, namely that the Courts of the European Union must review the assessment made by the institution concerned of the facts and circumstances relied on in support of the restrictive measures at issue and determine whether the information and evidence on which that assessment is based is accurate, reliable and consistent, and such review cannot be barred on the ground that that information and evidence is secret or confidential.

42. After having also emphasised, in paragraphs 148 to 151 of the judgment under appeal, that the effect on Mr Kadi's rights of the restrictive measures to which he had been subject for almost ten years was marked and long-lasting, in paragraph 151 of that judgment the General Court confirmed 'the principle of a full and rigorous judicial review of [freezing measures such as those at issue in this instance]'.

43. Examining, next, the second and fifth pleas in law in support of annulment, the General Court found, in paragraphs 171 to 180 of the judgment under appeal, that there was a breach of Mr Kadi's rights of defence, after observing, in essence, that:

— those rights had been respected only in a purely formal and superficial sense, since the Commission considered itself strictly bound by the findings of the Sanctions Committee and at no time envisaged calling them into question in the light of Mr Kadi's comments or making any real effort to refute the exculpatory evidence adduced by Mr Kadi;

— Mr Kadi was refused access by the Commission to the evidence against him despite his express request, whilst no balance was struck between his interests and the need to protect the confidentiality of the information in question, and

— the few pieces of information and the vague allegations in the summary of reasons relating to the listing of Mr Kadi on the Sanctions Committee Consolidated List, for example, that Mr Kadi was a shareholder in a Bosnian bank in which planning sessions for an attack on a United States facility in Saudi Arabia 'may have' taken place, were clearly insufficient to enable Mr Kadi to mount an effective challenge to the allegations against him.

44. The General Court also found, in paragraphs 181 to 184 of the judgment under appeal, that the principle of effective judicial protection had been infringed on the grounds, first, that since Mr Kadi was afforded no proper access to the information and evidence used against him, Mr Kadi had been unable to defend his rights with regard to that information and evidence in satisfactory conditions before the Courts of the European Union and, secondly, that that infringement had not been remedied in the course of the proceedings before the General Court, given that no evidence of that kind or any indication of the evidence relied on against Mr Kadi had been disclosed to the General Court by the institutions concerned.

45. The General Court further held, in paragraphs 192 to 194 of the judgment under appeal, that since the contested regulation had been adopted without Mr Kadi having been able to put his case to the competent authorities, notwithstanding the fact that the measures freezing his assets, given their general application and duration, represented a significant restriction on his right

to property, the imposition of such measures constituted an unjustified restriction of that right, and consequently that Mr Kadi's claim that the infringement by that regulation of his fundamental right to respect for property entailed a breach of the principle of proportionality was well founded.

46. The General Court therefore annulled the contested regulation in so far as it concerns Mr Kadi.

Procedure before the Court and forms of order sought

47. By order of the President of the Court of 9 February 2011, Cases C-584/10 P, C-593/10 P and C-595/10 P were joined for the purposes of the written and oral procedures and the judgment.

48. By order of the President of the Court of 23 May 2011, first, the Czech Republic, the Kingdom of Denmark, Ireland, the Kingdom of Spain and the Republic of Austria were granted leave to intervene in Case C-593/10 P in support of the forms of order of the Council, and, secondly, the Republic of Bulgaria, the Italian Republic, the Grand Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Slovak Republic and the Republic of Finland were granted leave to intervene in Cases C-584/10 P, C-593/10 P and C-595/10 P in support of the forms of order of the Commission, the Council and the United Kingdom.

49. In Case C-584/10 P, the Commission claims that the Court should:

- set aside the judgment under appeal in its entirety;
 - dismiss Mr Kadi's application for annulment of the contested regulation in so far as it concerns him as being unfounded, and
 - order Mr Kadi to pay the Commission's costs in this appeal and in the proceedings before the General Court.
50. In Case C-593/10 P, the Council claims that the Court should:
- set aside the judgment under appeal;
 - dismiss Mr Kadi's application for annulment of the contested regulation in so far as it concerns him as being unfounded, and
 - order Mr Kadi to pay the costs in the proceedings at first instance and in the present appeal.

51. In Case C-595/10 P, the United Kingdom claims that the Court should:

- set aside the judgment under appeal in its entirety;
- dismiss Mr Kadi's application for annulment of the contested regulation in so far as it concerns him, and
- order Mr Kadi to bear the United Kingdom's costs in the proceedings before the Court of Justice.

52. Mr Kadi contends in all three cases that the Court should:

- dismiss the appeals;
- uphold the judgment under appeal and declare that it became immediately enforceable on the date of delivery; and
- order the appellants to pay Mr Kadi's costs in the present appeal, including all costs incurred in responding to the observations of intervening Member States.

53. The French Republic, intervener at first instance, claims that in all three cases the Court should:

- set aside the judgment under appeal, and
- give final judgment as to the substance, in accordance with Article 61 of the Statute of the Court of Justice of the European Union, and reject the forms of order sought by Mr Kadi at first instance.

54. The Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, Ireland, the Kingdom of Spain, the Italian Republic, the Grand Duchy of Luxembourg,

Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Slovak Republic and the Republic of Finland claim that the judgment under appeal should be set aside and that Mr Kadi's action for annulment should be dismissed.

The request to reopen the oral procedure

55. By letter of 9 April 2013, Mr Kadi requested that the Court reopen the oral procedure, claiming, in essence, that statements made in point 117 of the Opinion of the Advocate General in relation to the issue of respect for the rights of the defence are contradicted by the findings of fact made by the General Court, in paragraphs 171 and 172 of the judgment under appeal, which have not been debated by the parties in the course of these appeals.

56. In that regard, it must be recalled that, first, the Court may, of its own motion, on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure, in accordance with Article 83 of the Rules of Procedure, if it considers that it lacks sufficient information or that the case should be decided on the basis of an argument which has not been debated between the parties (see judgment of 11 April 2013 in Case C-535/11 *Novartis Pharma* [2013] ECR I-0000, paragraph 30 and case-law cited).

57. Secondly, pursuant to the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require the Advocate General's involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (see judgment of 22 November 2012 in Case C-89/11 P *E.ON Energie v Commission* [2012] ECR I-0000, paragraph 62 and case-law cited).

58. In the present case, the Court, having heard the Advocate General, considers that it has sufficient information to adjudicate and that the cases need not be decided on the basis of arguments which have not been debated between the parties. There is therefore no need to accede to the request to reopen the oral procedure.

The appeals

59. The Commission, the Council and the United Kingdom put forward various grounds in support of their respective appeals. There are, in essence, three. The first ground, raised by the Council, alleges an error of law in that the contested regulation was not recognised as having immunity from jurisdiction. The second ground, raised by the Commission, the Council and the United Kingdom, alleges errors of law with regard to the level of intensity of judicial review determined in the judgment under appeal. The third ground, again raised by those three appellants, alleges that the General Court erred in its examination of Mr Kadi's pleas in respect of infringement of his rights of defence and his right to effective judicial protection, and in respect of infringement of the principle of proportionality.

The first ground of appeal: error of law in that the contested regulation was not recognised as having immunity from jurisdiction

Arguments of the parties

60. In relation to the first ground of appeal, the Council, supported by Ireland, the Kingdom of Spain and the Italian Republic, complains that the General Court erred in law, in particular in paragraph 126 of the judgment under appeal, by refusing, pursuant to the *Kadi* judgment, to recognise that the contested regulation had immunity

from jurisdiction. The Council, supported by Ireland, formally requests the Court to reconsider the principles set out in that regard in the *Kadi* judgment.

61. Referring to paragraphs 114 to 120 of the judgment under appeal, the Council, supported by Ireland and the Italian Republic, claims that the refusal to grant the contested regulation immunity from jurisdiction is contrary to international law. That refusal wholly ignores the fact that it is the Security Council which has primary responsibility for determining the measures necessary for the maintenance of international peace and security and ignores the primacy of obligations under the United Nations Charter over those arising under any other international agreement. It disregards the obligation to act in good faith and the duty to provide mutual assistance which must be respected when implementing Security Council measures. That approach leads the European Union's institutions to substitute themselves for the international bodies which have the relevant powers. It amounts to reviewing the legality of Security Council resolutions in the light of European Union law. The uniform, unconditional and immediate application of those resolutions is jeopardised. States which are members both of the United Nations and of the European Union find themselves in an impossible position as regards meeting their international obligations.

62. The refusal to grant the contested 'regulation' immunity from jurisdiction is also contrary to European Union law. It wholly ignores the fact that, under that law, the European Union institutions are bound to comply with international law and with the decisions of organs of the UN, where those institutions exercise, on the international stage, powers that have been transferred to them by the Member States. It disregards the need to strike a balance between the maintenance of international peace and security, on the one hand, and the protection of human rights and fundamental freedoms, on the other.

63. Mr Kadi contends that any challenge to the position that a European Union measure such as the contested regulation does not have immunity from jurisdiction is contrary to the principle of *res judicata*, given that that challenge concerns a question of law which was settled between the same parties by the *Kadi* judgment following consideration of the same arguments as those raised in the present case.

64. Referring to various passages in that judgment, Mr Kadi disputes, in any event, that the refusal to grant the contested regulation immunity from jurisdiction is contrary to international law and to European Union law.

Findings of the Court

65. In paragraph 126 of the judgment under appeal, the General Court held that, in accordance with paragraphs 326 and 327 of the *Kadi* judgment, the contested regulation could not be afforded any immunity from jurisdiction on the ground that its objective is to implement resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

66. Various factors, set out in paragraphs 291 to 327 of the *Kadi* judgment, were advanced in support of the position stated by the Court in that judgment, and there has been no change in those factors which could justify reconsideration of that position, those factors being, essentially, bound up with the constitutional guarantee which is exercised, in a Union based on the rule of law (see Case C-550/09 *E and F* [2010] ECR I-6213, paragraph 44, and the judgment of 26 June 2012 in Case C-335/09 P *Poland v Commission* [2012] ECR I-0000, paragraph 48),

by judicial review of the lawfulness of all European Union measures, including those which, as in the present case, implement an international law measure, in the light of the fundamental rights guaranteed by the European Union.

67. That European Union measures implementing restrictive measures decided at international level enjoy no immunity from jurisdiction has moreover been confirmed in Joined Cases C-399/06 P and C-403/06 P *Hassan and Ayadi v Council and Commission* [2009] ECR I-11393, paragraphs 69 to 75, and, more recently, in the judgment of 16 November 2011 in Case C-548/09 P *Bank Mellat v Council* [2011] ECR I-0000, where it is stated, in paragraph 105, with reference to the *Kadi* judgment, that, without the primacy of a Security Council resolution at the international level thereby being called into question, the requirement that the European Union institutions should pay due regard to the institutions of the United Nations must not result in there being no review of the lawfulness of such European Union measures, in the light of the fundamental rights which are an integral part of the general principles of European Union law.

68. It follows that the judgment under appeal, in particular paragraph 126 thereof, is not vitiated by any error of law with regard to the General Court's refusal, in accordance with the *Kadi* judgment, to afford the contested regulation immunity from jurisdiction.

69. The first ground of appeal must therefore be rejected.

The second and third grounds of appeal: respectively, errors of law relating to the level of intensity of judicial review defined in the judgment under appeal and errors committed by the General Court in the examination of the pleas for annulment based on infringement of the rights of the defence, the right to effective judicial protection and the principle of proportionality

70. The second and third grounds of appeal should be examined together, since the subject of both is, in essence, a criticism of errors of law vitiating the interpretation of the rights of the defence and the right to effective judicial protection adopted by the General Court in the judgment under appeal.

Arguments of the parties

71. In relation to the second and third grounds of appeal, the Commission, the Council and the United Kingdom, supported by the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Slovak Republic and the Republic of Finland, claim, first, that the judgment under appeal is vitiated by an error of law in that, contrary to what is stated in paragraphs 132 to 147 of that judgment, the *Kadi* judgment contains no indication supporting the General Court's approach concerning the level of intensity of judicial review to be applied to a European Union measure such as the contested regulation.

72. In the first place, the requirement, set out in paragraph 326 of the *Kadi* judgment, that there should be 'review, in principle full review', of the lawfulness of the contested regulation should be placed in the international context to the adoption of that measure, as described, in particular, in paragraphs 292 to 297 of that judgment.

73. In the second place, it is claimed that the General Court wrongly held, in paragraph 138 of the judgment under appeal, that the Court had, in the *Kadi* judgment,

endorsed the standard of review determined by the General Court in its case-law relating to the regime referred to in paragraphs 14 and 15 of this judgment. The fact is that the *Kadi* judgment contains no reference to that case-law of the General Court. Further, that argument wholly ignores the fundamental differences between that regime and the regime at issue in the present case, with regard to the discretion of the institutions of the European Union and their access to the information and evidence pertaining to the restrictive measures adopted.

74. Second, the Commission, the Council and the United Kingdom, supported by all the Member States intervening in the appeals, claim, on the basis of arguments taken from international law and European Union law broadly comparable to those set out in paragraphs 61 and 62 of this judgment, that the definition of the level of intensity of judicial review set out in paragraphs 123 to 147 of the judgment under appeal is wrong in law. They add that the excessively interventionist approach followed by the General Court in the judgment under appeal cannot be reconciled with settled case-law in favour of restricted judicial review, limited to manifest error of assessment, when the measures concerned are the outcome of choices resulting from complex assessments and the exercise of a wide discretion exercised in pursuit of broadly defined goals.

75. Third, the Commission, the Council and the United Kingdom claim that the General Court erred, in paragraphs 148 to 151 of the judgment under appeal, in suggesting that the restrictive measures at issue in this case should now be regarded as equivalent to a criminal penalty. Supported by the Czech Republic, Ireland, the French Republic, the Italian Republic, Hungary and the Republic of Austria, they claim that the purpose of those measures, which are essentially precautionary, is to anticipate and prevent current or future threats to international peace and security, and that they can be distinguished from criminal penalties, which are imposed, for their part, in respect of punishable past acts which have been objectively established. Moreover, the measures at issue are intended to be temporary and are accompanied by derogations.

76. Fourth, the Commission, the Council and the United Kingdom claim that the General Court's interpretation, in paragraphs 171 to 188 and 192 to 194 of the judgment under appeal, relating to the requirements, stemming from respect for Mr Kadi's fundamental rights, applicable to the listing of Mr Kadi's name in Annex I to Regulation No 881/2002 following the *Kadi* judgment is legally erroneous.

77. Supported by the Republic of Bulgaria, the Czech Republic, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Slovak Republic and the Republic of Finland, they claim that the General Court erred in holding that respect for those fundamental rights required the disclosure of the information and evidence relied on against Mr Kadi.

78. That interpretation by the General Court wholly ignores the possibility, stated in paragraphs 342 to 344 of the *Kadi* judgment, that the right of a party concerned to the disclosure of evidence relied on against him might be restricted in order to ensure that the disclosure of sensitive information cannot lead to third parties becoming privy to that information and thereby evading measures taken to combat international terrorism. Moreover, the criticisms made in paragraphs 345 to 352 of that judgment related to the failure to communicate to Mr Kadi the reasons for the listing of his name in Annex I to Regulation No 881/2002,

and not to the failure to disclose information and evidence held by the Sanctions Committee.

79. Further, the General Court's approach does not take into account the many material obstacles that exist to the communication of such information and evidence to the European Union institutions, in particular the fact that the source of that information and evidence is a statement of case sent to the Sanctions Committee by a Member of the UN, generally subject to a requirement of confidentiality due to its sensitivity.

80. In the present case, the summary of reasons provided by the Sanctions Committee which was disclosed to Mr Kadi enabled him to understand why his name was listed in Annex I to Regulation No 883/2002. Far from being limited to allegations against him which were general, unsubstantiated, vague and lacking in detail, that summary, contrary to what is stated in paragraphs 157 and 177 of the judgment under appeal, set out in detail the evidence which had led the Sanctions Committee to take the view that Mr Kadi had personal and direct links with the Al-Qaeda network and with Usama bin Laden.

81. Fifth, the Commission contends that the General Court erred by failing, except as regards the finding of fact made in paragraph 67 of the judgment under appeal, to take into account the parallel proceedings brought by Mr Kadi before courts in the United States in order to dismiss Mr Kadi's objections concerning the alleged lack of effective judicial protection and the alleged impossibility of obtaining access to the relevant information and evidence.

82. Sixth, the Commission, the Council and the United Kingdom claim that the analysis carried out by the General Court, in paragraphs 127 and 128 of the judgment under appeal, of the alterations made to the re-examination procedures established at United Nations level is defective.

83. Supported by all the Member States intervening in the appeals, they claim that the *ex officio* periodic re-examination procedure introduced by Resolution 1822 (2008) has contributed to an improvement in the protection of fundamental rights, as demonstrated by the fact that the names of a great many persons and entities have been removed from the Sanctions Committee Consolidated List. As regards the Office of the Ombudsman established by Resolution 1904 (2009), its creation represents a decisive new departure in this area by enabling the person concerned to argue his case before an independent and impartial authority, which has the task of submitting, if appropriate, to the Sanctions Committee reasons supporting the requested delisting.

84. Security Council Resolution 1989 (2011) of 17 June 2011 confirms the desire constantly to improve the process for dealing with requests for removal from the Sanctions Committee Consolidated List. In particular, such a delisting is no longer dependent on the unanimous consent of the members of the Sanctions Committee. It becomes effective 60 days after that Committee has completed consideration of a recommendation to that effect and of a comprehensive report both submitted by the Ombudsman, unless there is a consensus to the contrary within the Sanctions Committee or there is a request that the file be referred back to the Security Council. In the event that the Ombudsman's recommendation is not followed, the obligation on the Sanctions Committee to state reasons and its duty of transparency have been extended. Resolution 1989 (2011) is also intended to improve the access of the Ombudsman to confidential information held by the Members of the United Nations

and the disclosure of the identity of the States which requested the listing.

85. Mr Kadi responds, first, that the General Court correctly held, in the judgment under appeal, that the Court gave a perfectly clear indication, in the *Kadi* judgment, of the scope and intensity of judicial review applicable in this case. The Court explicitly stated, in the *Kadi* judgment, that the review of lawfulness should be a full review, extending, subject only to confidentiality requirements relating to public security, to the information and evidence relied on against Mr Kadi. Further, the fact that, unlike the regime referred to in paragraphs 14 and 15 of this judgment, the regime at issue in this case does not involve, prior to the procedure at European Union level, any procedure safeguarding respect for the rights of the defence subject to effective judicial review is an argument which supports the enhancement of effective judicial protection at European Union level, as stated by the General Court in paragraphs 186 and 187 of the judgment under appeal.

86. Second, Mr Kadi does not accept that the requirement stated in the judgment under appeal in relation to the level of intensity of judicial review applicable in this case is incorrect.

87. In the first place, the General Court's approach does not disregard international law. Judicial review of the lawfulness of the contested regulation is not equivalent to review of the validity of the resolution which that regulation implements. That review does not challenge either the primary responsibility of the Security Council in the area concerned or the primacy of the Charter of the United Nations over any other international agreement. Nor is such judicial review intended to substitute the political judgment of the Courts of the European Union for that of the competent international authorities. Its purpose is solely to ensure observance of the requirement that Security Council Resolutions are implemented within the European Union in a manner compatible with the fundamental principles of European Union law. More specifically, such review contributes to ensuring that a balance is struck between the requirements of international peace and security, on the one hand, and the protection of fundamental rights, on the other.

88. In the second place, the General Court's approach is consistent with European Union law, which requires respect for fundamental rights and the guarantee of independent and impartial judicial review, including review of European Union measures based on international law.

89. Third, after noting that the considerations of the General Court on the nature of the restrictive measures at issue are supplementary, Mr Kadi nonetheless argues that, in his particular case, those measures can no longer be described as preventive and have become punitive, by reason both of their general scope and the fact that he has been subject to them for a very long time, a factor which justifies full and rigorous review of the contested regulation.

90. Fourth, Mr Kadi does not accept that the requirements imposed by the General Court for the purposes of respect for his fundamental rights are vitiated by an error of law.

91. Mr Kadi contends, in this regard, that effective judicial review is impossible when there is a complete failure to disclose the information and evidence held by the bodies of the UN. As these very bodies accept, the narrative summary of reasons provided by the Sanctions Committee is not designed to be used as evidence. It

merely comprises a useful indication of the past activities of the person concerned and of the existence of evidence known to members of that committee.

92. The fact that there is no formal procedure for the exchange of information between the Security Council and the institutions of the European Union is no bar to an exchange of the information necessary to ensuring the achievement of their common goal of safeguarding fundamental human rights when applying restrictive measures. In the present case, despite Mr Kadi's express request, the Commission has not even attempted to obtain disclosure by the Sanctions Committee of a detailed statement of the facts or evidence justifying the listing of Mr Kadi's name on the lists at issue.

93. As regards the narrative summary of reasons provided by the Sanctions Committee, it contains a number of general and unsubstantiated allegations, which Mr Kadi has not been in a position effectively to rebut.

94. Fifth, Mr Kadi contends that the legal proceedings in the United States are of no relevance to this case, given that the purpose of those proceedings is the annulment of his listing on the list of the Office of Foreign Assets Control, of the United States Treasury Department, for reasons wholly distinct from the grounds at issue in this case. Those proceedings concern neither the contested regulation nor the Security Council Resolutions which that regulation is designed to implement.

95. Sixth, Mr Kadi contends that, when the contested regulation was adopted, the only re-examination procedure established at United Nations level was that of the Focal Point. As regards the creation of the Office of the Ombudsman, which, although post-dating that adoption, was taken into account by the General Court, that does not offer any guarantee of judicial protection. In particular, the person seeking the delisting of his name from the Sanctions Committee Consolidated List does not have available to him a detailed statement of the reasons for his being placed on that list, nor the evidence relied on against him, and he does not have the right to be heard by the Sanctions Committee, the body that will exclusively make the decision on delisting. Moreover, the Ombudsman has no power to compel any action by the Members of the UN or by the Sanctions Committee, which enjoys a discretion. The persistent shortcomings of this procedure have been emphasised by, among others, the Office of the Ombudsman itself in its first report of January 2011, which drew particular attention to the lack of access to classified or confidential information and the fact that the applicant remains unaware of the identity of the State or States that proposed his inclusion in that list.

96. Those shortcomings were not rectified by Resolution 1989 (2011). The recommendations of the Office of the Ombudsman still do not have binding force. The determination of the criteria for delisting from the Sanctions Committee Consolidated List and the power to decide to delist remain within the discretion of the Sanctions Committee. Where a delisting recommendation is made by the Office of the Ombudsman, any member of the Sanctions Committee may refer the matter to the Security Council, the five permanent members of which may exercise their veto according to their discretion. The Office of the Ombudsman depends, moreover, on the willingness of States to cooperate in gathering information.

Findings of the Court

— The extent of the rights of the defence and of the right to effective judicial protection

97. As stated by the General Court in paragraphs 125,

126 and 171 of the judgment under appeal, the Court held, in paragraph 326 of the *Kadi* judgment, that the Courts of the European Union must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order, including review of such measures as are designed to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations (see also, to that effect, *Hassan and Ayadi v Council and Commission*, paragraph 71, and *Bank Mellat v Council*, paragraph 105). That obligation is expressly laid down by the second paragraph of Article 275 TFEU.

98. Those fundamental rights include, *inter alia*, respect for the rights of the defence and the right to effective judicial protection.

99. The first of those rights, which is affirmed in Article 41(2) of the Charter of Fundamental Rights of the European Union ('the Charter') (see, to that effect, the judgment of 21 December 2011 in *Case C-27/09 P France v People's Mojahedin Organization of Iran* [2011] ECR I-0000, paragraph 66), includes the right to be heard and the right to have access to the file, subject to legitimate interests in maintaining confidentiality.

100. The second of those fundamental rights, which is affirmed in Article 47 of the Charter, requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons, without prejudice to the power of the court having jurisdiction to require the authority concerned to disclose that information, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question (see the judgment of 4 June 2013 in *Case C-300/11 ZZ* [2013] ECR I-0000, paragraph 53 and case-law cited).

101. Article 52(1) of the Charter nevertheless allows limitations on the exercise of the rights enshrined in the Charter, subject to the conditions that the limitation concerned respects the essence of the fundamental right in question and, subject to the principle of proportionality, that it is necessary and genuinely meets objectives of general interest recognised by the European Union (see *ZZ*, paragraph 51).

102. Further, the question whether there is an infringement of the rights of the defence and of the right to effective judicial protection must be examined in relation to the specific circumstances of each particular case (see, to that effect, *Case C-110/10 P Solway v Commission* [2011] ECR I-0000, paragraph 63), including, the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question (see, to that effect, as regards compliance with the duty to state reasons, the judgments of 15 November 2012 in *Joined Cases C-539/10 P and C-550/10 P Al-Aqsa v Council and Netherlands v Al-Aqsa* [2012] ECR I-0000, paragraphs 139 and 140 = 32 HRLJ 166 (2012), and in *Case C-417/11 P Council v Bamba* [2012] ECR I-0000, paragraph 55 = 32 HRLJ 159 (2012)).

103. In this case, it is necessary to determine whether, in the light of the requirements stated, in particular, in Article 3(1) and (5) TEU and Article 21(1) and (2)(a) and (c) TEU, relating to the maintenance of international

peace and security while respecting international law, and specifically the principles of the Charter of the United Nations, the fact that Mr Kadi and the Courts of the European Union did not have access to the information and evidence relied on against him, to which the General Court draws attention, particularly in paragraphs 173, 181 and 182 of the judgment under appeal, constitutes an infringement of the rights of the defence and the right to effective judicial protection.

104. In that regard, as the Court has previously stated, specifically in paragraph 294 of the *Kadi* judgment, it must be emphasised that, in accordance with Article 24 of the Charter of the United Nations, the Security Council has been invested by the members of the UN with the primary responsibility for the maintenance of international peace and security. To that end, it is the task of the Security Council to determine what constitutes a threat to international peace and security and to take the measures necessary, by means of the adoption of resolutions under Chapter VII of that Charter, to maintain or restore international peace and security, in accordance with the purposes and principles of the United Nations, including respect for human rights.

105. In that context, as is apparent from the resolutions, referred to in paragraphs 10 and 11 of this judgment, governing the regime of restrictive measures such as those at issue in this case, it is the task of the Sanctions Committee, on the proposal of a UN member supported by a 'statement of case' which should provide 'as much detail as possible on the basis(es) for the listing', the 'nature of the information' and 'supporting information or documents that can be provided', to designate, applying the criteria laid down by the Security Council, the organisations, entities and individuals whose funds and other economic resources are to be frozen. That designation, put into effect by the listing of the name of the organisation, entity or individual concerned on the Sanctions Committee Consolidated List which is maintained at the request of the Member States of the UN, is to be based on a 'summary of reasons' which is to be produced by the Sanctions Committee in the light of the material which the Member State proposing the listing has identified as capable of disclosure, particularly to the party concerned, and which is to be made accessible on its website.

106. When the European Union implements Security Council resolutions adopted under Chapter VII of the Charter of the United Nations, on the basis of a Common Position or a joint action adopted by the Member States pursuant to the provisions of the EU Treaty relating to the common foreign and security policy, the competent European Union authority must take due account of the terms and objectives of the resolution concerned and of the relevant obligations under that Charter relating to such implementation (see the *Kadi* judgment, paragraphs 295 and 296).

107. Consequently, where, under the relevant Security Council resolutions, the Sanctions Committee has decided to list the name of an organisation, entity or individual on its Consolidated List, the competent European Union authority must, in order to give effect to that decision on behalf of the Member States, take the decision to list the name of that organisation, entity or individual, or to maintain such listing, in Annex I to Regulation No 881/2002 on the basis of the summary of reasons provided by the Sanctions Committee. On the other hand, there is no provision in those resolutions to the effect that the Sanctions Committee is automatically to make available

to, in particular, the European Union authority responsible for the adoption by the European Union of its decision to list or maintain a listing, any material other than that summary of reasons.

108. Accordingly, both in respect of an initial decision to list the name of an organisation, entity or individual in Annex I to Regulation No 881/2002 and, as in the present case, in respect of a decision to maintain such a listing originally adopted before 3 September 2008, the date of the *Kadi* judgment, Article 7a(1) and (2) and Article 7c(1) and (2) of Regulation No 881/2002, inserted by Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation No 881/2002 (OJ 2009 L 346 p. 42) in order to amend the listing procedure following that judgment, as is explained in recital 4 of the preamble to Regulation No 1286/2009, refer exclusively to the 'statement of reasons' provided by the Sanctions Committee for the purposes of the taking of such decisions.

109. In the particular case of Mr Kadi, it is apparent from the file that the initial listing of his name, on 17 October 2001 in the Sanctions Committee Consolidated List followed a request by the United States on the basis of the adoption on 12 October 2001 of a decision in which the Office of Foreign Asset Control identified Mr Kadi as a 'Specially Designated Global Terrorist'.

110. As is apparent from recital 3 of the preamble to the contested regulation [Regulation No 1190/2008], following the *Kadi* judgment the Commission, by means of that regulation, decided to maintain the name of Mr Kadi on the list in Annex I to Regulation No 881/2002 on the basis of the narrative summaries of reasons which had been transmitted by the Sanctions Committee. As the General Court recorded in paragraph 95 of the judgment under appeal, and as the Commission confirmed at the hearing before the Court, the Commission was not, for that purpose, put in possession of evidence other than such a summary of reasons.

111. In proceedings relating to the adoption of the decision to list or maintain the listing of the name of an individual in Annex I to Regulation No 881/2002, respect for the rights of the defence and the right to effective judicial protection requires that the competent Union authority disclose to the individual concerned the evidence against that person available to that authority and relied on as the basis of its decision, that is to say, at the very least, the summary of reasons provided by the Sanctions Committee (see, to that effect, the *Kadi* judgment, paragraphs 336 and 337), so that that individual is in a position to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in bringing an action before the Courts of the European Union.

112. When that disclosure takes place, the competent Union authority must ensure that that individual is placed in a position in which he may effectively make known his views on the grounds advanced against him (see, to that effect, Case C-32/95 P *Commission v Lirrestal and Others* [1996] ECR I-5373, paragraph 21; Case C-462/98 P *Mediobanca v Commission* [2000] ECR I-7183, paragraph 36, and the judgment of 22 November 2012 in Case C-277/11 M. [2012] ECR I-0000, paragraph 87 and case-law cited).

113. As regards a decision whereby, as in this case, the name of the individual concerned is to be maintained on the list in Annex I to Regulation No 881/2002, compliance with that dual procedural obligation must, contrary to the position in respect of an initial listing (see, in that regard,

the *Kadi* judgment, paragraphs 336 to 341 and 345 to 349, and *France v People's Mojahedin Organization of Iran*, paragraph 61), precede the adoption of that decision (see *France v People's Mojahedin Organization of Iran*, paragraph 62). It is not disputed that, in the present case, the Commission, the author of the contested regulation, complied with that obligation.

114. When comments are made by the individual concerned on the summary of reasons, the competent European Union authority is under an obligation to examine, carefully and impartially, whether the alleged reasons are well founded, in the light of those comments and any exculpatory evidence provided with those comments (see, by analogy, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Case C-525/04 P *Spain v Lenting* [2007] ECR I-9947, paragraph 58, and M., paragraph 88).

115. In that context, it is for that authority to assess, having regard, *inter alia*, to the content of any such comments, whether it is necessary to seek the assistance of the Sanctions Committee and, through that committee, the Member of the UN which proposed the listing of the individual concerned on that committee's Consolidated List, in order to obtain, in that spirit of effective cooperation which, under Article 220(1) TFEU, must govern relations between the Union and the organs of the United Nations in the fight against international terrorism, the disclosure of information or evidence, confidential or not, to enable it to discharge its duty of careful and impartial examination.

116. Lastly, without going so far as to require a detailed response to the comments made by the individual concerned (see, to that effect, *Al-Aqsa v Council and Netherlands v Al-Aqsa*, paragraph 141), the obligation to state reasons laid down in Article 296 TFEU entails in all circumstances, not least when the reasons stated for the European Union measure represent reasons stated by an international body, that that statement of reasons identifies the individual, specific and concrete reasons why the competent authorities consider that the individual concerned must be subject to restrictive measures (see, to that effect, *Al-Aqsa v Council and Netherlands v Al-Aqsa*, paragraphs 140 and 142, and *Council v Bamba*, paragraphs 49 to 53).

117. As regards court proceedings, in the event that the person concerned challenges the lawfulness of the decision to list or maintain the listing of his name in Annex I to Regulation No 881/2002, the review by the Courts of the European Union must extend to whether rules as to procedure and rules as to competence, including whether or not the legal basis is adequate, are observed (see, to that effect, the *Kadi* judgment, paragraphs 121 to 236; see also, by analogy, the judgment of 13 March 2012 in Case C-376/10 P *Tay Za v Council* [2012] ECR I-0000, paragraphs 46 to 72).

118. The Courts of the European Union must, further, determine whether the competent European Union authority has complied with the procedural safeguards set out in paragraphs 111 to 114 of this judgment and the obligation to state reasons laid down in Article 296 TFEU, as mentioned in paragraph 116 of this judgment, and, in particular, whether the reasons relied on are sufficiently detailed and specific.

119. The effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person in Annex I to Regulation No 881/2002 (the

Kadi judgment, paragraph 336), the Courts of the European Union are to ensure that that decision, which affects that person individually (see, to that effect, the judgment of 23 April 2013 in Joined Cases C-478/11 P to C-482/11 P *Gbagbo and Others v Council* [2013] ECR I-0000, paragraph 56), is taken on a sufficiently solid factual basis (see, to that effect, *Al-Aqsa v Council and Netherlands v Al-Aqsa*, paragraph 68). That entails a verification of the allegations factored in the summary of reasons underpinning that decision (see to that effect, *E and F*, paragraph 57), with the consequence that judicial review cannot be restricted to an assessment of the abstract cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.

120. To that end, it is for the Courts of the European Union, in order to carry out that examination, to request the competent European Union authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination (see, by analogy, *ZZ*, paragraph 59).

121. That is because it is the task of the competent European Union authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded.

122. For that purpose, there is no requirement that that authority produce before the Courts of the European Union all the information and evidence underlying the reasons alleged in the summary provided by the Sanctions Committee. It is however necessary that the information or evidence produced should support the reasons relied on against the person concerned.

123. If the competent European Union authority finds itself unable to comply with the request by the Courts of the European Union, it is then the duty of those Courts to base their decision solely on the material which has been disclosed to them, namely, in this case, the indications contained in the narrative summary of reasons provided by the Sanctions Committee, the observations and exculpatory evidence that may have been produced by the person concerned and the response of the competent European Union authority to those observations. If that material is insufficient to allow a finding that a reason is well founded, the Courts of the European Union shall disregard that reason as a possible basis for the contested decision to list or maintain a listing.

124. If, on the other hand, the competent European Union authority provides relevant information or evidence, the Courts of the European Union must then determine whether the facts alleged are made out in the light of that information or evidence and assess the probative value of that information or evidence in the circumstances of the particular case and in the light of any observations submitted, in relation to them by, among others, the person concerned.

125. Admittedly, overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations may preclude the disclosure of some information or some evidence to the person concerned. In such circumstances, it is nonetheless the task of the Courts of the European Union, before whom the secrecy or confidentiality of that information or evidence is no valid objection, to apply, in the course of the judicial review to be carried out, techniques which accommodate, on the one hand,

legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process (see, to that effect, the *Kadi* judgment, paragraphs 342 and 344; see also, by analogy, *ZZ*, paragraphs 54, 57 and 59).

126. To that end, it is for the Courts of the European Union, when carrying out an examination of all the matters of fact or law produced by the competent European Union authority, to determine whether the reasons relied on by that authority as grounds to preclude that disclosure are well founded (see, by analogy, *ZZ*, paragraphs 61 and 62).

127. If the Courts of the European Union conclude that those reasons do not preclude disclosure, at the very least partial disclosure, of the information or evidence concerned, it shall give the competent European Union authority the opportunity to make such disclosure to the person concerned. If that authority does not permit the disclosure of that information or evidence, in whole or in part, the Courts of the European Union shall then undertake an examination of the lawfulness of the contested measure solely on the basis of the material which has been disclosed (see, by analogy, *ZZ*, paragraph 63).

128. On the other hand, if it turns out that the reasons relied on by the competent European Union authority do indeed preclude the disclosure to the person concerned of information or evidence produced before the Courts of the European Union, it is necessary to strike an appropriate balance between the requirements attached to the right to effective judicial protection, in particular respect for the principle of an adversarial process, and those flowing from the security of the European Union or its Member States or the conduct of their international relations (see, by analogy, *ZZ*, paragraph 64).

129. In order to strike such a balance, it is legitimate to consider possibilities such as the disclosure of a summary outlining the information's content or that of the evidence in question. Irrespective of whether such possibilities are taken, it is for the Courts of the European Union to assess whether and to what extent the failure to disclose confidential information or evidence to the person concerned and his consequential inability to submit his observations on them are such as to affect the probative value of the confidential evidence (see, by analogy, *ZZ*, paragraph 67).

130. Having regard to the preventive nature of the restrictive measures at issue, if, in the course of its review of the lawfulness of the contested decision, as defined in paragraphs 117 to 129 of this judgment, the Courts of the European Union consider that, at the very least, one of the reasons mentioned in the summary provided by the Sanctions Committee is sufficiently detailed and specific, that it is substantiated and that it constitutes in itself sufficient basis to support that decision, the fact that the same cannot be said of other such reasons cannot justify the annulment of that decision. In the absence of one such reason, the Courts of the European Union will annul the contested decision.

131. Such a judicial review is indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned (see, to that effect, *E and F*, paragraph 57), those being shared values of the UN and the European Union.

132. Notwithstanding their preventive nature, the restrictive measures at issue have, as regards those rights and freedoms, a substantial negative impact related, first, to the serious disruption of the working and family life of the person concerned due to the restrictions on the exercise of his right to property which stem from their general scope combined, as in this case, with the actual duration of their application, and, on the other, the public opprobrium and suspicion of that person which those measures provoke (see, to that effect, the *Kadi* judgment, paragraphs 358, 369 and 375; *France v People's Mojahedin Organization of Iran*, paragraph 64; *Al-Aqsa v Council and Netherlands v Al-Aqsa*, paragraph 120, and the judgment of 28 May 2013 in *Case C-239/12 P Abdulrahim v Council and Commission* [2013] ECR I-0000, paragraph 70 and case-law cited).

133. Such a review is all the more essential since, despite the improvements added, in particular after the adoption of the contested regulation, the procedure for delisting and *ex officio* re-examination at UN level they do not provide to the person whose name is listed on the Sanctions Committee Consolidated List and, subsequently, in Annex I to Regulation No 881/2002, the guarantee of effective judicial protection, as the European Court of Human Rights, endorsing the assessment of the Federal Supreme Court of Switzerland, has recently stated in paragraph 211 of its judgment of 12 September 2012, *Nada v. Switzerland* (No 10593/08, not yet published in the *Reports of Judgments and Decisions*, 32 HRLJ 129 (2012)).

134. The essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognition of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered (see, to that effect, *Abdulrahim v Council and Commission*, paragraphs 67 to 84).

— The errors of law affecting the judgment under appeal

135. It follows from the criteria analysed above that, for the rights of the defence and the right to effective judicial protection to be respected first, the competent European Union authority must (i) disclose to the person concerned the summary of reasons provided by the Sanctions Committee which is the basis for listing or maintaining the listing of that person's name in Annex I to Regulation No 881/2002, (ii) enable him effectively to make known his observations on that subject and (iii) examine, carefully and impartially, whether the reasons alleged are well founded, in the light of the observations presented by that person and any exculpatory evidence that may be produced by him.

136. Second, respect for those rights implies that, in the event of a legal challenge, the Courts of the European Union are to review, in the light of the information and evidence which have been disclosed *inter alia* whether the reasons relied on in the summary provided by the Sanctions Committee are sufficiently detailed and specific and, where appropriate, whether the accuracy of the facts relating to the reason concerned has been established.

137. On the other hand, the fact that the competent European Union authority does not make accessible to the person concerned and, subsequently, to the Courts of the European Union information or evidence which is in the sole possession of the Sanctions Committee or the

Member of the UN concerned and which relates to the summary of reasons underpinning the decision at issue, cannot, as such, justify a finding that those rights have been infringed. However, in such a situation, the Courts of the European Union, which are called upon to review whether the reasons contained in the summary provided by the Sanctions Committee are well founded in fact, taking into consideration any observations and exculpatory evidence produced by the person concerned and the response of the competent European Union authority to those observations, will not have available to it supplementary information or evidence. Consequently, if it is impossible for the Courts to find that those reasons are well founded, those reasons cannot be relied on as the basis for the contested listing decision.

138. Hence, in paragraphs 173, 181 to 184, 188 and 192 to 194 of the judgment under appeal, the General Court erred in law by basing its finding that the rights of the defence and the right to effective judicial protection and, consequently, the principle of proportionality had been infringed, on the failure of the Commission to disclose to Mr Kadi and to the General Court itself the information and evidence underlying the reasons for maintaining the listing of Mr Kadi's name in Annex I to Regulation No 881/2002, when, as is apparent from paragraphs 81 and 95 of the judgment under appeal, the General Court had recognised, both in order to reject Mr Kadi's application for a measure of organisation of procedure in order to secure that disclosure and in the course of the hearing, that the Commission was not in possession of that information and evidence.

139. Contrary to what is stated in paragraphs 181, 183 and 184 of the judgment under appeal, the passages in the *Kadi* judgment to which the General Court referred in those paragraphs do not indicate that the fact that the party concerned and the Courts of the European Union do not have access to information or evidence which the competent Union authority does not have in its possession constitutes, as such, an infringement of the rights of the defence or the right to effective judicial protection.

140. Further, and bearing in mind that the assessment, by the General Court, of whether the statement of reasons is or is not sufficient is subject to review by the Court on an appeal (see, to that effect, *Council v Bamba*, paragraph 41 and case-law cited), the General Court erred in law by basing, as is apparent from paragraphs 174, 177, 188 and 192 to 194 of the judgment under appeal, its finding that there had been such an infringement on the fact that, in its opinion, the allegations made in the summary of reasons provided by the Sanctions Committee were vague and lacking in detail, even though such a general conclusion cannot be drawn if each of those reasons is examined separately.

141. Admittedly, as the General Court correctly ruled by endorsing, in paragraph 177 of the judgment under appeal, the argument of Mr Kadi set out in the fourth indent of paragraph 157 of that judgment, the last of the reasons stated in the summary provided by the Sanctions Committee, namely the allegation that Mr Kadi had been the owner in Albania of several firms which funnelled money to extremists or employed those extremists in positions where they controlled the funds of those firms, up to five of which received working capital from Usama bin Laden, is insufficiently detailed and specific given that it contains no indication of the identity of the firms concerned, of when the alleged conduct took place and of the identity of the 'extremists' who allegedly benefitted from that conduct.

142. On the other hand, the same cannot be said of the other reasons stated in the summary provided by the Sanctions Committee.

143. The first reason, based on Mr Kadi's acknowledgement that he is a founding trustee and directed the activities of the Muwafaq Foundation, which always operated under the umbrella of Makhtab al-Khidamat/Al Kifah – founded by, among others, was Usama bin Laden, which was the predecessor to Al-Qaeda and which, following the dissolution of Makhtab al-Khidamat/Al Kifah in June 2001, was absorbed into Al-Qaeda – is sufficiently detailed and specific, in that it identifies the entity concerned and Mr Kadi's role in relation to it, together with mention of an alleged link between that entity, on the one hand, and Usama bin Laden and Al-Qaeda, on the other.

144. The second reason is based on the fact that, in order to manage the European offices of the Muwafaq Foundation, Mr Kadi appointed, in 1992, Mr Al-Ayadi on the recommendation of Mr Julaidan, a financier who had fought alongside Usama bin Laden in Afghanistan in the 1980s. When he was appointed, Mr Al-Ayadi was said to be one of the principal leaders of the Tunisian Islamic Front and to be operated under agreements with Usama bin Laden. Mr Al-Ayadi is said to have gone to Afghanistan, in the early 1990s, to receive paramilitary training there, then, with other individuals, to Sudan to conclude there with Usama bin Laden an agreement regarding the reception and training of Tunisians and, later, an agreement regarding the reception of Tunisian mujahidin from Italy by Usama bin Laden's collaborators in Bosnia and Herzegovina.

145. That second reason is sufficiently detailed and specific, in that it contains the necessary detail concerning the time and context of the appointment in question and information on the individuals involved in the allegation that that appointment was connected with Usama bin Laden.

146. The third reason, which is based on a statement allegedly made in 1995 by Mr Talad Fund Kassem, the leader of the Al-Gama'at al Islamiyya, to the effect that the Muwafaq Foundation provided logistical and financial support to a mujahidin battalion in Bosnia and Herzegovina, is based on the fact that, that Foundation was said to be involved, in the mid 1990s, alongside Usama bin Laden, in providing financial support for terrorist activities of those mujahidin and to have assisted in the trafficking of arms from Albania to Bosnia and Herzegovina.

147. That third reason is sufficiently detailed, and specific, since it identifies the person who made the statement concerned, the forms of activity reported, the time when they were allegedly carried out and their alleged link with the activities of Usama bin Laden.

148. The fourth reason is based on the fact that Mr Kadi was one of the major shareholders in the Bosnian bank Deposita Banka, now closed, in which Mr Al-Ayadi held a position and acted as nominee for Mr Kadi, and where planning sessions for an attack against a United States facility in Saudi Arabia might have taken place.

149. Contrary to what is stated in paragraph 175 of the judgment under appeal, that fourth reason is sufficiently detailed and specific, in that it identifies the financial institution through which Mr Kadi allegedly contributed to terrorist activities and the nature of the alleged terrorist project concerned. The circumstance that the indication that it was in that institution that planning sessions for that alleged project took place is expressed as a possibility is

not incompatible with the essential requirements of the duty to state reasons, since the reasons for listing on a European Union list may be based on suspicions of involvement in terrorist activities, without prejudice to the determination of whether those suspicions are justified.

150. Although it emerges from paragraphs 138 to 140 and 142 to 149 of this judgment that errors of law were made by the General Court, it is necessary to determine whether, notwithstanding those errors, the operative part of the judgment under appeal can be seen to be well founded on legal grounds other than those maintained by the General Court, in which event an appeal must be dismissed (see, to that effect, the judgment of 19 April 2012 in Case C-221/10 *P Aręgodan v Commission* [2012] ECR I-0000, paragraph 94 and case-law cited).

– The unlawfulness of the contested regulation

151. It must be observed, as regards the first reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 143 of this judgment, that, in his comments of 10 November 2008 submitted in support of his action before the General Court, Mr Kadi, while acknowledging that he had been a founding trustee of the Muwafaq Foundation, denied that it had provided any support to terrorism and that there was any link between it and Makhtab al-Khidamat/Al Kifah. Attaching to those comments the Muwafaq Foundation's Constitution and Declaration of Trust, Mr Kadi claimed that the objects and purpose of that foundation were exclusively charitable and humanitarian, directed mainly towards providing relief to people suffering famine in the world, in particular in the Sudan. While admitting that he was involved in international strategic decisions of the Muwafaq Foundation, he denied any involvement in the day-to-day management of its activities across the world, particularly in the recruitment of local staff. He also disputed that the Muwafaq Foundation joined Al-Qaeda in June 2001, stating in particular, and providing documents in support of his contention, that the foundation had ceased operations by 1998 at the latest.

152. In its reply of 8 December 2008 to the comments of Mr Kadi, also submitted to the General Court, the Commission contended that the fact that some or all of the activities of the entity concerned had ceased did not rule out the possibility that that entity, having continuous legal personality, had joined Al-Qaeda.

153. It is however clear that no information or evidence has been produced to substantiate the allegations of the Muwafaq Foundation's involvement in international terrorism in the form of links with Makhtab al-Khidamat/Al Kifah and Al-Qaeda. In such circumstances, the indications of the role and duties of Mr Kadi in relation to that foundation are not such as to justify the adoption, at European Union level, of restrictive measures against him.

154. As regards the second reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 144 of this judgment, Mr Kadi, in his comments of 10 November 2008, while accepting that he had recruited, in 1992, on the recommendation of Mr Julaidan, Mr Al-Ayadi to head the European offices of the Muwafaq Foundation, none the less asserted that the sole aim of that foundation in Europe was to provide support to refugees from Bosnia and Croatia during the Balkans conflict in the 1990s. Mr Kadi stated that Mr Julaidan, who, at that time, was working with him on a project supporting vocational

training for refugees from Croatia, had recommended Mr Al-Ayadi to him because of his professional experience in the management of humanitarian work and because of his integrity. Mr Kadi also claimed that, in 1992, he had no grounds to suspect that Mr Al-Ayadi and Mr Julaidan were supporting terrorist activities, stating that, in the 1980s, Usama bin Laden was regarded as an ally of the West against the Soviet Union, that only after 1996 was Usama bin Laden described as a threat to international security, and that only in October 2001 and September 2002 respectively were Mr Al-Ayadi and Mr Julaidan listed on the Sanctions Committee Consolidated List. Lastly, Mr Kadi asserts that he had no knowledge of the Tunisian Islamic Front and the alleged links between Mr Al-Ayadi and that organisation.

155. In its reply of 8 December 2008 to Mr Kadi's comments, the Commission asserted that the recruitment of Mr Al-Ayadi by Mr Kadi on the recommendation of Mr Julaidan, combined with the fact that Mr Al-Ayadi and Mr Julaidan had contacts with Usama bin Laden, justified the conclusion that those various individuals had acted in concert or were part of one single network. The Commission added that, in such circumstances, it was of no consequence that Mr Kadi claimed to have been unaware of the alleged links between Mr Al-Ayadi and the Tunisian Islamic Front.

156. In that regard, while it is conceivable that the material relied on in the summary of reasons provided by the Sanctions Committee as regards the recruitment by Mr Kadi, in 1992, of Mr Al-Ayadi on the recommendation of Mr Julaidan and the alleged involvement of Mr Al-Ayadi and Mr Julaidan in terrorist activities in association with Usama bin Laden might have been deemed sufficient to justify the initial inclusion, in 2002, of Mr Kadi's name in the list of persons in the annex to Regulation No 881/2002, it must be observed that that same material, not otherwise substantiated, cannot justify maintaining, after 2008, the listing of Mr Kadi's name in that regulation, as amended by the contested regulation. Given how far apart in time those two measures are, that material, which refers to 1992, is no longer sufficient in itself to justify, in 2008, maintaining, at European Union level, the name of Mr Kadi in the list of persons and entities subject to the restrictive measures at issue.

157. As regards the third reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 146 of this judgment, in his comments of 10 November 2008, Mr Kadi asserted that he had no knowledge of Mr Talad Fuad Kassem. He also stated that he had never provided financial, logistic or any other support of any kind to that individual, to the organisation which he led or to mujahidin in Bosnia and Herzegovina. Mr Kadi also maintained that, so far as he was aware, neither the Muwafaq Foundation nor any of its employees had ever provided any such support of that kind.

158. In its reply of 8 December 2008 to Mr Kadi's comments, the Commission asserted that the statement of Mr Talad Fuad Kassem served as partial corroboration of the fact that Mr Kadi had used his position for purposes other than ordinary business purposes. The Commission added that, in such circumstances, it was irrelevant whether or not Mr Kadi knew Mr Talad Fuad Kassem.

159. However, no information or evidence has been submitted which makes it possible to determine the accuracy of the statement attributed to Mr Talad Fuad Kassem in the summary of reasons provided by the Sanctions Committee and to assess, having regard, in

particular, to Mr Kadi's claim that he had no knowledge of Mr Talad Fuad Kassem, the probative value of that statement in respect of the allegations that the Muwafaq Foundation was providing support to terrorist activities in Bosnia and Herzegovina in association with Usama bin Laden. In such circumstances, the indication relating to the statement of Mr Talad Fuad Kassem does not constitute sufficient basis to justify the adoption, at European Union level, of restrictive measures against Mr Kadi.

160. As regards the fourth reason relied on in the summary of reasons provided by the Sanctions Committee and referred to in paragraph 148 of this judgment, in his comments of 10 November 2008, Mr Kadi denied ever having provided financial support to international terrorism through Deposita Banka or through any other entity. He explained that he had acquired an interest in that bank for entirely commercial reasons having regard to the prospects of social and economic reconstruction in Bosnia after the Dayton Peace Accord of 1995, and that he had, in order to comply with local law, appointed Mr Al-Ayadi, a Bosnian national, as his nominee to hold his shares in that bank. Relying on reports from international firms of auditors relating to the period from 1999 until 2002 and on the report of a financial analyst engaged by a Swiss magistrate covering the period from 1997 to 2001, he claimed that none of those reports suggest that Deposita Banka was involved in any way in the funding or support of terrorism. Mr Kadi disputed that that bank had been closed, explaining, and providing supporting documents, that it had merged with another bank in 2002. Further, he produced documents relating to an occasion, in 1999, when United States authorities, the manager of Deposita Banka and the political authorities in Bosnia were in contact to discuss legal issues relating to the banking sector in Bosnia and Herzegovina. Lastly, Mr Kadi claimed that if the Saudi Arabian authorities had had grounds to suspect that any attacks were planned, within the Deposita Banka, against United States interests in Saudi Arabia, they would inevitably have questioned him, as the Saudi Arabian owner of that institution. According to Mr Kadi the Saudi Arabian authorities have never done so.

161. In its reply of 8 December 2008 to Mr Kadi's comments, the Commission asserted that the indications that Deposita Banka was used for the planning of an attack in Saudi Arabia serve as partial corroboration that Mr Kadi had used his position for purposes other than ordinary business purposes.

162. However, since no information or evidence has been produced to support the claim that planning sessions might have taken place in the premises of Deposita Banka for terrorist acts in association with Al-Qaeda or Usama bin Laden, the indications relating to the association of Mr Kadi with that bank are insufficient to sustain the adoption, at European Union level, of restrictive measures against him.

163. It follows, from the analysis set out in paragraph 141 and paragraphs 151 to 162 of this judgment, that none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of

restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.

164. In those circumstances, the errors of law, identified in paragraphs 138 to 140 and 142 to 149 of this judgment, which vitiate the judgment under appeal are not such as to affect the validity of that judgment, given that its operative part, which annuls the contested regulation in so far as it concerns Mr Kadi, is well founded on the legal grounds stated in the preceding paragraph.

165. Consequently, the appeals must be dismissed.

Costs

166. In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules, which apply to the procedure on appeal by virtue of Article 184(1) of those Rules, an unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellants have been unsuccessful and Mr Kadi has applied for costs, they must be ordered to pay the costs. Where an intervener at first instance, which has not itself brought an appeal, participates in the proceedings before the Court, the Court may, under Article 184(4) of those Rules, decide that it is to bear its own costs. Article 140(1) of those Rules provides that Member States which have intervened in the proceedings are to bear their own costs.

167. Since the Commission, the Council and the United Kingdom have been unsuccessful, they must be ordered, in accordance with Mr Kadi's pleadings, to pay the costs.

168. The Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Slovak Republic and the Republic of Finland, as interveners, are to bear their own costs.

On those grounds, the Court (Grand Chamber):

1. Dismisses the appeals.
2. Orders the European Commission, the Council of the European Union and the United Kingdom of Great Britain and Northern Ireland to pay the costs.
3. Orders the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, Hungary, the Kingdom of the Netherlands, the Republic of Austria, the Slovak Republic and the Republic of Finland to bear their own costs.

The Court (Grand Chamber) was composed of the following Judges: V. Skouris, President; K. Lenaerts (*Rapporteur*), Vice-President; M. Ilešić, L. Bay Larsen, T. von Danwitz and M. Berger, Presidents of Chambers; U. Lohmus, B. Levis, A. Arnbadjev, C. Toader, J.-J. Kiesel, M. Safjan and D. Šváby; Advocate General: Y. Bot; Registrar: A. Impellizzeri.

Chapter 3

The Common Security and Defence Policy

3.1 Introduction

A policy field intimately connected with the CFSP, and thereby also present in the Union's 'outer layer', is the Common Security and Defence Policy. It forms a relatively new addition, reaching full operational status only in 1999. It has nevertheless rapidly grown to become of seminal importance.¹ It is through the CSDP that the EU is able to make a tangible difference in the wider world, by undertaking civilian or military missions in the face of natural disasters and humanitarian emergencies, occasionally providing for transitional justice, alleviating political tensions, or strengthening the rule of law in third countries.

In some respects, the CSDP can be regarded a *lex specialis* of the CFSP, as it elaborates further on the 'security' element contained in the term 'Common Foreign and Security Policy'. Moreover, the relevant provisions have been tucked away in Title V of the EU Treaty as well. At the same time, this view may give rise to confusion, for in a broad reading, the CFSP could then of itself be considered to encompass each and every defence issue. There would therefore appear to be little need for another policy, the CSDP, which only differs in one formal respect from the CFSP (viz. the explicit inclusion of 'Defence' in its title). In comparison, the previous name of this policy field, 'European Security and Defence Policy', used until the entry into force of the Lisbon Treaty, was much more distinctive (also when abbreviated: ESDP). It is mainly for reasons of clarity that we prefer to discuss the CSDP in a separate and dedicated chapter, instead of treating it as an appendix or sub-domain of the CFSP. This setup does not mean to downplay or negate in any way the manifest and inextricable linkages with the latter.

Since the CSDP is undeniably connected to the CFSP, albeit in a slightly fuzzy way, all the features described in the previous chapter (actors, decision-making, legal instruments) apply *mutatis mutandis*. At several stages in the previous chapters,

¹Article 42 (1) TEU currently declares the CSDP to be "an integral part" of the CFSP.

we have already hinted at the specific manifestations of CFSP players and the specific application of CFSP concepts in the CSDP context. This chapter links in with the previous and aims to 'fill in the blanks'. It discusses in subsequent order the historical evolution of the CSDP (para. 3.2), its foundations and main principles (para. 3.3), the theory and practice of CSDP operations (para. 3.4), CSDP resources (para. 3.5) and the European Security Strategy (para. 3.6).

3.2 Historical Background

The first provision ever regarding the Union's ambitions in the field of security was introduced with the Maastricht Treaty, but the clause was sketchy at best.² What was then Article B of the TEU referred to "the eventual framing of a common defence policy, which might in time lead to a common defence". For several years, legal developments lingered on, and no meaningful follow-up actions were initiated. It was only through resolute political action in the late 1990s that the CSDP's foundations took shape in greater detail.

The original kick-start of this process can be traced back to a 1992 summit of the Western European Union, which took place in the hamlet of Petersberg, Germany. The so-called 'Petersberg Declaration' sketched what ought to be the role of the WEU countries in ensuring a secure continent after the defeat of communism, as well as the missions they could decide to undertake for that purpose.³ Above all, this event was memorable for signalling the fact that Europe, after decades of military support from the United States, was finally ready and willing to take responsibilities into its own hands.

For the first few years however, not much came of these intentions. In the mid-1990s, the troubles in Yugoslavia escalated into a full-blown civil war, while the EU countries preferred to remain idle and keep their distance, only launching a handful of half-baked initiatives for restoring peace. Humiliatingly, the savage conflict dragged on for years, and it was not before the US subjected them to severe economic, political and diplomatic pressure that the warring parties consented to end hostilities.

In 1998, a new momentum arose at a Franco-British summit at St. Malo. At that spot, the then French President Jacques Chirac and British Prime Minister Tony Blair asserted that the EU needed to command a stronger presence in matters of defence and security. One year later, at the European Council summit of June 1999 in Cologne, their ideas were rehearsed, expanded, and ultimately put down in

²The Pleven Plan, the earlier (stillborn) initiative for constructing a unified defence architecture was discussed in Chap. 2, para. 2.2.1.

³The full text may be obtained from www.w eu.int/documents/920619peten.pdf.

writing.⁴ The European Council members agreed to transfer the responsibility for decision-making and the capacity for action across the full range of 'Petersberg operations' from the WEU to the EU. This marked the official birth of what we now know as the CSDP. That same year, detailed plans were drawn up for procuring the necessary means and resources, culminating in the so-called 'Helsinki Headline Goals' established under the Finnish Council Presidency in December 1999.

With the entry into force of the Amsterdam Treaty, the legal world finally realigned itself with the political ambitions, and a novel Art. 17 was introduced in the EU Treaty. This clause placed solid bedrock under what was soon called the European Security and Defence Policy. The provision affirmed the neutrality of certain Member States and underscored the desire not to undermine NATO and UN obligations. In addition, it proffered an explicit legal basis for undertaking any of the 'Petersberg Tasks': humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking. Through the adoption of an impressive number of secondary legal instruments and soft law documents, the ESDP quickly rose in stature.

In the final paragraph of what was then Art. 17 TEU, the provision was singled out for review, in order to improve the prospects for attaining the Union's objectives in the fields of defence and security. In the European Convention that drafted the Constitutional Treaty, such a review was indeed undertaken. This eventually led to the novel CSDP regime introduced by the Treaty of Lisbon. To this regime, we will now turn.

3.3 Foundations and Main Legal Principles

The Lisbon Treaty inserted a new Section 2 into Chapter 2 of Title V of the TEU. It consists of a handsome quintet of clauses on security and defence issues (Arts. 42–46 TEU), where previously, as remarked, there was only one.

Article 42 (1) TEU reiterates that the CSDP has both a civilian and a military dimension. The same provision, as well as Art. 42 (3) TEU, requires the Member States to make civilian and military capabilities available to the Union for the implementation of the CSDP and the attainment of its objectives.

Article 42 (2) TEU states that the CSDP includes the progressive framing of a common defence policy, "which will lead to a common defence when the European Council so decides". What such a "common defence" structure denotes is not entirely clear. Several commentators have noted that, at present, in some form or the other, a common defence is actually already in existence. Possibly, the provision envisages the creation of a single European army, yet the realisation of

⁴*Presidency Conclusions, Cologne European Council, 3–4 June 1999, Annex III, Presidency Report on Strengthening of the Common European Policy on Security and Defence.*

that goal would clash with NATO obligations – something the EU Member States have studiously sought to avoid.⁵

In CSDP decision-making, unanimity is the main rule.⁶ Different from the CFSP, in the CSDP, this main rule knows no exceptions.⁷ The initiative for the adoption of any act or instrument will come from either the High Representative or a Member State.⁸ Thereby, as in the CFSP more generally, the Commission would appear to be sidelined. Where appropriate, the High Representative may however, in a joint effort with the Commission, propose a combined approach for setting up any actions or operations using both EU instruments and national resources.⁹

In Article 42 (5) and (6) TEU, arrangements have been made for entrusting groups of Member States with special tasks, or to enable them to forge ahead in the form of 'permanent structured cooperation'. This is further elaborated upon in Arts. 44 and 46 TEU.¹⁰ Importantly, compared to 'enhanced cooperation' in EU law in general, a much more flexible framework can be set up here, as the scheme is not conditioned by a predetermined quorum of participants.¹¹

The most striking feature of the novel regime may well be the inclusion of a mutual assistance clause, replicating similar provisions in the NATO and WEU Treaties. Article 42 (7) TEU lays down that, in case of armed aggression on the territory of a Member State, the other Member States are obliged to aid and support the latter with any means in their power. Such assistance should, however, comply with the requirements for invoking the right to self-defence, codified in Art. 51 of the UN Charter. Three further limitations are immediately apparent. First, the clause only applies to armed aggression (contrary to the Art. 51 of the UN Charter, which covers imminent threats of use of force). Second, it should concern aggression on its territory (in contrast to the international law regime, where attacks on a state's goods and persons and means of transportation may also trigger the right to self-defence).¹² Third, if Member States pursue a special and distinct security and defence policy (e.g. Ireland, Finland and Sweden), Art. 42 (7) TEU underlines that they are not obliged to provide assistance.¹³

⁵As the second sentence of Art. 42 (2) and Art. 42 (7) TEU make clear.

⁶See Art. 42 (4) TEU.

⁷Article 42 (4) applies here as a *lex specialis* to Art. 31, but one should keep in mind that Art. 31 (4) also rules out QMV for decisions with military or defence implications.

⁸See Art. 42 (3) TEU.

⁹*Ibid.*

¹⁰See also Protocol No. 10, annexed to the Treaties, which spells out the level of commitment Member States have to reach in order to apply, how the decision-making takes place, and what is expected of them once they decide to pursue this option.

¹¹*Cf.* Art. 326 *et seq* TFEU.

¹²See Randelzhofer (2002).

¹³Compare the wider 'solidarity clause' of Art. 222 TFEU, which extends to terrorist attacks on Member States and any natural or man-made disasters. This clause has not been subjected to similar qualifications, albeit that further decision-making is required before specific action has to be taken.

In Art. 43 TEU, we once again encounter the list of Petersberg Tasks, albeit that they have been revised and enhanced to meet the challenges of the twenty-first century. We now proceed to zoom in on these a bit further.

3.4 CSDP Missions in Theory and Practice

3.4.1 CSDP Missions: Theoretical Aspects

With regard to the possible missions and operations to be undertaken under the CSDP, the old Art. 17 TEU was short, vague and limited. It merely stated that the CFSP "included all questions relating to the security of the Union", and the second paragraph added that such questions "include[d] humanitarian and rescue tasks, peacekeeping tasks, and tasks of combat forces in crisis management, including peacemaking". This terse enumeration corresponded one-on-one with the Petersberg Tasks. For all its brevity, the list did not appear to be exhaustive, allowing for various other forms of action to be undertaken. The newly revised provision is nonetheless appreciably richer, and provided for a timely and much-needed update. As remarked above, the EU is nowadays explicitly rendered competent to use civilian and military means. Importantly, Art. 42 (1) TEU makes it possible to use these means on missions outside EU territory. The objectives of such missions may be (1) peacekeeping, (2) conflict prevention and (3) strengthening international security, in accordance with the principles of the UN Charter. Article 43 TEU specifies that these three main tasks include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peacekeeping tasks, tasks of combat forces in crisis management, including peacemaking and post-conflict stabilisation.¹⁴ Additionally, all these tasks may contribute to the fight against terrorism, which includes supporting third countries in combating terrorism in their territories.¹⁵ As not even this list appears to be exhaustive, there are few types of operations which the EU should presently be considered incompetent to engage in.

One older discussion, however, retains some of its topicality, namely the issue of how broadly the mandate for EU military personnel to use force may be formulated. Since the Second World War, the United Nations has engaged in several peacekeeping operations. International lawyers commonly regarded strict neutrality,

¹⁴A common synonym for peacemaking is peacebuilding (although some scholars employ a deviant terminology; cf. Merlingen and Ostrauskaite 2009).

¹⁵The latter phrase is slightly ambiguous: it could encompass lending support through an active (physical) presence of EU forces in those countries, or instead, merely supplying the latter with the means to engage the terrorists themselves.

consent of the parties to the conflict, and use of force only for self-defence as the classic elements and preconditions.¹⁶ Over time, the concept evolved, leading to 'second generation' peacekeeping, entailing a more active role for the peacekeeping forces,¹⁷ and 'third generation' peacekeeping, also referred to as 'robust' peacekeeping.¹⁸ Some authors have taken the view that the EU was never meant to engage in the latter type of operations, and that under 'peacekeeping', the TEU understood nothing but the 'classic' variety.¹⁹ Under the novel provisions, this issue remains unsettled. Its veracity can only be established by keeping a close watch on all forthcoming EU missions that are officially labelled as 'peacekeeping' ones. At the same time, due to the fact that Art. 43 enables the EU to send out *peacemaking* missions as well, it is inevitable that, when assigned that particular task, EU servicemen may indeed resort to a broader use of force – while naturally still remaining within the boundaries of international (humanitarian) law. So far though, no such missions have been launched. Besides, unlike the UN and NATO, the EU does not yet have the political standing to be deploying 'robust peacekeeping' operations with any regularity – and without the necessary means to carry them out, the Union is in danger of punching substantially above its weight.

It is for the Council to decide on the launch of CSDP operations. The legal instrument employed is a decision of the 'joint action' type.²⁰ In such decisions, the objectives, scope and the general conditions for their implementation should be specified.²¹ Their actual management is entrusted to the PSC, in cooperation with, and closely supervised by, the High Representative.²² It is expected that, in the time to come, the European External Action Service, spurred by the HR, will take up a more prominent steering and monitoring role. The EU Military Committee and EU Military Staff may be asked to furnish the necessary strategic guidelines. Practical assistance can be provided through e.g. the EU Joint Situation Centre and the Satellite Centre.

As regards the procedure for adopting the decisions through which CSDP missions are established, Art. 43 (2) applies as a *lex specialis* to Art. 42 (4) TEU.²³ Significantly, where in general, CSDP decisions are adopted on the

¹⁶Traditional manifestations were e.g. the establishment of buffer zones, interpositioning of forces, surveillance of conflict lines and monitoring of armistice agreements.

¹⁷More actively promoting and consolidating peace-processes, by e.g. drawing (interim) borders, disarming warring factions, seizing and destroying arms and equipment.

¹⁸Here, a much wider mandate for using force is given, either on a broad reading of self-defence, or with authorisation for peace enforcement under Chapter VII of the UN Charter. It thus represents a rupture with the classic ideas of neutrality and consent of the parties.

¹⁹See Graf von Kielmansegg (2007), p. 633.

²⁰Cf. Art. 28 TEU.

²¹Article 43 (2) TEU.

²²Cf. Art. 38 TEU.

²³Which in itself forms a *lex specialis* for the CSDP vis-à-vis Art. 31 as the *lex generalis* in the CFSP.

initiative of the High Representative, the Council is free to adopt decisions *proprio motu* where it concerns operational action involving the use of civilian and military means.

3.4.2 CSDP Operations in Practice

The very first CSDP (at the time: ESDP) mission was sent out in January 2003, on the territory of the former Yugoslavia – in itself a highly symbolic feat, as this was the scene of many earlier frustrations. From that moment on, the EU busied itself with a myriad of civilian and military operations. Over the past years, more than 20 missions have been launched, ranging from Bosnia²⁴ to Indonesia²⁵ and from Congo²⁶ to Afghanistan.²⁷ The objectives have varied from monitoring fair elections and strengthening the rule of law²⁸ to combating piracy.²⁹

All this makes for an impressive record indeed. Yet, one should keep in mind that the scale and size of missions has varied considerably. At one point, an EU operation consisted of only two dozen observers and advisors.³⁰ Moreover, as stated, the Union does not aim to duplicate the tasks of NATO or the UN, to thwart their good efforts or needlessly get in their way. At the same time though, when so requested, it is usually willing to step in and take over. This has already occurred on more than one occasion.³¹

3.5 CSDP Resources

3.5.1 Cooperation and Consultation, Development and Procurement

Evidently, in order to attain the objectives of the CSDP, the proper resources should be available, to be understood in terms of people, equipment, armaments, vehicles, etc. Similar to the UN, the EU may send out missions under its flag, but does not

²⁴EUPM, since 2003; EUFOR ALTHEA, since 2004.

²⁵AMM Monitoring Mission, 2005–2006.

²⁶DRC/Artemis, 2003; EUPOL Kinshasa, 2005–2007; EUFOR Congo, 2006; EUSEC Congo, since 2005.

²⁷EUPOL Afghanistan, since 2007.

²⁸EUJUST Themis, 2004–2005.

²⁹EU NAVFOR ATALANTA, since 2008.

³⁰EUBAM Rafah, since 2005.

³¹For example, the EU Police Mission in Bosnia, taking over from the UN International Police Force; EULEX Kosovo, taking over from KFOR, a NATO operation.

employ its own soldiers, nor does it dispose of its own materiel. For that reason, the Treaty makes the Member States responsible for providing the necessary civilian and military means. To guarantee that the EU is able to rise to challenges of the future, they are also instructed to improve their military capabilities.³²

In the past decades, many structures and working groups have been put in place for furthering mutual cooperation and consultation in defence matters, for promoting innovation, and ensuring that essential resources were kept at peak-levels.³³ After the end of the Cold War, the traditional incentives for expanding the national military base and developing new weapons and military technology dissipated quickly. In response, the European Defence Agency was set up to play a pivotal role, identifying operational requirements, stimulating the necessary research and expenditure, and strengthening the industrial and technological base of the European defence sector.

The official tasks of the EDA are fivefold: first and foremost, it serves to identify the Member States' military capability objectives and to evaluate whether they live up to their capability commitments. Second, it aims to encourage harmonisation of operational needs and the adoption of effective, compatible procurement methods. Third, the Agency is to propose multilateral projects so as to fulfil the objectives in terms of military capabilities and ensure coordination of Member States' (cooperation) programmes. Fourth, it is required to support, coordinate and plan (joint) defence technology research, as well as studies into technical solutions for future operational needs. Finally, the EDA ought to contribute to the identification and implementation of useful measures for strengthening the industrial and technological base of the defence sector, and to the improvement of the effectiveness of military expenditure.³⁴

The High Representative serves as head of the board of the EDA, ensuring a close and permanent link with the members of the Council. The Agency also carries out its task in liaison with the Commission where necessary. Participating in and contributing to EDA activities occurs on an entirely voluntary basis, however. Thus, as Art. 45 (2) TEU makes clear, Member States may decide for themselves whether or not to take part in its activities.³⁵

In line with the second of its tasks, the EDA's first major achievement was the approval of a voluntary 'Code of Conduct on Defence Procurement' in November 2005, which entered into force on 1 July 2006. This decision marked a crucial turning point. Although the Code is voluntary and non-binding, it was immediately adhered to, and it turned on its head the established practice of Member States exempting defence issues from EU internal market and competition rules on the

³²See Art. 42 (1) and (3) TEU respectively.

³³E.g. WEAG, WEAO, EDEM, OCCAR, POLARM. Some of these are still active at present.

³⁴See Art. 45 TEU.

³⁵Currently, all Member States do so, with the exception of Denmark (which has an opt-out in the area of defence policy).

basis of Art. 296 TEC.³⁶ From that moment on, all military and defence contract opportunities were published on the website of the EDA.³⁷ Yet, as pointed out by several scholars, this new approach still appears to lie at odds with the official and binding rules that ought to be complied with.³⁸ To start with, ECJ case law makes abundantly clear that Art. 346 TFEU (formerly 296 TEC) has to be interpreted restrictively, and that it by no means grants a blank cheque.³⁹ Where the Treaty provision stipulates that Member States "may take such measures as considered necessary for the protection of the essential interests of its security, connected with the production of, or trade in arms, munitions and war material", this is not meant as a categorical exemption. After all, it immediately adds that such measures shall (i.e. may) not adversely affect the conditions of competition in the internal market regarding products not intended for specifically military purposes. Correspondingly, the general EU public procurement rules apply without qualification, requiring public authorities to proceed in a consistent, transparent and non-discriminatory way when putting certain projects, services or equipment out to tender.⁴⁰ Thus, the Code of Conduct on Defence Procurement, administered by the EDA, established a special regime that flies in the face of primary and secondary EU law.

For the sake of completeness, it should be stressed that the incongruity has not gone unnoticed. Some years ago, a special effort was launched to counter the erroneous interpretations of the applicable rules, in an attempt to raise awareness of the limited discretion for pursuing particular national preferences. The year 2009 saw the adoption of a special Directive that established a comprehensive set of rules not only for the procurement of arms, munitions and war material (plus related works and services), but also for the procurement of sensitive supplies, works and services for non-military security purposes.⁴¹ This Directive can be applied to the vast majority of defence and security procurement contracts without putting at risk Member States' essential security objectives. Nevertheless, the Code of Conduct, still openly endorsed by the EDA, remains to be repealed. Even if such a repeal

³⁶All EU Member States except Romania and Denmark participate in this scheme; so does Norway.

³⁷The Code of Conduct applies to contracts worth more than EUR 1 million. It introduces distinctive award criteria based on the most economically advantageous solutions for the particular requirement. It provides for a debriefing after the contract is awarded, during which session, upon request, unsuccessful bidders are given feedback.

³⁸See Trybus (2006), pp. 696–698; see also the Commission's *Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement*, COM (2006) 779 final.

³⁹See e.g. Case C-414/97, *Commission v Spain*; Case C-284/05, *Commission v Finland*; Case C-337/05, *Commission v Italy*.

⁴⁰See Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ [2004] L34/114.

⁴¹Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, OJ [2009] L 216/76.

takes place, it remains an open question whether the Member States are truly willing to alter their past practice, which they might still believe to serve their national security and defence interests best. If they would indeed continue to prefer to safeguard their own companies and industries, one cannot help but be pessimistic with regard to the establishment of a true internal market for military equipment, a level playing field for defence contractors, and a further streamlining of the relevant technological and industrial base in the EU.

3.5.2 Closing the Capabilities-Expectations Gap

At various times in the past, specific political commitments were undertaken to ensure that a shortage of means would not impair the realisation of the overall ambitions, or pose sudden restrictions at a moment when immediate action was called for. As mentioned above, in 1999, the Helsinki European Council laid down the so-called 'Helsinki Headline Goal' (HHG). Therein, the EU Member States agreed that, by the year 2003, they would have to be able to deploy rapidly and sustain forces capable of the full range of Petersberg Tasks, including the most demanding of those tasks.⁴² Also, these forces would have to be militarily self-sustaining, with the necessary command, control and intelligence capabilities, logistics, other combat support services, and additionally, as appropriate, air and naval elements. The Member States also agreed that these forces should be ready for deployment at this level within 60 days, and that within this same time-limit, they should be able to provide smaller rapid response elements, available and deployable at high readiness. Finally, it was decided that they should be capable of sustaining any such deployment for a period of at least 1 year.⁴³ In follow-up meetings, these still fairly broad objectives were converted into more detailed commitments.⁴⁴

By 2003, significant progress had been made on the majority of the targets, but a number of objectives remained to be achieved. For that reason, 1 year later, a novel headline goal was set for 2010.⁴⁵ In 2007, the first of the so-called EU Battle Groups, originally planned to form part of a Rapid Reaction Force, became fully

⁴²In operations up to corps level – i.e. up to 15 brigades (or 50,000–60,000 persons).

⁴³Requiring an additional pool of deployable units (and supporting elements) at lower readiness to provide replacements for the initial forces.

⁴⁴For example with the Helsinki Headline Catalogue, indicating that the capabilities sought would ideally involve 100,000 personnel, 400 combat aircraft and 100 naval vessels, and the European Capabilities Action Plan, focusing on particular crucial pieces of equipment, such as transport planes and unmanned aerial vehicles.

⁴⁵Headline Goals 2010, as approved by General Affairs and External Relations Council on 17 May 2004, endorsed by the European Council of 17 and 18 June 2004, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/2010%20Headline%20Goal.pdf>.

operational. Although not completely matching the grand ambitions outlined in the HHG, these rapidly deployable forces do go a long way, consisting of 1,500 men (supplied by three different Member States on a rotating basis), being ready for command within 10 days, and able to engage in any desired theatre of operations within 15 days.

That same year, a separate headline goal was laid down for civilian crisis management operations.⁴⁶ The Civilian Headline Goal (CHG) sought to improve the Union's civilian capabilities and to respond effectively to crisis management tasks, building on the results and experiences in the ESDP so far. The CHG aimed to ensure that the EU is able to conduct any type of crisis management operation. For that purpose, high-quality resources need to be devoted and deployed with all the support functions and equipment required, in a short time-span and in sufficient quantity. Again, at the expiry of the deadline in 2010, the majority of the objectives were achieved on paper. However, only time and practice will reveal whether the EU is currently up to the task of staging any type of crisis management operation.

Overall then, as the gap between what is expected of the EU and what it is actually able to deliver does not yet appear completely closed, the targets will have to be renewed at some point. While the available resources seem to be at a level that enables for challenges and threats to be tackled adequately, more needs to be done to reach an optimal standard and overcome all contingencies. It has been asserted that at present, only a meagre 10–15% of the total armed forces can be made available and deployed for EU purposes.⁴⁷ At the same time, this figure provides a neat indication of the Union's grand potential.

3.6 The European Security Strategy

The first European Security Strategy (ESS) saw the light of day in 2003. It was authored by the then High Representative Javier Solana, and heralded yet another new era for the EU's foreign and defence policy.⁴⁸ In the United States, every new administration comes up with an official security strategy, often giving birth to a particular doctrine, named after the incumbent president.⁴⁹ The 2003 ESS was a first stab at visualising and ordering the mid- and long-term strategic priorities

⁴⁶Civilian Headline Goal 2010, as approved by the Ministerial Civilian Capabilities Improvement Conference and noted by the General Affairs and External Relations Council on 19 November 2007, available at http://www.consilium.europa.eu/uedocs/cmsUpload/Civilian_Headline_Goal_2010.pdf.

⁴⁷See Biscop (2008), p. 431.

⁴⁸A Secure Europe in a Better World – The European Security Strategy, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.

⁴⁹For example, the 1948 Truman doctrine, spelling out the United States structural assistance to countries in the communist sphere of influence that risked being overwhelmed, or the 2002 Bush doctrine, stressing the United States readiness to engage in 'pre-emptive self defence'.

of the Union. In 2008, the first report on its implementation appeared, providing for a partial revision and update.⁵⁰ A novel edition is likely to be churned out by every new HR.

The current ESS identifies four key challenges and threats: terrorism and organised crime; proliferation of weapons of mass destruction; regional conflicts and state failure; cyber security, energy security and climate change.⁵¹ The ESS also indicates four strategic objectives: to address threats as early as possible with a variety of instruments, including, but not confined to military means; to build security in the neighbourhood and promote a ring of well-governed bordering countries; to contribute to the establishment of an international order based on effective multilateralism; to increase the EU's effectiveness with appropriate administrative and command structures, improved capabilities, well-trained staff and better support, employing a 'people-based approach'.⁵² The 2008 implementation report reinforces the broad understanding of security canvassed by the ESS, underlining the Union's ability to rely upon a combination of instruments, stressing the link between security and development, and pointing out the need to focus on enhanced regional integration.

Commendable as its content may be, the legal status of the European Security Strategies remains questionable. The 2003 edition was, somewhat surprisingly, not tagged as an official 'common strategy', and not adopted on the basis of what was then Art. 13 TEU. It thus resided in a quaint legal limbo. A forthcoming new ESS may well – and perhaps ought to – be based on Art. 26 TEU. Paradoxically, in that case, although it would explicitly still be called a 'strategy', its official status will be that of a decision.

It will be interesting to see whether, content-wise, a new ESS will also turn the page. The current document does not comprise tangible rights or obligations. In fact, it is even more ambiguous than many of the soft law documents referred to in the previous paragraph, since they at least outlined some concrete targets. Scholars have dubbed the handiwork of Mr Solana an 'inspirational sketch', too full of political rhetoric to be assigned any legal meaning. Nevertheless, its great symbolic value should not be overlooked: the mere issuing of an ESS illustrates the growing self-confidence of the EU as a (quasi-) unitary actor on the world stage. Indeed, the ESS could be considered a statement of identity, conveyed through the Union's 'front office'. Moreover, the passionate emphasis it places on multilateralism has been hailed as a significant virtue in a time where other powerful international

⁵⁰ See *Report on the Implementation of the European Security Strategy – Providing Security in a Changing World*, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/reports/104630.pdf.

⁵¹ The ESS should be distinguished from the Union's Internal Security Strategy, for the first time adopted in February 2010 (available at <http://register.consilium.europa.eu/pdf/en/10/st05/st05842-re02.en10.pdf>). Confusingly though, in some respects, the internal and external security strategies appear to overlap.

⁵² An in-depth analysis offers Biscop (2005).

players were all too eager to go it alone. Seen in this light, the ESS forms a shining beacon, exhibiting the hallmarks of the 'European way' in promoting peace and security.

3.7 Conclusion

The Common Security and Defence Policy passed through an eventful first decade. Quickly thereafter, with the complete overhaul of Title V TEU by the Treaty of Lisbon, its legal base was expanded, legitimising many of the developments that had hitherto taken place outside the official framework. After many shattered dreams and wasted opportunities in the 1990s, the EU went off to a new start at the beginning of the twenty-first century. The CSDP gradually gained momentum, and with the launching of more than 20 missions in barely 5 years time, the EU clearly affirmed its operational capacity.

In the new world order after the end of the Cold War, tried and tested organisations such as the WEU and NATO rapidly lost credibility, with the original configurations having surpassed their sell-by date and sundry attempts at repositioning proving unsuccessful. In contrast, the potential for the European Union to step in and take over appears to have grown exponentially. The gamut of missions in which the EU, in its post-Lisbon form, is willing to engage, is nothing short of impressive. Though several obstacles are yet to be overcome, through the European Defence Agency, the Member States have been enabled to effectively pool their resources, coordinate and concentrate their R & D efforts. Even if the capabilities-expectations gap persists for some time more, over the past years, it did at least become smaller. So far, what has too often been lacking is the firm determination to make use of the possibilities the CSDP has to offer. But if in due time, a number of countries were to take up the gauntlet and form an avant-garde, opting for 'permanent structured cooperation', there would be only few security and defence issues left that the Union, in one way or the other, is unable to tackle.

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7. The Common Security and Defence Policy in a multilateral world

Mark Webber*

INTRODUCTION

The Cologne European Council of June 1999 took what many at the time and since have regarded as a historic step – namely, the launch of the European Security and Defence Policy (ESDP).¹ Conceived within the framework of the existing Common Foreign and Security Policy (CFSP), ESDP marked a step-change in the ambitiousness of EU external action (it would allow the EU to ‘play its full role on the international stage’) and, by extension, the nature of the European project (ESDP was hailed as ‘a new step in the construction of the European Union’).² Ten years on, the official position remained highly positive. Javier Solana, the EU High Representative for the CFSP, noted in June 2009 that ESDP was ‘the missing link’ of international peace and security; numerous missions across four continents had demonstrated the ‘crucial role [of the EU] in bringing stability to different parts of the world’.³ ESDP, he suggested a little later, has brought ‘unique added value’, a ‘joint civilian–military approach’ meaning that ‘the EU remains the only organisation that can call on a full panoply of instruments and resources [to] complement the traditional foreign policy tools of its member states’.⁴

* The author would like to thank Lorenzo Cladi for research assistance provided in the preparation of this chapter.

¹ The Lisbon Treaty uses the term Common Security and Defence Policy (CSDP). This chapter, however, will refer to ESDP, the term in common usage in the ten-year period the chapter is concerned with.

² ‘Declaration of the European Council on Strengthening the Common European Policy on Security and Defence’ (Cologne, 3–4 June 1999), reprinted in Rutten, M. (comp.), ‘From St-Malo to Nice – European Defence: Core Documents’ (2001) 47 Chaillot Paper (Paris: Institute for Security Studies, Western European Union), pp. 41–2.

³ J. Solana, ‘ESDP@10: What Lessons for the Future?’, speech delivered in Brussels, 28 July 2009, at: www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/discours/109453.pdf (accessed 10/1/2010).

⁴ Solana, J., ‘EU Makes Its Mark on the World Stage’, *The Guardian*

This, the official position, has not passed without qualification – EU documentation has been relatively frank in its consideration of issues surrounding implementation, capabilities and the effectiveness of decision-making. These are, however, essentially caveats, the identification of the means to enhance an already successful project.⁵ More critical judgements have been apparent among those bodies formally charged with scrutinising ESDP's development. The European Parliament's Committee on Foreign Affairs, for one, has made it its business to highlight ESDP's strategic and operational deficiencies. While generally upbeat in its assessment of ESDP's potential, it remains, according to a recent report, unconvinced of the policy's strategic direction.⁶ Expert opinion, meanwhile, has been divided. Anand Menon in a ten-year retrospective noted that the 'development of the ESDP has been significant and remarkably rapid'. It has, he continued, 'performed far more creditably than many predicted and than anyone had a right to expect'.⁷ In stark contrast, Nick Witney, the first Chief Executive of the European Defence Agency (EDA), has written that '[t]en years after the launch of the EU's defence effort [...] the European Security and Defence Policy badly needs a shot in the arm. Procrastination, weak coordination, and persistent absenteeism [...] have hobbled the Union's ability to [...] make a significant contribution to maintaining international peace.'⁸

Given the diversity of opinion, how then are we to judge ESDP? While the initiative is still a work in progress, a decade's worth of activity has provided a body of evidence sufficient to make a considered evaluation of its performance. Ten years, furthermore, is long enough to take into account not simply what the EU has promised to do, but to pay detailed attention to what it has actually done. In this connection, commentators as well as the EU itself paid greatest attention in the early years of ESDP to its institutional development and capabilities. This was understandable because without these ESDP lacked the platform from which operations could take flight. With an extensive operational record, it no longer makes sense, however, to concentrate simply on the prerequisites of action; the operations themselves ought also to be a focus of attention. Broadening the analysis out still further, operations (and, by exten-

(Comment is Free), 11 October 2009 at: <http://www.guardian.co.uk/commentisfree/2009/oct/11/eu-esdp-10-years> (accessed 10/1/2010).

⁵ This is, for example, the spirit in which the biannual Presidency Reports on ESDP are written.

⁶ See 'Report on the European Security Strategy and ESDP', document A6-0032/2009, 28 January 2009.

⁷ Menon, A., 'Empowering Paradise? The ESDP at Ten', (2009) 85 *International Affairs* 244, 246.

⁸ Witney, N., 'Re-energising Europe's Security and Defence Policy', (2008) *Policy Paper* (European Council on Foreign Relations), p.1.

sion, ESDP writ large) only make sense when seen in strategic and political context. What is their rationale? From where do they derive their legitimacy? And how far do they further the EU's aim of strengthening partnerships and multilateral order?

Proceeding from these observations, this chapter discusses ESDP in six thematic sections concerned respectively with reason and rationale, legitimacy, institutions, operations, multilateralism, and capabilities. A concluding section contemplates ESDP's future near-term development in light both of the record to date and of pressures currently bearing down upon the EU. The argument of the chapter is that the record of ESDP is mixed. A broadly positive view can be reached in regard to what one might label the 'acquis ESDP' (its political and legal attributes and institutional architecture) but serious questions hang over the effectiveness of operations and the generation of capabilities. A gap, in other words, exists between ESDP's potential and its performance.

REASON AND RATIONALE

A distinction is to be made between, on the one hand, the reasons for ESDP and, on the other, its underlying rationale: reasons provide context, rationale is the public justification of what ESDP is for. This distinction is sometimes blurred – why ESDP came into existence has obviously influenced the nature of the tasks undertaken by that policy. Yet it is worth keeping these two meanings in mind for each has a somewhat different bearing in terms of how one assesses the initiative.

If one examines the reasons for ESDP first, it is hard not to agree with that policy's underlying logic. This requires one to reject some of its more controversial connotations. As Jolyon Howorth has convincingly argued, ESDP was set up neither to balance the US nor to undermine NATO. Neither was it the vanity project of UK Prime Minister Tony Blair or a conspiracy aimed at the creation of a European army. ESDP, rather, was occasioned by the convergence of a number of powerful political and historical circumstances.⁹ The external context or setting of the EU is crucial here. The end of the Cold War, first and foremost, challenged pretty well all important international organisations. On the continent of Europe this resulted in a reorientation of NATO's mission, the rebirth of the Conference on Security and Cooperation in Europe (as the Organisation for Security and Cooperation in Europe (OSCE)) and the

⁹ Howorth, J., *Security and Defence Policy in the European Union* (Basingstoke: Palgrave Macmillan, 2007), pp. 33–60.

signing of the Treaty on European Union (TEU) at Maastricht. The latter had a gestation which predated this historic juncture (the Single European Act of 1987 being its immediate precursor) but the Treaty's framing and, more specifically, its inclusion of provisions for CFSP were propelled forward precisely by these revolutionary developments.¹⁰ The challenge of transformation became that much more painful in the years that followed. For the UN, NATO and the fledgling EU, the collapse of Yugoslavia and the attendant wars – in Bosnia and then Kosovo – proved a baptism of fire. No organisation emerged with much credit from the Bosnian imbroglio and while NATO salvaged some respect during Operation Allied Force in Kosovo, this mission served only to highlight the inadequacy of European efforts in responding to a large-scale crisis so close to home. That it was NATO and by extension the US which saved the day was little consolation. The Clinton administration's prevarications in the Balkans throughout the 1990s had demonstrated the unreliability of American power, while efforts at strengthening the 'European pillar' within the Alliance (the much touted European Security and Defence Identity or ESDI) had lacked the political will (and, indeed, the proper institutional setting) necessary to galvanise the creation of a credible European crisis management capability.

All these factors clearly demonstrated that there was an objective need for an enhancement of a European capacity for crisis management – precisely the type of initiative which the French and British undertook at St Malo in 1998 and which materialised the following year as ESDP. That it was the EU specifically that served as the receptacle of the initiative reflected two further influences. The first was a normative pressure. The 1990s was a decade characterised by humanitarian catastrophe. While the international response was patchy (witness the hesitations over Bosnia and the catastrophic failure over Rwanda), there was a growing appreciation, among the leading Western powers at least, that a right of humanitarian intervention had emerged in both state practice and customary international law.¹¹ This proved a propitious development for the EU. Admittedly, a number of its Member States (notably the Dutch, the French, the Germans and the British) had demonstrated an ambiguous commitment to humanitarian objectives in their individual foreign policies (and in Balkan affairs specifically), but as for the EU itself, its identity as an international actor was premised on quite distinct moral claims

¹⁰ Judt, T., *Postwar: A History of Europe Since 1945* (London: William Heinemann, 2005), p. 713.

¹¹ Schoenbaum, T.J., *International Relations – the Path not Taken: Using International Law to Promote World Peace and Security* (Cambridge: Cambridge University Press, 2006), pp. 122–3.

buttressed, in turn, by a commitment to multilateralism and legality in the conduct of international affairs.¹²

The second influence was the inherent logic of the EU's own historic development. The well-known neo-functional view suggests that a deepening of economic and social integration encourages integrationist spillover into the domain of foreign policy cooperation, a process illustrated by CFSP and prefigured by European Political Cooperation in the 1970s and 1980s. Yet there was no inevitability that this would, in turn, lead to the emergence of a policy of the ESDP type involving the coordinated use of military, police and civilian instruments.¹³ That it did was less to do with the internal dynamic of European integration and more with how this process affected the EU's external standing. With the development of the European Union and all that that entailed (the single market, a single currency, and the pooling of a range of other economic, social and political resources), it was clear the EU had achieved, potentially, a real global weight. Even those, such as the British, traditionally sceptical of a distinctive European role came to appreciate that this potential was a resource that offered huge benefits in a troubled and uncertain world – for burden sharing among European states and as a complement to NATO activities. But to harness it required taking the project of European integration in a new direction, towards a specifically EU crisis-management capacity.

Much has changed in the ten years or more since ESDP was launched. The wars in Iraq and Afghanistan and the securitisation of terrorism following 9/11 have, however, only reinforced the trends above: the US is now even less concerned with European security and so the space (and the necessity) for European autonomy has expanded. The EU itself has also altered because of both enlargement and Treaty revision (culminating in the adoption of the Lisbon Treaty), and this too has made the logic of ESDP that much more compelling. Given this context, the specific rationale for ESDP has been notably consistent. When launched, its core purpose was clear: to permit the EU the ability 'to take decisions on the full range of conflict prevention and crisis management tasks' through the development of 'a capacity for autonomous action, backed up by credible military forces'. This capacity would not be detrimental to NATO, would be in accordance with the principles of the UN Charter and would entail the EU playing 'its full role on the international stage'.¹⁴

¹² Howorth, n9 above, pp. 54–5.

¹³ Andreatta, F., 'Theory and the European Union's International Relations', in Hill, C. and Smith, M. (eds), *International Relations and the European Union* (Oxford: Oxford University Press, 2005), pp. 22–3.

¹⁴ See n2 above.

This clarity of purpose has been muddled somewhat by allusions to 'defence' in relation to ESDP. The Treaty on European Union – the Maastricht Treaty – and the successors of Amsterdam (Article J.7) and Nice (Article 17) all committed the EU to the possibility of a 'common defence';¹⁵ the Lisbon Treaty repeats this while also containing clauses on mutual solidarity and mutual assistance (both of which can be construed as having defence implications).¹⁶ However, the status of this ambition remains moot so long as a majority of EU states reside simultaneously in NATO. At present, therefore, the 'D' of ESDP cannot be taken as suggesting the EU has the status of a military alliance or that it is geared to defending Europe. This conceivably may occur at some later date,¹⁷ but thus far 'the defence component' of ESDP is more accurately construed as 'part of [the EU's] approach to confronting insecurity and managing crises'¹⁸ and thus of 'projecting stabilisation forces outside – and sometimes far outside – its borders'.¹⁹

In fact, EU statements have kept to this core rationale. While the broad sweep of EU external action sometimes means the precise status of ESDP is obscured (it is telling, for instance, that the European Security Strategy of 2003 does not refer to ESDP by name), that policy has nonetheless steered towards a reasonably well-defined set of objectives derived from the so-called Petersberg Tasks. Adopted by the Western European Union (WEU) in 1992 and integrated into the Treaty of Amsterdam, these went on to inform the EU's Helsinki Headline Goal of 1999 (that is the 'Force Catalogue' or pool of capabilities upon which ESDP would draw). Already ambitious ('humanitarian and rescue tasks, peacekeeping [...] and tasks of combat forces in crisis management, including peacemaking'), these were subsequently extended by the European Council of June 2004 to embrace 'joint disarmament operations [...] military advice and assistance tasks, conflict prevention [and] post-conflict stabilization'. The intended scope of operations has followed from this (as recently outlined in the Headline Goal 2010 and the Civilian Headline Goal 2010), as has consideration of necessary capabilities, both military and civil-

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¹⁷ Salmon, T., 'The European Union: Just an Alliance or a Military Alliance?', (2006) 29 *Journal of Strategic Studies* 813.

¹⁸ Speech of Javier Solana (High Representative of the CFSP), Bonn, 11 October 2005 in 'EU Security and Defence: Core Documents 2005', *Chaillot Paper*, No. 87, March 2006, p. 286.

¹⁹ D'Argenson, P-H., 'The Future of European Defence Policy', (2009) 51 *Survival* 147.

ian, to support them (discussed below). The Treaty status of the extended Petersberg Tasks, meanwhile, has followed from their inclusion in Article 43 of the Lisbon Treaty.²⁰ The Treaty of Nice had undertaken a similar job but Lisbon is much more robust. As the House of Commons Select Committee on Defence has reported, all existing aspects of ESDP 'have for the first time been brought within the framework of a single treaty'.²¹

LEGITIMACY

The European Convention, the aborted Constitutional Treaty and, more recently, the Treaty of Lisbon have all been suffused by debates as to how to strengthen the EU's legitimacy. The assumption behind these debates is that the democratic values of the Union, its working methods and its institutions are (or, at least, ought to be) legitimate by design. Yet, owing to its peculiar character, these considerations need not apply *strictu sensu* to the domain of EU security policies. Security is an area, at least in domestic politics, usually shielded from intrusive oversight. This practice has been replicated to some degree at the EU level and so ESDP and CFSP (in pre-Lisbon Treaty terms) have fallen within the second pillar thereby giving priority to the Member States in policy formation while at the same time marginalising input and oversight by the European Parliament and the Commission.²²

This important qualification aside, there are important ways in which ESDP does enjoy a veneer of legitimacy, one which has moreover, developed positively over time. In this connection, a useful distinction can be made between the legitimacy which falls to the EU as an actor pursuing ESDP and that which attaches to the particular action of ESDP itself (the deployment of missions in other words).²³ Taking the first of these, at its most elevated level, legitimacy attaches to an actor because it has a widely recognised right to govern.²⁴ Put another way, an institution will enjoy legitimacy where its member states

²⁰ [2009] OJ C115/39. For other references in this paragraph see Quille, G., 'The Lisbon Treaty and Its Implications for CFSP/ESDP' (European Parliament, Directorate-General External Policies, Policy Department, February 2008).

²¹ 'The Future of NATO and European Defence', Ninth Report of Session 2008/08 (London: The Stationery Office, 2008), p. 86.

²² Bono, G., 'Challenges of Democratic Oversight of EU Security Policies', (2006) 15 *European Security* 435.

²³ This actor/action distinction is derived from Coleman, K. P., *International Organisations and Peace Enforcement: The Politics of International Legitimacy* (Cambridge: Cambridge University Press, 2007), pp. 20–24.

²⁴ Hurd, I., 'Legitimacy and Authority in International Politics', (1999) 53 *International Organization* 381.

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ian, to support them (discussed below). The Treaty status of the extended Petersberg Tasks, meanwhile, has followed from their inclusion in Article 43 of the Lisbon Treaty.²⁰ The Treaty of Nice had undertaken a similar job but Lisbon is much more robust. As the House of Commons Select Committee on Defence has reported, all existing aspects of ESDP 'have for the first time been brought within the framework of a single treaty'.²¹

LEGITIMACY

The European Convention, the aborted Constitutional Treaty and, more recently, the Treaty of Lisbon have all been suffused by debates as to how to strengthen the EU's legitimacy. The assumption behind these debates is that the democratic values of the Union, its working methods and its institutions are (or, at least, ought to be) legitimate by design. Yet, owing to its peculiar character, these considerations need not apply *strictu sensu* to the domain of EU security policies. Security is an area, at least in domestic politics, usually shielded from intrusive oversight. This practice has been replicated to some degree at the EU level and so ESDP and CFSP (in pre-Lisbon Treaty terms) have fallen within the second pillar thereby giving priority to the Member States in policy formation while at the same time marginalising input and oversight by the European Parliament and the Commission.²²

This important qualification aside, there are important ways in which ESDP does enjoy a veneer of legitimacy, one which has moreover, developed positively over time. In this connection, a useful distinction can be made between the legitimacy which falls to the EU as an actor pursuing ESDP and that which attaches to the particular action of ESDP itself (the deployment of missions in other words).²³ Taking the first of these, at its most elevated level, legitimacy attaches to an actor because it has a widely recognised right to govern.²⁴ Put another way, an institution will enjoy legitimacy where its member states

²⁰ [2009] OJ C115/39. For other references in this paragraph see Quille, G., 'The Lisbon Treaty and Its Implications for CFSP/ESDP' (European Parliament, Directorate-General External Policies, Policy Department, February 2008).

²¹ 'The Future of NATO and European Defence', Ninth Report of Session 2008/08 (London: The Stationery Office, 2008), p. 86.

²² Bono, G., 'Challenges of Democratic Oversight of EU Security Policies', (2006) 15 *European Security* 435.

²³ This actor/action distinction is derived from Coleman, K. P., *International Organisations and Peace Enforcement: The Politics of International Legitimacy* (Cambridge: Cambridge University Press, 2007), pp. 20–24.

²⁴ Hurd, I., 'Legitimacy and Authority in International Politics', (1999) 53 *International Organization* 381.

recognise the right of that institution to act on their behalf.²⁵ In the case of the EU, this right may, for instance, derive from its encapsulation of the common norms and values which pertain to its individual members. The EU has, of course, been hailed as a 'normative power' and certainly in regard to its 'self-construction' or official discourse this is an appellation which has some merit.²⁶ The 'right to govern', alternatively, may reflect a more functional quality based on the effectiveness of governance and the generation of policy outputs. Here too, the EU has a reasonable claim to make. In the sphere of external policy and ESDP specifically, this rests on the ability, unique among regional international organisations, to combine instruments of civilian and military crisis-management. The upshot, potentially at least, is the delivery of global public goods, sometimes in concert with other international bodies (NATO and the UN) but on occasion involving the EU acting alone.²⁷ More formally, the right is expressed in law. The ability of the EU to act within the security sphere has a sound legal footing given the inclusion of provisions on ESDP and CFSP in the Lisbon Treaty (presaged in turn by provisions contained in the Treaties of Maastricht, Amsterdam and Nice). ESDP here has an inter-governmental character in the sense, first, that unanimity in decision-making is the presumed norm (notwithstanding a provision for constructive abstention) in launching missions; second, that capabilities for ESDP missions are provided by the Member States; and third, that this area is exempt from legislative acts and oversight by the European Court of Justice. Further, the Treaty basis is significant in at least three respects in ascribing actorness to the EU. First, the competence of the Union is clearly specified (as alluded to above in reference to the extended Petersberg Tasks). Second, and notwithstanding their derivation from the Member States, capabilities for ESDP are regarded as expressly providing 'the Union with an operational capacity'.²⁸ And third, since the Treaty of Nice, recognition has been given to those EU institutions tasked with carrying out ESDP, namely (as articulated in the Lisbon Treaty), the European Council, the Council, the High Representative, the European Defence Agency, and the Political and Security Committee.

²⁵ Lord, C., 'Accountable and Legitimate? The EU's International Role', in Hill and Smith (eds), n13 above at 113–14.

²⁶ Diez, T. and Pace, M., 'Normative Power Europe and Conflict Transformation' (paper presented to the tenth biennial conference of the European Union Studies Association, Montreal, May 2007).

²⁷ Howorth, J., 'Implementing a "Grand Strategy"', in de Vasconcelos, A. (ed.), *What Ambitions for European Defence in 2020?* (Paris: European Union Institute for Security Studies, 2009), pp. 37–8.

²⁸ Article 42(1) TEU.

As well as being a quality derived from its Member States, the legitimacy of the EU as actor in ESDP also stems from the support it enjoys among other relevant audiences. The EU's external audience is, of course, vast, but to simplify, it can be argued that among major global and regional actors (such as the US, China, India, Brazil, ASEAN or the African Union) the EU is viewed favourably as a nascent military and civilian power.²⁹ As for its internal audience, one significant measure here is public opinion. On the one hand, this has been seen as ill-disposed towards ESDP: European publics are far from uniform in their preferences but, overall, tend to oppose ESDP deployment far beyond EU borders and are not well disposed to bearing increased costs, be these financial or human, for missions (in these respects, the Danes, British, Irish and Swedes are notable sceptics).³⁰ Yet on the other hand, a 'permissive consensus' does exist in favour of the ESDP project: 2008 Eurobarometer data indicates that across the EU 27, two-thirds of respondents regarded defence and foreign affairs as an area in which decisions ought to be made jointly by governments within the EU. This, moreover, was the fourth most popular area in this respect, well ahead of, for example, the EU's traditional concern with economic integration.³¹

Assuming, then, that legitimacy attaches to the EU as actor in the ESDP field, it might be logical to infer that legitimacy *ipso facto* also pertains to particular ESDP actions. Here, however, additional criteria apply. In this connection, a case can be made that legitimacy follows from the formal act by which an operation is initiated and subsequently extended. All ESDP operations have a legal basis in a Joint Action of the Council (and this is also a measure of a political consensus among EU Member States). This, in turn, is reinforced by two other features. First, some ESDP missions have been launched following an express invitation by the government of the host state. Second, ESDP connects to some degree with international law. The fit here, however, is not perfect. Whereas some Member States – for instance Finland, France, Ireland and Sweden – set great store by Security Council authorisation, the British position (mindful of possible Russian and Chinese vetoes) is that the EU need not regard such approval as a *sine qua non* of action.³² The EU has consequently struck an ambivalent position. While committed to

²⁹ Howorth, n27 above, p. 38.

³⁰ Brummer, K., 'Superficial not Substantial: The Ambiguity of Public Support for Europe's Security and Defence Policy', (2007) 16 *European Security* 183.

³¹ See *Eurobarometer 70 – Public Opinion in the European Union* (December 2008), p. 50. At: http://ec.europa.eu/public_opinion/archives/eb/eb70/eb70_first_en.pdf (accessed 10/1/2010).

³² Born, H., Anghel, S., Dowling, A., Fuior, T., 'Parliamentary Oversight of ESDP Missions' *Policy Paper*, No. 28 (Geneva Centre for Democratic Control of Armed Forces: 2008), pp. 27–8.

'strengthening international security in accordance with the principles of the United Nations Charter',³³ it does not acknowledge any special status for the Security Council in mandating ESDP action (see also below).

Action legitimacy may also be seen as following from susceptibility to mechanisms of accountability and specifically parliamentary accountability. Taking national parliaments first, here considerable variation is in evidence. The most significant powers are enjoyed in Finland, Luxembourg and Sweden, where prior parliamentary approval is sought before the respective governments sign up to a Joint Action on ESDP. More widespread is the requirement for prior authorisation before troops are deployed. Taking these different forms of authorisation together, one recent survey of 25 Member State legislatures found that 14 were 'currently involved in prior authorisation before the actual launch of military ESDP missions', while ten were involved in prior authorisation of civilian missions.³⁴ The picture is, however, patchy and this is also the case when it comes to the European Parliament (EP). This body has no power to authorise ESDP missions (this right, as noted above, being reserved to the Council), and while it can issue non-binding resolutions prior to a mission being launched, its record in doing so is poor. As of early 2008, the EP had passed only three *ex ante* resolutions pertaining to military operations and none relating to civilian missions. *Ex post* oversight, that is a decision-making role in the implementation and termination of an ESDP mission, is similarly constrained. As of mid 2009, the EP had not adopted a single *ex post* resolution on ESDP.³⁵ The European Parliament also enjoys powers of scrutiny through the work of the Sub-Committee for Security and Defence.³⁶ The Treaty of Lisbon under Article 36 augments these powers by requiring that the newly created High Representative for Foreign Affairs and Security Policy 'regularly consult' the Parliament and '[take] into consideration' its views when formulating policy. These provisions at present remain untested. As for financial powers, finally, the EP has some say in setting budgets for civilian missions but lacks any such abilities in respect of military operations.³⁷

³³ Article 42(1) TEU.

³⁴ Born et al., n32 above, p. 32.

³⁵ Comelli, M. and Zanon, F., 'Democratic Legitimacy and Accountability of ESDP Operations', Paper presented at the 3rd Expert Seminar on 'The EU in Conflict Prevention and Civil-Military Crisis Management – the Quest for Effectiveness and Legitimacy', Turin, 25–26 June 2009, pp. 7–8.

³⁶ Born et al., n32 above, pp. 7–13.

³⁷ Comelli and Zanon, n35 above, pp. 8–9.

To summarise, then, the EU can claim both actor and action legitimacy in respect of ESDP even though the specifically democratic character (via parliamentary involvement) of the policy remains underdeveloped. A democratic deficit pertains to some degree in ESDP, but legitimacy – as indicated by the criteria above – is not a function of democratic procedure and method only.

INSTITUTIONS

The ability of the EU to carry forward ESDP is, in part, a function of its military and civilian capabilities (as we shall see below). In addition to these deployable resources, other, institutional, assets are also crucial. ESDP is not an alliance of the traditional type dealing with threats but a multifaceted structure that responds to security risks.³⁸ Its institutional evolution reflects this broad purpose. Further, and unlike NATO, ESDP is not a stand-alone structure; rather, it is embedded within the wider set of EU institutions and this context too has had a decisive influence.

These twin contexts were clearly significant at ESDP's outset. The initial impulse of development gave priority to military requirements stemming from observation of the Balkan crises of the 1990s, while the institutional setting was strongly conditioned by the experience of CFSP. ESDP carried forward many of the working methods of its parent policy, the politically most significant being the location of ESDP within the second pillar. From the outset, it was thus subject to inter-governmental decision making premised on unanimity and political oversight of the Member States acting through the General Affairs Council (Foreign Ministers), COREPER (Permanent Representatives) and ultimately the European Council (along with the rotating Presidency). The principal new bodies of ESDP created in its first 18 months³⁹ comprised the Political Security Committee (PSC) (of ambassadors), the European Union Military Committee (EUMC) (of chiefs of defence staff), and the EU Military Staff (EUMS). All reflected ESDP's strict inter-governmentalism and its nascent military requirements. The prominent role of the HR-CFSP as advocate of ESDP, meanwhile, stemmed precisely from his attachment to CFSP and his accountability to the Council.

³⁸ This distinction is derived from Wallander, C. A. and Keohane, R. O., 'Risk, Threat and Security Institutions', in Wallander, H. et al (eds), *Imperfect Unions: Security Institutions over Time and Space* (Oxford: Oxford University Press, 1999), pp. 24–6.

³⁹ That is, between the Cologne European Council of June 1999 and the Nice European Council in December 2000.

The history of ESDP institutions thereafter has been marked by three broad characteristics. The first has been the development of structures to complement the growing number of ESDP civilian missions. CIVCOM, the Committee for Civilian Aspects of Crisis Management (attached to the PSC) had been created in May 2000 and this was supplemented in 2006 with the establishment of a Civil–Military Cell within the EUMS and, a year later, by the creation of a Civilian Planning and Conduct Capability located in the Council Secretariat. The main consequence of the civilianisation of ESDP, however, has been in expanding the role of the Commission through its representation on the permanent ESDP bodies noted above, liaison with the Council Secretariat, and the development of its own organs (most notably, Directorate A of DG-RELEX) dedicated to CFSP/ESDP matters. The Commission, furthermore, is responsible for overseeing CFSP expenditure on civilian ESDP missions. The second characteristic concerns proliferation. The institutions above constitute the main components of ESDP's 'wiring diagram' but, as already implied, these have been the basis for further growth. The EUMS alone, for instance, has given rise to a wealth of bodies dedicated to planning and overseeing operations as well as maintaining contact with NATO (and SHAPE specifically). Similarly, the role of the HR-CFSP has been enhanced by a Policy Unit and a Joint Situation Centre. The third, and all-embracing characteristic has been that of adaptation. Institutionalisation has, in many ways, been a response to operational requirements but equally to political imperatives derived from the needs (in pre-Lisbon Treaty parlance) of cross-pillar cooperation (hence the association of the Commission) and of striking a balance between the competing demands of national prerogatives (hence the retention of inter-governmental methods) and the creation of a specific EU resource for crisis management.

The upshot of these developments has been the formation of an extremely complex network of institutions.⁴⁰ Institutionalisation of this sort, often maligned in the EU as a substitute for policy, has however had some beneficial effects, facilitating negotiation and compromise among the bewildering variety of actors engaged in EU policy-making. ESDP decision-making is thus typical of much else in the EU: time-consuming and opaque but nonetheless delivering movement on a policy area without privileging the preferences of a single Member State or institutional actor.⁴¹ Institutional complexity does, however, give rise to inevitable blockages in policy implementation. The most egregious instances have been where separate lines of institutional engage-

⁴⁰ The fullest exposition can be found in Grevi, G., 'ESDP Institutions' in Grevi, G., Helly, D. and Keohane, D. (eds), *European Security and Defence Policy: The First Ten Years (1999–2009)* (Paris: EU Institute of Security Studies, 2009), pp. 19–67.

⁴¹ Howorth, n9 above, pp. 90–91.

ment have been poorly coordinated. In the case of EUSEC RD Congo, for example, a single coordinated mission for security sector reform was not possible owing, in large part, to the jealously guarded responsibility of the Commission for overseeing a quite distinct Community programme of judicial reform.⁴² In Afghanistan, similar problems have arisen in that a lack of coordination between the EU Special Representative (answerable to the HR-CFSP), the EUPOL police reform mission and the Commission's development programmes (separate from ESDP) has undermined the EU's overall effort in the country.⁴³

CFSP/ESDP provisions in the Lisbon Treaty do make some attempt to address problems of this sort. In many respects, the Treaty confirms existing practices on CFSP/ESDP (thus modifications to decision-making are slight)⁴⁴ or affirms the standing of existing institutions (see Articles 38 on the PSC and 42 on the European Defence Agency). Its major institutional innovation is that of the position of the High Representative of the Union for Foreign Affairs and Security Policy assisted by a European External Action Service. Initiated in December 2009 and occupied by Baroness Ashton, this office is intended to be 'triple hatted':⁴⁵ (i) assuming the functions of the office of HR-CFSP once occupied by Javier Solana, that is ensuring implementation of 'decisions adopted by the European Council and the Council';⁴⁶ (ii) as representative of the Union on CFSP matters and as chair of the Foreign Affairs Council (thus assuming the responsibilities of the rotating presidency in CFSP/ESDP matters); and (iii) acting as a Vice-President of the Commission to 'ensure consistency of the Union's external action'.⁴⁷

On paper, then, this new position holds the potential to galvanise a more effective coordination between the variety of institutions engaged in ESDP, the bridge to the Commission being particularly noteworthy. Of this writing it is too early to judge the impact of this change. However, some scepticism is in order. The new High Representative will continue to be placed in a complex institutional environment – and will have to work alongside (and perhaps compete with) the new position of President of the European Council, the President of the Commission and those Commissioners responsible for areas (development, humanitarian assistance) that might intrude upon ESDP. Rather

⁴² Clément, C., 'EUSEC RD Congo', in Grevi et al. (eds), n40 above, p. 249.

⁴³ Peral, L., 'EUPOL Afghanistan', in Grevi et al. (eds), n40 above, p. 335.

⁴⁴ See the analysis in House of Lords, European Union Committee, 'The Treaty of Lisbon: An Impact Assessment', Vol. I: Report (HL Paper 62-I, March 2008), pp. 182–5.

⁴⁵ House of Lords, European Union Committee, 'The Treaty of Lisbon', p. 189.

⁴⁶ Article 27 TEU.

⁴⁷ Articles 18 and 42 TEU.

than cultivating the network of international contacts that was the mark of Solana's tenure, the incumbent may end up a manager of the EU's internal decision-making process. This, if effectively carried out, may still unblock at source potential problems of ESDP policy-making and implementation but equally, when conjoined with an exhausting workload, it could result in a job paralysed by bureaucracy and unceasing political squabbles.⁴⁸

OPERATIONS

ESDP was born in 1999; in January 2003, the EU police mission in Bosnia was launched, the first ever ESDP operation, and in May of that year ESDP was declared as possessing 'operational capability across the full range of Petersberg Tasks'.⁴⁹ The EU has so far conducted 24 separate ESDP operations, thirteen of which were ongoing as of this writing (see Table 7.1). In terms of the number of operations, the EU's record is bettered only by the UN, and in terms of personnel, only by the UN and NATO. By comparison with other regional bodies, the EU is (in quantitative terms) a more significant provider of peace operations than the Commonwealth of Independent States (CIS), the African Union, the OSCE and the Organization of American States (OAS) (see Table 7.2.)

Two important operational trends stick out when surveying ESDP.⁵⁰ First, the EU has widened its operational area of deployment. This is not yet global in scope (no operations have been mounted in the western hemisphere), but it has taken the EU well beyond its borders. An initial concentration on the Western Balkans (Bosnia-Herzegovina and Macedonia) has been supplemented by missions elsewhere in Europe (Georgia, Moldova/Ukraine), in Central Asia (Afghanistan), the Middle East (Iraq and the Palestinian territories), East Asia (the Aceh province of Indonesia) and Africa (including offshore in the Indian Ocean). Second, ESDP has been characterised by an expansion of its 'operational spectrum'. As initially formulated, ESDP was geared principally to a military role in crisis management. Perhaps significantly, however, its first

⁴⁸ Angelet, B. and Vrillas, I., 'European Defence in the Wake of the Lisbon Treaty', Egmont Paper, No. 21 (Brussels, Royal Institute for International Relations, 2008), pp. 23–5.

⁴⁹ 'Declaration on EU Military Capabilities', EU Capability Conference (Brussels, 19 May 2003) at: http://www.foreignpolicy.org.tr/documents/eucc_190503_p.htm (accessed 10/1/2010).

⁵⁰ These are derived from Pirozzi, N. and Sandawi, S., 'Five Years of ESDP in Action: Operations, Trends, Shortfalls', (2008) 39 *European Security Review* pp. 14–15.

Table 7.1 ESDP – missions ongoing October 2009

Operation	Type of mission	Duration	Size
EUPM Bosnia	(Civilian) Advice on policing, law and order	Since January 2003	363
EUFOR Althea Bosnia	(Military) Peacekeeping	Since December 2004	2,104
EUJUST LEX Iraq	(Civilian) Training senior police, judicial and prison officials	Since June 2005	45
EU BAM Moldova/ Ukraine	(Civilian) Training Ukrainian and Moldovan border officials	Since December 2005	230
EUPOL COPPS Palestinian Territories	(Civilian) Assist with reform of Palestinian police force	Since January 2006	60
EU BAM Rafah, Palestinian Territories	(Civilian) Border-crossing monitoring mission	Launched January 2006 but suspended since mid 2007	30
EUPOL Afghanistan	(Civilian) Assist formation of an Afghan police force	Since May 2007	426
EUPOL RD Congo	(Civilian) Advice on police, justice and security sector reform	Since July 2007	74
EUSEC RD Congo	(Mixed military civilian) Advice on security sector reform.	Since July 2007	44
EU SSR Guinea-Bissau	(Mixed military/civilian) Advice on security sector reform	Since February 2008	32
EULEX Kosovo	(Civilian) Assisting Kosovan police, courts and customs services	Since June 2008	2,598
EUMM Georgia	(Civilian) Ceasefire monitoring	Since September 2008	366
EU NAVFOR – Atalanta East African coast	(Military) Anti-piracy naval mission	Since December 2008	1,800

Total = 8,172

Sources: 'ESDP and EU Missions Updates – October 2009', *European Security Review*, No. 46, October 2009; 'Overview of the Missions and Operations of the European Union, October 2009', at: <http://www.consilium.europa.eu/showPage.aspx?id=268&lang=> (accessed 10/1/2010).

Table 7.2 Multilateral peace operations (December 2008)

	No. of missions	No. of personnel
United Nations	23	98,614
African Union	2	3,560
CIS	3	5,349
OSCE	9	461
EU	12	7,932
NATO	3	65,978
OAS	1	40
Ad hoc coalitions	6	5,148

Source: K.Soder, 'Multilateral Peace Operations in 2008', *SIPRI Yearbook 2009: Armaments, Disarmament and International Security* (Oxford etc.: SIPRI, 2009), summary at: <http://www.sipri.org/yearbook/2009/03/03A> (accessed 10/1/2010).

operation was a civilian one and since 2003 military missions have made up only a minority of deployments. While many ESDP missions, in fact, exhibit both military and civilian characteristics, what is significant is the increasing emphasis on the latter. This civilian thrust, moreover, has exhibited notable variation (see Table 7.1) as missions have provided advice and assistance on policing, rule-of-law provision, security-sector reform and different types of monitoring. Taken as a whole, ESDP's operational spectrum has embraced three broad functional tasks: promoting the stabilisation of areas of crisis (the Western Balkans, Georgia, the Aceh province of Indonesia and the Democratic Republic of Congo), enhancing governance and state capacity in nascent and failing states (Bosnia, Iraq, Afghanistan, the Democratic Republic of Congo and the Palestinian Authority) and, in service of these first two tasks, complementing the efforts of other international organisations, be this the UN, NATO, the OSCE or the African Union (see below).

ESDP's operational trends can certainly be taken positively. The ability to deploy at distance has provided some substance to the notion of the EU as a global actor and puts flesh on the claim of the European Security Strategy that the EU 'should be ready to share in the responsibility for global security'.⁵¹ That the EU has done this in concert with other major organisations suggests that it has acquired a degree of credibility which CFSP alone had failed to

⁵¹ *European Security Strategy: 'A Secure Europe in a Better World'* (European Council, Brussels, 12 December 2003), reprinted in Missiroli, A., (comp.), 'From Copenhagen to Brussels, European Defence: Core Documents' (2003) 67 Chaillet Paper p. 325.

provide. The sheer number of operations, meanwhile, indicates an activism and freshness at odds with the impression generated otherwise of an EU beset, as a consequence of the prolonged saga of the Constitutional and Lisbon Treaties, by paralysis and introspection.⁵²

Assessing operations does need, however, to take proper cognisance of impact on the ground. ESDP remains a relatively new initiative and it has deployed in some extremely challenging circumstances. That it has mounted operations in such zones of danger and complexity at all, and that these have occurred via ESDP rather than, say, the UN is in itself a measure of progress.⁵³ With this in mind, ESDP has scored some notable successes. Operation Artemis in the Democratic Republic of Congo (DRC) helped stabilise a precarious humanitarian situation and was a path-breaking case of an autonomous (that is, without recourse to NATO), rapidly assembled and far-flung ESDP mission. EUFOR RD Congo in 2006 performed similarly, on this occasion supporting the work of the local UN mission (MONUC) and providing a stable environment in the capital Kinshasa for the conduct of elections. Further afield in Aceh in Indonesia, the EU monitoring mission successfully oversaw a ceasefire between local separatists and the Indonesian authorities. ESDP's clearest successes, however, have been in the Western Balkans. EUFOR, ESDP's biggest mission so far, has been largely successful, both in discharging its mandate of post-conflict stabilisation and in effecting a working relationship with NATO. Operation Concordia in Macedonia shares a similarly positive assessment, having also worked alongside NATO and, in this case, helping lay the ground for a stabilisation of the country that would eventually see it obtain EU candidate status. Early assessments of EULEX Kosovo, operational since December 2008, have also been upbeat.⁵⁴

Set alongside these positive examples there are, however, some obvious failings. EUPOL, the police assistance mission in Afghanistan, is widely regarded as among ESDP's greatest disappointments – slow to deploy, lacking direction and subject to an ill-judged transference of the Bosnian experience.⁵⁵ The EUJUST LEX rule-of-law mission in Iraq, meanwhile, was hampered from the outset by political divisions among the Member States. The positions

⁵² Such a positive reading of ESDP can be found in Howorth, n9 above, p. 240.

⁵³ Menon, n7 above, pp. 230–31.

⁵⁴ These assessments are summaries of detail provided in what is the most comprehensive survey to date of ESDP operations. See chapters 5, 6, 9, 14, 18 and 21 in Grevi et al. (eds), n40 above. See also the chapter in this volume by Keukeleire, Kalaja and Çollaku.

⁵⁵ Korski, D., 'Shaping Europe's Afghan Surge', *Policy Brief* (Brussels: European Council on Foreign Relations, March 2009), p. 9; Dempsey, J., 'Europe's Afghan Mission Still in Disarray', *International Herald Tribune*, 18 November 2009.

of France and Spain prevented the mission from deploying in country and thus constrained from the outset its operational usefulness.⁵⁶ In Georgia, similarly, caution among some Member States at deploying in a Russian area of interest limited the size and duration of EUJUST THEMIS, a mission whose effectiveness was also undermined by incompetent planning, poor financial management and uncertain liaison with local authorities.⁵⁷

Over and above these specific instances, a more general criticism also stands out. In its various declarations on the matter, the EU has attached a far-reaching 'level of ambition' to ESDP.⁵⁸ Yet, as Nick Witney has pointed out, ESDP missions have been characterised by a lack of precisely this quality.⁵⁹ In most cases, missions have occurred in places where a robust NATO presence (as in Kosovo, Bosnia and Macedonia) or a UN role (as in Congo and Kosovo) had already paved the way for deployment. This is in itself not to be decried in that the EU has still performed a very valuable and, in both Bosnia and Kosovo, extensive role in these places. Nonetheless, in many cases, the EU has operated in a very circumscribed fashion – be this in terms of the operational mandate, duration of the mission or strength of deployed personnel. Indeed, some missions have quite simply not been equal to the task before them (EUPOL, Afghanistan), have been too time-limited to have any lasting effect (EUJUST Themis in Georgia) or too small in scale to tackle the severity and enormity of the local environment (EU SSR Guinea-Bissau, EUSEC RD Congo). A lack of ambition has also meant ESDP has sometimes failed to deploy where otherwise it may have proven beneficial. Crises in Darfur and the DRC in late 2008 both provided occasions for discussion of ESDP intervention but in neither case did an operation materialise. What this seemed to demonstrate was ESDP's limits, a lingering caution in the face of what appeared to be the more testing cases of crisis management.

⁵⁶ Korski, D., 'EUJUST LEX (Iraq)', in Grevi et al. (eds), n40 above, pp. 231–41.

⁵⁷ Kurowska, X. 'EUJUST THEMIS (Georgia)', in Grevi et al. (eds), n40 above, pp. 201–9.

⁵⁸ See, for instance, 'Declaration by the European Council on the Enhancement of the European Security and Defence Policy (ESDP)', Annex 2, Presidency Conclusions, Brussels, 11–12 December 2008, in Glière, C. (comp.), 'EU Security and Defence: Core Documents 2008', Chaillot Paper No. 117 (Paris: European Union Institute for Security Studies, 2009), p. 464. This outlines the range of military and civilian operations which it is envisaged the EU should be capable of conducting *simultaneously* under ESDP auspices 'in the years ahead'.

⁵⁹ Witney, n8 above, p. 41.

'EFFECTIVE MULTILATERALISM'

The security and prosperity of the EU, the 2003 European Security Strategy proclaimed, rests on the promotion of an 'effective multilateral system'.⁶⁰ The Lisbon Treaty, similarly, commits the EU to cooperation 'with third countries, and international, regional or global organisations', and to promoting 'multilateral solutions to common problems'.⁶¹ True to this spirit, ESDP has developed as an inclusive initiative. Its credibility and, to some extent, its effectiveness have been premised on the generation of local, regional and global partnerships.

Two strands of policy are relevant here. The first, and one apparent from its inception, was an openness to 'third-party' involvement. Specific bilateral arrangements have been worked out with significant operational partners (Russia, Ukraine, Canada) and ESDP missions have been characterised by varying levels of engagement by non-EU contributors, including putative members, local states of influence and strategic partners (see Table 7.3). The added value of these contributions has not always been apparent – partner contingents have often been very small and difficult to integrate – but they serve the added political purpose of rendering particular missions more acceptable both to local populations and to international opinion. Second, arrangements have been negotiated and developed with important institutional actors including NATO, the UN, the African Union and the OSCE (see Table 7.3). Space prevents full treatment of all of these. Links to NATO (the longest-standing arrangement) and with the UN (more recent and reflective of ESDP's growing reach), however, illustrate some of the character of this inter-organisational cooperation.

The relationship with NATO has significant pedigree. Throughout the 1990s, considerable effort had been expended on fashioning a workable relationship between NATO and the WEU and these arrangements subsequently formed the basis of dialogue between the Alliance and the EU from 1999. The overlapping but differing memberships of the two bodies (from mid-1999, NATO included six European non-EU members⁶² as well as Canada and the US) and the need to obtain access to NATO resources for certain mission scenarios meant such dialogue was both an operational and a political necessity. A formal package of measures to facilitate this was finalised in March 2003 (known as 'Berlin-plus'). Shortly afterwards, the EU launched two operations – Operation Concordia in Macedonia and Althea in Bosnia – which

⁶⁰ Missiroli (comp.), n51 above, p. 329.

⁶¹ Article 21(1) TEU.

⁶² Iceland, Norway, Turkey, the Czech Republic, Hungary and Poland.

Table 7.3 ESDP in a multilateral world (missions ongoing October 2009)

Operation	Region	Connection of ESDP operation to other international organisations	Third party involvement in ESDP operation
EUPM Bosnia	Western Balkans	Follow on from UN Police Mission	Canada, Iceland, Norway, Russia, Switzerland, Turkey, Ukraine
EUFOR Althea	Western Balkans	Formal cooperation with NATO (Berlin-plus)	Albania, Chile, FYROM, Switzerland, Turkey
EUJUST LEX Iraq	Middle East		Jordan and Egypt host training events for Iraqis
EU BAM Moldova/ Ukraine	Western former Soviet Union		Georgia, Kazakhstan, Tajikistan
EUPOL COPPS Palestinian Territories	Middle East		Norway, Canada
EUBAM Rafah Palestinian Territories	Middle East		
EUPOL Afghanistan	Central Asia	Cooperation with UN (UNAMA). Absence of a comprehensive agreement with NATO (i.e. Berlin-plus); ad hoc cooperation (e.g. via individual arrangements with NATO-led Provincial Reconstruction Teams)	Canada, Croatia, Norway, New Zealand
EUPOL RD Congo	Central Africa	Political context of UN Eastern Congo Stabilisation Plan but no formal agreed EU-UN cooperation	Canada, Turkey, Switzerland, Angola
EUSEC RD Congo	Central Africa	UNSCR 1856 provides for cooperation between the local UN mission, MONUC, and the EU	

Operation	Region	Connection of ESDP operation to other international organisations	Third party involvement in ESDP operation
EU SSR Guinea-Bissau	West Africa		
EULEX Kosovo	Western Balkans	Transition from rule-of-law aspects of UNMIK	Norway, Switzerland, Turkey, Croatia, Canada, USA
EUMM Georgia	South Caucasus	EUMM de facto replaces withdrawn missions of OSCE and UN (UNOMIG)	Presence of ESDP mission premised on a bilateral agreement with Russia
EU NAVFOR Atalanta	East African coast	In support of UNSCRs to promote anti-piracy actions and to protect vessels of the UN World Food Programme	Croatia, Norway

Source: G. Grevi, D. Helly and D. Keohane (eds), *European Security and Defence Policy: The First Ten Years (1999–2009)* (Paris: EU Institute of Security Studies, 2009), passim.

relied on NATO cooperation. Formal institutional links have developed in tandem. These include meetings between the PSC and the North Atlantic Council, between respective Military Committees and the convening of a NATO–EU Capability Group. EU officers, further, enjoy a permanent presence at SHAPE and NATO maintains liaison with the EU Military Staff.⁶³ The assumption behind these contacts is that the EU and NATO would engage in a long-term cooperative division of labour harnessing each other's strengths in the fields of post-conflict reconstruction and stabilisation, and defence and security sector reform.⁶⁴ And this seems an entirely reasonable objective; as the House of Commons Select Committee on Defence has noted, both bodies share a similar security agenda and 'both [are] engaged in a process of seeking to enhance capabilities and improve force generation for expeditionary operations'. The reality, however, has in the words of the same committee, been a 'relationship [...] fraught with difficulties [and] plagued by mistrust

⁶³ Details of Berlin-plus and associated arrangements can be found at Simkus, J. (rapporteur), 'NATO–EU Operational Cooperation' (NATO Parliamentary Assembly, document 166 DSCTC 07 E, 2007), paras 20–21.

⁶⁴ Ibid, paras 9–16.

and unhealthy competition'. 'Little progress', it concludes, 'has been achieved in recent years in improving a relationship which [has] remained stalled and inefficient'.⁶⁵ The upshot has been that only the two missions noted above have formally made use of the Berlin-plus mechanism. Both have been generally regarded as successful.⁶⁶ Elsewhere, there has been an unnecessary duplication of effort (the EU and NATO launched separate missions to Darfur in 2005) or sub-optimal cooperation between local EU and NATO operations (as in Kosovo and Afghanistan), which has undermined the effectiveness of both.⁶⁷

Responsibility for this deadlock cannot simply be laid at the door of the EU. The core problem is political and specifically the refusal of Turkey to countenance fuller discussions on EU–NATO collaboration because this would involve Cyprus (a member of the EU since 2004). This has, in effect, blocked the initiation of new Berlin-plus operations and stymied high-level consultations on problems like Afghanistan where both organisations are present. While less disruptive, there have also been some within the EU (France most notably) who have themselves been less than enthusiastic in their support of EU–NATO dialogue.⁶⁸ The broader context, however, is also relevant. The problems of NATO–EU cooperation are, in part, the consequence of two bureaucratic machines finding it difficult to obtain a functional fit. This is despite a seeming convergence of roles (the EU is a civilian power acquiring military instruments whereas NATO is a military power moving increasingly into civilian areas of responsibility) and a clear sense of continuing functional specialisation (NATO could benefit as much from the EU's civilian resources of humanitarian aid, police and legal training etc., as could the EU from NATO's military assets). These seeming synergies have, however, come up against some profound political forces. The EU's growing international role has been welcomed in NATO by the US⁶⁹ but American leadership has not materialised in service of unblocking Turkish obstructionism. The US,

⁶⁵ House of Commons, Defence Committee, *The Future of NATO and European Defence*, Ninth Report of Session, 2007–08 (London: The Stationery Office, 2008), pp. 81–2.

⁶⁶ Cascone, G., 'ESDP Operations and NATO: Cooperation, Rivalry or Muddling Through?', in Merlingen, M. and Ostrauskaitis, R. (eds), *European Security and Defence Policy: An Implementation Perspective* (London and New York: Routledge, 2008), pp. 142–58.

⁶⁷ Simkus, n63 above, paras 32–40.

⁶⁸ In mitigation, France's return to NATO's integrated command structures in 2009 as well as the coming to power of the Obama administration have modified the attitude in Paris.

⁶⁹ When launched, ESDP was looked upon sceptically by the Clinton administration out of a concern that it would undermine NATO. Berlin-plus assuaged this worry. In light of NATO's burden in Afghanistan, the Bush and Obama administrations would both come to support a stronger ESDP role in crisis management.

mindful of years of observing EU division and weakness in the CFSP field, also remains sceptical of ESDP's deliverables. Some in the EU (France, Germany, Spain), meanwhile, are suspicious of NATO's transformation and the priority it attaches to Afghanistan, regarding the Alliance as a body less in service of European or Transatlantic interests and more one whose role is to deliver European resources in service of US (under Obama as much as Bush) grand strategy.⁷⁰

Turning to the UN, here a formal relationship is roughly coincident in time with the history of ESDP (formal EU–UN contacts having only been established in 2000). This is also a relationship in which purposes have largely converged. The EU's approach to crisis management is based on the integrated application of civilian and military instruments; so too with the UN, whose peacekeeping missions rely on a synthesis of political, security, humanitarian and developmental approaches.⁷¹ As the UN's role in peacekeeping has become severely overstretched and as the EU has acquired experience of crisis management, so the opportunities for fruitful cooperation have multiplied. In Bosnia, the EU Police Mission (deployed from 2002) was the successor to the UN International Police Task Force. And in the Democratic Republic of Congo, the EU's Operation Artemis was prompted by a request of the UN Secretary General (endorsed by the Security Council) and paved the way for a strengthening of the UN operation (MONUC) there. These two experiences, in turn, gave rise to a more institutionalised relationship formalised in declarations signed in September 2003 and June 2004 and the creation of a Steering Committee of UN and EU officials. Thereafter, and perhaps reflecting its more ambitious quality, so EU–UN cooperation has become more strained. In Chad, parallel EU and UN missions were launched in 2007 authorised by UNSCR 1778. Problems of coordination then ensued although this was less to do with political controversy (the EU mission was fully supported within the Security Council including, materially, by Russia which agreed to provide it with helicopters) than with a reluctance among some EU member countries to deploy and unclear lines of communication between the General Affairs and External Relations Council (GAERC) and the Security Council.⁷² In the DRC, similarly, cooperation with MONUC, the local UN mission, has proven difficult as controversy has arisen over whether the EU or the UN should take the lead role in security sector reform.

⁷⁰ Howorth, n9 above, p. 177.

⁷¹ Morsut, C., 'Effective Multilateralism? EU–UN Cooperation in the DRC, 2003–2006', (2009) 16 *International Peacekeeping* 268.

⁷² Gowan, R., 'ESDP and the United Nations' in Grevi et al. (eds), n40 above, pp. 121–3.

As these examples suggest the EU–UN relationship is far from perfect. There is a broader context here which is also relevant. European governments have been reluctant to commit personnel to UN peacekeeping missions and this is, in part, an opportunity cost of prioritising ESDP missions. Further, as noted above, a desire for political control over ESDP has meant recourse to the Security Council has not been seen as essential when framing an operation. Thus, EUPM in Bosnia, Operations Concordia and Proxima in Macedonia, EUJUST THEMIS in Iraq, EUPOL KINSHASA and EUJUST LEX in Georgia have all been initiated without formal Security Council authorisation.⁷³

In summary, the overall pace of progress can be regarded as modest. The EU–UN relationship is relatively new and in less than a decade has moved from a non-existent cooperation in crisis management to what Richard Gowan has described as ‘frequent if imperfect operational interaction’. ESDP via the UN has thus ‘moved from a “paper policy” to concrete engagement in global security’⁷⁴ even if this has exhibited a number of operational and political difficulties.

CAPABILITIES

The ambition and effectiveness of ESDP operations is a matter which rests squarely on the question of resources. Problems in generating military and civilian capabilities for ESDP has, however, been a dead weight dragging the initiative down. At its launch, ESDP was premised upon improvements in European military capabilities – further development of ‘the appropriate capabilities and instruments’, the Cologne European Council declaimed, were necessary for the EU ‘to fully assume its tasks in the field of conflict prevention and crisis management’.⁷⁵ The Helsinki European Council of December 1999, meanwhile, added an important supplement by committing the EU to develop ‘non-military crisis response tools’.⁷⁶

⁷³ Tardy, T., ‘EU–UN Cooperation in Peacekeeping: A Promising Relationship in a Constrained Environment’, in Ortega, M. (ed.), ‘The European Union and the United Nations: Partners in Effective Multilateralism’, Chaillot Paper, No. 78 (Paris: EU Institute for Security Studies, 2005), pp. 49–50.

⁷⁴ Gowan, n72 above, p. 125.

⁷⁵ ‘Declaration of the European Council on Strengthening the Common European Policy on Security and Defence’ (Cologne, 3–4 June 1999), reprinted in Rutten (comp.), n2 above, p. 41.

⁷⁶ ‘Presidency Report on Non-Military Crisis Management of the European Union’ (Helsinki, 10–11 December 1999), reprinted in Rutten (comp.), n2 above, pp. 89–90.

To these ends, ESDP has been premised upon a formal commitment of the Member States to both military and civilian capability goals in order to carry out the range of missions envisaged for ESDP. In the military sphere, ESDP kicked off with the ‘Helsinki Headline Goal’ (with its attention-grabbing commitment to a 60,000-strong European Rapid Reaction Force). Difficulties in generating assets, in turn, resulted in the European Capabilities Action Plan (ECAP) of December 2001, followed in June 2004 by a new ‘Headline Goal 2010’ (notable for its endorsement of the ‘battlegroup’ concept). The EDA then added its voice to calls for improvement with the publication in October 2006 of a ‘Long-Term Vision for European Defence Capability and Capacity Needs’. Identified shortfalls were given further prominence in a Capability Development Plan (CDP) issued the following July, and in December 2008 the process turned full circle with the Council ‘Declaration on Strengthening Capabilities’, a reprise of the targets of the Headline Goals. As for civilian goals, an Action Plan on non-military crisis management was agreed at Helsinki and this was followed at the Feira (June 2000), Nice (December 2000) and Göteborg (June 2001) European Councils by agreed targets for policing, rule of law and civilian administration missions. Increasing attention to civilian missions, in turn, led to the adoption of a further Action Plan on civilian capabilities in June 2004 and a Civilian Headline Goal 2008 that December.

The number and repetitive nature of these various statements is certainly suggestive of a keen sense of priority and this effort has produced some benefits. These can, in one sense, be regarded as conceptual, involving the identification of the requisite assets to meet operational scenarios and their adjustment in light of operational experience. The EDA’s ‘Long-Term Vision’ supplemented by the CDP is the apotheosis of this process.⁷⁷ Further, ESDP has provided an additional spur to military reform among the member states (initiatives launched by NATO have acted in parallel) involving shifts in recruitment, training and procurement to better meet the needs of conflict management and force projection. Thus, while equipment shortfalls among European militaries are legion, ESDP (and specifically the work of the EDA) has made some impression on beginning the long-term process of cutting redundant equipment from national inventories, rectifying capability gaps (in strategic air transport, and helicopters), pooling procurement, and developing joint research and technology projects.⁷⁸ Yet for all this, capabilities remain ESDP’s Achilles’ heel. Even Solana, ESDP’s professional optimist, was

⁷⁷ Weis, A., ‘Improving Capabilities for ESDP’s Future Needs’, in de Vasconcelos (ed.), n27 above, 107–10.

⁷⁸ Grevi, G. and Keohane, D., ‘ESDP Resources’, in Grevi et al. (eds), n40 above, pp. 70–88, 104–5.

moved to note in 2007 the EU's 'negative' track record in this regard.⁷⁹ This comment followed publication of a Capabilities Improvement Chart which made plain that only twelve of the 64 capability shortfalls included in the original Headline Goal had been addressed. Two years later, Solana still remained concerned; capabilities, he suggested, was ESDP's major failing, accounting for the 'gap between our ambitions and the reality' of policy implementation.⁸⁰

Many observers of ESDP have noted that low defence spending largely accounts for this poor record,⁸¹ and it is certainly true (as noted below) that the trend in Europe has been one of long-term decline. Yet, the total spend is still considerable: in 2008, France, the UK, Germany and Italy were respectively the world's third, fourth, sixth and eighth largest military spenders.⁸² What seemingly matters, therefore, is how this money is spent. As Nick Witney has shown, too little is spent among the EU 27 on research and development and procurement, and too much on personnel costs. With some notable exceptions (the UK, Sweden, France, the Netherlands and, to some degree, Germany and Italy), the upshot is armed forces ill-suited to the types of mission priorities associated with ESDP. Only 30 per cent of European forces are capable of operating outside of national territory and in 2006 only 5 per cent were actually deployed in extra-European missions.⁸³

Nearly two decades after the end of the Cold War, such deep-seated problems of military transformation remain endemic among many European militaries. How they feed into ESDP can be seen from the brief history of the EU Battlegroups. This initiative marked a seeming shift towards qualitative improvements given its emphasis on swiftly deployable 'effective, credible and coherent' force packages.⁸⁴ Declared operational at the beginning of 2007, these formations had still not been deployed as of this writing. Questions also continue to hang over the degree of inter-operability among participating militaries and thus the readiness of Battlegroups to deploy in the demanding crisis situations for which they are designed.⁸⁵

⁷⁹ Speech in Berlin, 29 January 2007 at: http://www.europa-eu-un.org/articles/en/article_6720_en.htm (accessed 10/1/2010).

⁸⁰ Solana, n3 above.

⁸¹ Menon, n7 above, p. 234.

⁸² Stalenheim, P. et al., *Military Expenditure Data, 1999–2008*, Stockholm International Peace Research Institute, Military Expenditure Database, at: <http://www.sipri.org/yearbook/2009/05/05A> (accessed 10/1/2010).

⁸³ Witney, n8 above, pp. 16–21.

⁸⁴ 'Headline Goal 2010', Annex I to the Presidency Report on ESDP (European Council, Brussels, 17–18 June 2004), in 'EU Security and Defence: Core Documents 2004', Chaillot Paper, No. 75 (Paris: European Union Institute for Security Studies, 2005), p. 112.

⁸⁵ Herz, J., 'Military Capabilities – A Step Forward in ESDP?', (2009) 46

A similar picture emerges when considering civilian capabilities. Again, the issue is not entirely a matter of resources. As Grevi and Keohane note, the budget for CFSP has increased markedly during the last decade, a trend that can 'be ascribed almost exclusively to the growth and costs related to ESDP civilian operations'.⁸⁶ The problems, rather, are bureaucratic and political. For example, the disbursement of funds has often proven overly time-consuming, thus undermining the early stages of certain missions. Recruitment, meanwhile, has not been easy. To mount civilian operations, the EU relies on personnel (police officers, judges, customs officers, etc.) seconded from the Member States, a pool of expertise that is often difficult to tap owing to a lack of career incentives for working outside the domestic environment. Blame for this does not entirely fall upon the EU. Less forgivable is the problem of political will. A 'member state audit' carried out by Korski and Gowan notes the professionalism and commitment of some in the EU in training and recruitment (Denmark, Finland, Germany, the Netherlands, Sweden and the UK) but, equally, the under-performance and indifference of others (France, Italy, Bulgaria, Cyprus, Estonia, Greece, etc.).⁸⁷

The resourcing and modernisation of military capabilities has bedevilled European militaries for decades. Long recognised in NATO, ESDP is simply its contemporary manifestation, now with the added problem of generating competencies in civilian crisis management. And as the demand for ESDP missions has grown so these deficiencies have become an increasing cause for concern. In short, just like its parent CFSP, ESDP has become victim to its very own version of the 'capabilities-expectations gap'.⁸⁸ A rationalisation of defence expenditure along with a greater pooling of defence resources and projects is one long-term means of addressing this. So too are the so far untested provisions on Permanent Structured Cooperation in the Lisbon Treaty that allow for the more able and willing to act in concert free of certain institutional and decision-making constraints.⁸⁹ But ultimately, given the irreconcilable mismatch between the proliferation of global crises and ESDP's limited resources, the EU may simply have to learn to do less but to do less better.

European Security Review, October, p. 3. On the development of the EU legal framework on defence industries, see the chapter by Koutrakos in this volume.

⁸⁶ Grevi and Keohane, n78 above, p. 92.

⁸⁷ Korski, D. and Gowan, R., *Can the EU Rebuild Failing States? A Review of Europe's Civilian Capacities* (London: European Council on Foreign Relations, 2009), pp. 46–51.

⁸⁸ The well-known formulation derived from Hill, C., 'The Capabilities-Expectations Gap, or Conceptualizing Europe's International Role', (1993) 31(3) *Journal of Common Market Studies*, 305.

⁸⁹ Biscop, S., 'Permanent Structured Cooperation and the Future of ESDP', (2008) 20 *Egmont Paper* (Brussels: Royal Institute for International Relations).

CONCLUSION

ESDP represents a triumph of heightened expectations. The EU has been able to mount a range of both military and civilian operations and has done so both near and beyond the locality of Europe. In the process it has managed to forge agreement among a normally fractious and divided membership and has created an institutional machinery virtually from scratch. All this, moreover, has served to promote the EU's autonomy and influence. ESDP operations have, by and large, eschewed NATO assistance and in some instances the EU has come to be regarded as an equal partner either of the Alliance (as in the Balkans) or of the UN (as in Africa). From 'a standing start', in the words of Solana's advisor Robert Cooper, the EU has in the first decade of the 21st century vastly improved upon the record of policy failure and inaction that characterised the 1990s. It may still lack the capabilities and decisiveness of response that characterise a great power. But while the EU is not the US, Russia, China or India, its record of conflict management is, arguably, no worse than that of these states. The ponderous and incremental nature of its policy may, in fact, make it a good deal better – '[i]f the EU is slow to decide', Cooper suggests, 'it may also be slow to make mistakes'.⁹⁰

Precisely because the EU now has a record of intervention, one that has gone hand in hand with bald claims of international responsibility, so too have expectations grown that the EU do more and do it more effectively. Yet for all the progress of the last ten years, the EU continues to act within severe constraints. The vexed issue of capabilities has trammelled the ambitions of ESDP throughout its short life. Calls for rises in military expenditure have fallen on deaf ears since 1999. This is the product of long-term historical trends (the blunting of militarism among political elites and the political priority given to domestic economic and social expenditure) which have gestated since the end of the Second World War. The end of the Cold War and, more recently, the urgent fiscal crisis confronting European economies has served only to reinforce this retreat.⁹¹ There is, in short, no prospect of any of the European powers reversing this trend of declining military expenditure or, by that same token, of the EU being able to extract greater resources from its members to materially develop ESDP. The initiative thus remains reliant on more effective collaborative use of existing resources, a process which is still in its early stages and, whatever the merits of the EDA and other initiatives,

⁹⁰ Cooper, R., 'Response', in Grant, C., *Is Europe Doomed to Fail as a Power?* (London: Centre for European Reform, 2009), pp. 30–33.

⁹¹ For a considered historical analysis of these trends see Sheehan, J., *The Monopoly of Violence: Why Europeans Hate Going to War* (London: Faber and Faber, 2008), esp. pp. 217–21.

one which has to compete with national reservations and the ongoing priority accorded to NATO by a majority of EU members.

Over and above this, a growing sense of political retrenchment is also evident. While ESDP was never meant to fight wars, the long, brutal NATO campaign in Afghanistan will have a shaping influence. Already commitments in that theatre have curtailed the readiness of some, not least the UK, Germany and the Netherlands, to lend support to some putative EU-led operations.⁹² This constraint will continue as long as ISAF remains in situ. Even after its withdrawal, a consequent military and political exhaustion will linger thereby ruling out military adventurism abroad. Such caution will have greater effect on NATO than on the EU, but it will also ensure that ESDP does not stray beyond the operational parameters that have guided it since its inception.

The low level of ambition so bemoaned by commentators is, therefore, likely to persist with the EU making periodic, time-constrained and limited-impact forays into global conflict management. Such a prospect is not to condemn ESDP with faint praise. The EU will continue to be a security provider in demand (both by the Member States and by external audiences). Further, the very fact that it will have to operate within limits will encourage ongoing innovation. And this will not simply be a matter of institutional reconfiguration. As ESDP reached the end of its first decade, it launched what in many ways may come to be regarded as its most significant mission to date. Operation Atalanta, an anti-piracy mission off the coast of Somalia (and also embracing the Gulf of Aden and the Red Sea), has entailed an area of operation of some 1.4 million square nautical miles, the carrying out of a multiplicity of complex tasks (intelligence gathering, monitoring, law enforcement, and escorting maritime transport), the involvement of some 2,000 personnel from nineteen EU states and coordination with a parallel NATO operation as well as communication with the American, Russian, Chinese and Indian fleets.⁹³ Not only has this been the EU's first ever naval operation, it was launched without recourse to NATO resources and represented a conscious application of strategic thinking – an appreciation of the need to stabilise the EU's geopolitical environment and to directly uphold EU strategic interests (keeping sea-lanes open) while also serving broader multilateral purposes (protecting vessels of the UN World Food Programme). Such strategic thinking has also been in evidence in Balkan missions, but Atalanta is significant in that it has occurred

⁹² Thus, in December 2008 the mooted ESDP deployment to the DRC was opposed by the UK on the grounds that it lacked sufficient deployable forces to assist the mission. See Gowan, 'ESDP and the United Nations' in Grevi et al. (eds), n40 above, p. 125.

⁹³ Helly, D., 'EU NAVFOR Somalia: The EU Military Operation Atalanta' in Grevi et al. (eds), n40 above, pp. 395–400.

at greater geographic remove from the EU, and without the protective cover of (or prior preparation by) NATO and the UN.⁹⁴

The very innovative nature of this mission suggests that Atalanta will not necessarily be a template for ESDP's future development. What it does demonstrate, however, is that ten years on from its launch ESDP has travelled a long way, conceptually, operationally and politically.

⁹⁴ Germond, B. and Smith, M. E., 'Re-Thinking European Security Interests and the ESDP: Explaining the EU's Anti-Piracy Operation', (2009) 30 Contemporary Security Policy pp. 573–76, 587–8.

8. The role of law in Common Security and Defence Policy: functions, limitations and perceptions

Panos Koutrakos

INTRODUCTION

In an essay originally written in the early 1990s, Weiler wrote that, '[i]n some ways, Community law and the European Court were everything an international lawyer could dream about: the Court was creating a new order of international law in which norms were norms, sanctions were sanctions, courts were central and frequently used, and lawyers were important'.¹

This emphasis on law as a motor for integration has been apparent in the extraordinary process of group therapy which the European Union has undergone in the last nine years: the Laeken Declaration of the European Council in December 2001, the establishment of the European Convention, the process of the drafting of the Treaty Establishing a Constitution for Europe, the fateful story of its ratification, the Intergovernmental Conference which led to the signing of the Lisbon Treaty in December 2007, the tumultuous process of its ratification and its entry into force on 1 December 2009, all brought the law to the very centre of the debate about the Union's direction. And as the process got longer and the road to the entry into force of the relevant legal arrangements revealed more roadblocks and turns than their drafters had envisaged, the debate became more heated and its subject-matter wider and more profound. The fate of the legal rules agreed upon first in the Constitutional Treaty and then in the Lisbon Treaty was associated with the very identity of the Union: law was seen as guaranteeing the effectiveness of the Union's stature on the world scene. It is interesting in this context that, during the Russia–Georgia crisis in 2008, President Sarkozy of France, then holder of the rotating EU Presidency, wrote that, had the Lisbon Treaty entered into force,

¹ J. H. H. Weiler, *The Constitution of Europe* (Cambridge: CUP 1999) pp205–6 where he goes on: 'Community law as transformed by the European Court was an antidote to the international legal malaise.'

the Union would have had the appropriate institutions to deal with international crises.²

The Lisbon Treaty introduced a number of institutional innovations which provided a focal point for this debate about the role of legal rules in the EU's foreign affairs. The appointment of the President of the European Council under Article 15(6) TEU, and the High Representative of the Union for Foreign Affairs and Security Policy under Article 18 TEU had been anticipated eagerly as boosting the ability of the Union to act on the international scene. Similarly, the establishment of the European External Action Service (EEAS) under Article 27(3) TEU had been viewed as enhancing the coherence of the EU's foreign policies. The appointment of Herman van Rompuy, who had been the Prime Minister of Belgium for nine months, as the first President of the European Council, and Baroness Ashton, the Trade Commissioner for a year and a former head of a regional health authority in the United Kingdom, were subsequently viewed as distinctly underwhelming. As for the inter-institutional squabbles which marred the process of setting up the EEAS, they were not only unhelpful but also entirely typical of the internal conflicts which underpin the shaping of the Union's external posture.

The analysis of the institutional innovations introduced by the Lisbon Treaty is beyond the scope of this chapter.³ Instead, the aim of this chapter is to focus on legal rules which govern the Common Security and Defence Policy, and examine the different functions which they may assume in areas which are at the core of national sovereignty. Therefore, the point of reference for this analysis is distinct from that of the quote which began this chapter: by focusing on the CSDP, one moves away from the tighter legal system set out in what used to be the Community legal order. However, it will become apparent that, whilst further away, the subject matter of this chapter is not entirely distinct from that legal order. The choice of topics it will discuss is highly selective, the aim being to highlight different functions that legal rules assume in the CSDP context. The analysis is structured as follows. First, the chapter will examine the mutual assistance clause introduced at Lisbon and will assess its limitations in terms of the legal duties it imposes on Member States. Second, it will outline the provisions on permanent structured cooperation and will comment on the issues which its application raises. Third, it will analyse the only provision of primary law on defence products, namely Article 346 of the Treaty on the Functioning of the European Union (TFEU), explain its evolving interpretation and set it out within the broader legal and political CSDP context.

² *Le Figaro*, 18 August 2008.

³ See the chapters by Cremona, and Duke.

MUTUAL ASSISTANCE CLAUSE: RULES ON THE LIMITS OF LAW

For the first time in the Union's constitutional history, the Lisbon Treaty introduced a mutual assistance clause. This is laid down in Article 42(7) TEU which reads as follows:

• If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.

This clause imposes on Member States a duty the scope of which appears to be very broad: 'by all the means in their power'. The caveats which are set out are broad too, as they relate to compliance with international law,⁴ the neutrality of certain Member States and the fundamental choices about security and defence made by Member States in relation to NATO. This formulation of the solidarity clause is entirely consistent with the tenor of CSDP and the balance which it seeks to strike between the security and defence choices made by the Member States and the common policy which it envisages for the Union. It is recalled that, under Article 42(2) subparagraph 2 TEU, the CSDP

shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realized in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.

However, the questions which Article 42(7) TEU raises are how far are Member States required to go in order to comply with their duty and how

⁴ According to Art. 51 UN Charter, '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

rigorous can the enforcement of this duty be. Its wording suggests that, rather than a mutual defence clause, the duty this provision sets out is one of mutual assistance. This is a significant distinction because, quite apart from the semantics of the clause, it suggests two points: on the one hand, military means constitute merely one option open to a Member State when it examines how best to comply with its duty; on the other hand, it suggests that there is a broader set of parameters within which national authorities are expected to make this assessment. Even with due regard to the States to which the above caveats refer, compliance with the mutual assistance clause cannot but depend on the subjective assessment of a Member State as to how best it may assist a State which is a victim of armed aggression on its territory. This assessment is subject to multifarious considerations, not least of a political and economic nature. Such inherently indeterminate criteria do not lend themselves to a rigorous mechanism of verification or control. It is interesting that, in their Decision on the Concerns of the Irish People on the Treaty of Lisbon, the Heads of State or Government Meeting within the European Council state that the CSDP 'does not prejudice the security and defence policy of each Member State, including Ireland, or the obligations of any Member State'.⁵

Furthermore, in a case of armed aggression on the territory of a Member State, time would be of the essence, and protracted negotiations between Member States would merely reduce the relevance of the assistance which the State under attack would require. In other words, it is for each Member State to ascertain which means it is prepared to utilise and in which manner in order to assist another State under attack. There can be no common assessment of whether, for instance, military means should be relied upon by all Member States. After all, the EU is not a military alliance,⁶ and the mutual assistance clause may not render it into one. Therefore, the similarity of their wording notwithstanding, comparisons between Article 42(7) TEU and the mutual

⁵ Brussels European Council, 18–19 June 2009, Presidency Conclusions, 1225/2/09 REV 2, Annex 1, p18.

⁶ See, for instance, Declaration 13 concerning the Common Foreign and Security Policy which is annexed to the Lisbon Treaty: 'The Conference underlines that the provisions in the Treaty on European Union covering the Common Foreign and Security Policy, including the creation of the office of High Representative of the Union for Foreign Affairs and Security Policy and the establishment of an External Action Service, do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.'

The Conference also recalls that the provisions governing the Common Security and Defence Policy do not prejudice the specific character of the security and defence policy of the Member States'.

defence clauses laid down in Article V of the Brussels Treaty⁷ or Article 5 of the NATO Charter⁸ are misplaced.⁹

The above does not mean to suggest that the provision of Article 42(7) TEU is not significant. On the one hand, it is a specific illustration of political solidarity, one of the main pillars of CFSP as laid down in Article 24(3) TEU. As such, it may appear to merely state the obvious. However, when it comes to the Union's foreign policy, the obvious often needs to be stated. It is recalled that, when Greece claimed that its territorial integrity was undermined by Turkey in the Imia incident in December 1995, and Spain made a similar claim regarding Morocco in the Leila incident in July 2002, their fellow Member States failed woefully to provide any substantial support in terms of political solidarity, let alone even assurances about military assistance.¹⁰ It is against this background that the mutual assistance clause must be understood. On the other hand, as the principle of political solidarity, the interpretation of the mutual assistance clause is subject to continuous redefinition: the development of CSDP and political solidarity in general, and of common structures of military capabilities in particular, is bound to have an impact on how close to the military end of the scale Member States would be prepared to go in order to assist a Member State under attack.

There is another function of the mutual assistance clause which is noteworthy: against the various CSDP missions which are carried out in far-flung places and export EU values to third parties, it renders the CSDP relevant to

⁷ This provides that, '[i]f any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power.'

⁸ This reads as follows: 'The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.'

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.'

⁹ See the statement to the contrary by Open Europe in House of Lords Select Committee Twelfth Report *The Treaty of Lisbon: An Impact Assessment* (HL 62-II) C35.

¹⁰ See J. Monar, 'The CFSP and the Leila/Perejil Island Incident: The Nemesis of Solidarity and Leadership', (2002) 7 EFA Rev 251.

the Union's citizens in a much more direct and concrete manner. By suggesting a tangible benefit to the security of each Member State at a time of crisis, it brings the Union closer to its citizens, hence meeting one of the main objectives of the reform of the EU constitutional order which started with the European Convention and led to the entry into force of the Lisbon Treaty.¹¹

In addition to the mutual assistance clause set out in Article 42(7) TEU, there is a solidarity clause which is laid down in Article 222 TFEU. Its first paragraph reads as follows:

The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:

- (a) – prevent the terrorist threat in the territory of the Member States;
 - protect democratic institutions and the civilian population from any terrorist attack;
 - assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
- (b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

In addition to the Union, the other Member States are also to assist a Member State under a terrorist attack or a victim of a natural or man-made disaster at the request of its political authorities.¹² The threats facing the Union are assessed regularly by the European Council in order to ensure that both the Union and its Member States can take effective action.¹³

The solidarity clause has a clear security and defence dimension. This is illustrated by the reference to the military resources of the Member States, and is acknowledged by its procedural provisions: according to Article 222(3) TFEU, the Council decides on the arrangements for the implementation of the clause following a joint proposal by both the Commission and the High Representative; where this decision has defence implications, it will be adopted by unanimity in accordance with Article 31(1) TEU, with the European Parliament being kept informed;¹⁴ furthermore, the Council is assisted by the Political and Security Committee, along with the CSDP structures (such as the EU Military Committee and the EU Military Staff).¹⁵

¹¹ This features prominently in the Laeken Declaration of the European Council (December 2001).

¹² Art. 222(2) TFEU.

¹³ Art. 222(4) TFEU.

¹⁴ This implies that, in the absence of defence implications, decisions are adopted by a qualified majority.

¹⁵ A standing committee provided for in Art. 71 TFEU will also participate, if

The core of the solidarity clause could well have been placed in Title V TEU. In fact, it is striking that there is no reference to terrorism in the mutual assistance clause in Article 42(7) TEU. After all, it is recalled that terrorism features prominently in the European Security Strategy¹⁶ as well as the 2008 Report on its implementation.¹⁷ On the other hand, the reference to Article 222 TFEU illustrates the broader understanding of security which now informs the Union's activities and establishes a link with the European Security Strategy as the latter, even when the Union was based on the tripartite pillar structure, puts forward the need for a combination of a broad range of instruments.¹⁸ The significance of the reference to terrorism, as well as the solidarity clause itself, is illustrated by the European Council's Declaration on Combating Terrorism. Adopted in response to the terrorist attack in Madrid in March 2004, the Declaration refers expressly to the precursor to Article 222 TFEU in the Constitutional Treaty:¹⁹ it refers to the spirit of that provision and sets out the commitment of the Member States, as well as the acceding States, to act jointly in case one of them becomes the victim of a terrorist attack.²⁰

In terms of its CSDP links, another noteworthy feature of the solidarity clause is its broad scope. The action it envisages is not confined to response to terrorist attacks. Instead, it is about prevention and protection, as well as assistance. The temptation for testing the outer limits of the Union's competence might end up being too great in the light of the increasing securitisation of its policies.

Finally, it is worth noting that, in their Decision on the Concerns of the Irish People on the Lisbon Treaty, the Heads of State or Government of the European Union state that it 'will be for Member States – including Ireland, acting in a spirit of solidarity and without prejudice to its traditional policy of

necessary by submitting joint proposals with the Political and Security Committee. The former aims 'to ensure that operational cooperation on internal security is promoted and strengthened within the Union' and to 'facilitate coordination of the action of the Member States' competent authorities'. Its proceedings may involve representatives of the Union bodies, offices and agencies, and the Parliament and national Parliaments must be kept informed of them.

¹⁶ *A Secure Europe in a Better World: European Security Strategy* (Brussels, 12 December 2003).

¹⁷ *Report on the Implementation of the European Security Strategy: Providing Security in a Changing World* (S407/08, Brussels, 11 December 2008).

¹⁸ The ESS points out that, 'in contrast to the massive visible threat in the Cold War, none of the new threats is purely military, nor can any be tackled by purely military means. Each requires a mixture of instruments' (at 7).

¹⁹ Namely Art. 42 of the Constitutional Treaty.

²⁰ There is also the following clarification: 'It shall be for each Member State or acceding State to the Union to choose the most appropriate means to comply with this solidarity commitment towards the affected State.'

military neutrality – to determine the nature of aid or assistance to be provided to a Member State which is the object of a terrorist attack or the victim of armed aggression on its territory'.²¹

PERMANENT STRUCTURED COOPERATION: RULES SETTING OUT A BROAD FRAMEWORK FOR ACTION

The Treaty provides a mechanism for permanent structured cooperation. In accordance with Article 42(6) TEU, this is open to Member States 'whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions'. However, rather than merely outlining the relevant criteria, the drafters of the Treaty defined them further. In a Protocol attached to the Lisbon Treaty, the commitments on military capabilities are set out in detail. In Article 1, a Member State wishing to participate in a structured cooperation mechanism is required to

- (a) proceed more intensively to develop its defence capacities through the development of its national contributions and participation, where appropriate, in multinational forces, in the main European equipment programmes, and in the activity of the Agency in the field of defence capabilities development, research, acquisition and armaments (European Defence Agency), and
- (b) have the capacity to supply by 2010 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group, with support elements including transport and logistics, capable of carrying out the tasks referred to in Article 28 B of the Treaty on European Union, within a period of 5 to 30 days, in particular in response to requests from the United Nations Organisation, and which can be sustained for an initial period of 30 days and be extended up to at least 120 days.

These are further defined in Article 2 of the Protocol, according to which the participating Member States undertake to

- (a) cooperate, as from the entry into force of the Treaty of Lisbon, with a view to achieving approved objectives concerning the level of investment expenditure on defence equipment, and regularly review these objectives, in the light of the security environment and of the Union's international responsibilities;
- (b) bring their defence apparatus into line with each other as far as possible, particularly by harmonising the identification of their military needs, by pooling and, where appropriate, specialising their defence means and capabilities, and by encouraging cooperation in the fields of training and logistics;
- (c) take concrete measures to enhance the availability, interoperability, flexibility

²¹ n5 above.

and deployability of their forces, in particular by identifying common objectives regarding the commitment of forces, including possibly reviewing their national decision-making procedures;

- (d) work together to ensure that they take the necessary measures to make good, including through multinational approaches, and without prejudice to undertakings in this regard within the North Atlantic Treaty Organisation, the shortfalls perceived in the framework of the 'Capability Development Mechanism';
- (e) take part, where appropriate, in the development of major joint or European equipment programmes in the framework of the European Defence Agency.

Member States fulfilling the criteria and having made the above commitments may notify their intention to engage in permanent structured cooperation to the Council and the High Representative. In accordance with Article 46(2) TEU, the decision to establish such cooperation rests with the Council which is expected to take it within three months following notification by a qualified majority and following consultation with the High Representative. In terms of its management, any decision and recommendation by the Council within the context of permanent structured cooperation is taken unanimously on the basis of the votes of the representatives of the participating Member States under Article 46(6) TEU, unless otherwise provided for in Article 46 TEU.

There are certain principles which appear to govern the permanent structured cooperation mechanism. First, the principle of openness: provided that the criteria and requirements set out in Article 46(1) TEU and Articles 1 and 2 of the Protocol are met, any Member State may participate in the mechanism, either *ab initio* or at a later stage. In the latter case, following a notification from the relevant State to the Council and the High Representative, the Council will adopt the decision confirming the participation of the Member State by a qualified majority of the participating Member States and after consulting the latter.²²

The second principle is that of continuity: every participating Member State must fulfil the criteria and make the necessary commitments throughout their participation. According to Article 46(4) TEU, if at any point they cease to do so, the Council may suspend the participation of the Member State concerned by a qualified majority of the members representing the participating Member States, with the exception of the Member State in question. In this respect, Article 3 of the Protocol on Permanent Structured Cooperation provides for the involvement of the European Defence Agency (EDA). In accordance with this provision, the role of the EDA is broad: it contributes to the regular assessment of participating Member States' contributions regarding capabilities in general, and in particular those made in accordance with the criteria to be established on the basis of, amongst others, Article 2 of the

²² Art. 46(3) subpara. 2 TEU.

Protocol. However, its impact is limited, at least as a matter of law: whilst it is entrusted with reporting at least once a year, its assessment 'may serve as a basis for Council recommendations and decisions adopted in accordance with Article 46 of the Treaty on European Union'.²³

Third, the free will of the Member States is an essential precondition for their participation: any participating Member State may withdraw by notifying its intention to do so to the Council. The latter has neither the power to veto this nor the right to approve it. In accordance with Article 46(5) TEU, it will merely 'take note that the Member State in question has ceased to participate'.

Fourth, the definition of the capabilities criteria mentioned in Article 46(1) TEU and set out in Article 2 of the Protocol on Permanent Structured Cooperation is subject to a dynamic, incrementally evolving process. Both Articles 2 and 3 of the Protocol suggest that they need to be further elaborated on and defined in greater detail. On the one hand, it would be odd if things were otherwise: requirements related to military capabilities may vary depending on factors as diverse as technical and operational needs, geopolitical environment, activities of international security organisations, financial conditions, political commitment. After all, primary law is inherently unsuitable to define with any degree of precision such requirements. On the other hand, the vagueness of the relevant provisions is such as to render their application entirely a matter to be determined on the basis of factors as inherently indeterminate as political will, and as constantly evolving as economic realities.

The vagueness of the legal rules on permanent structured cooperation reminds one of the vagueness of the Lisbon Treaty in general and Article 18 TEU in particular in relation to the function of the High Representative. It is recalled that, from a legal point of view, these provisions are strikingly vague as to the precise functions of the new post, and leave considerable scope for overlaps and inter-institutional skirmishes. This is all the more so as the provisions about the function of the President of the European Council, that is, another actor involved in the representation of the Union, are similarly opaque.²⁴ It may appear curious that the post of High Representative, which purported to bring clarity and coherence in the EU's external policies, should be defined in such unclear terms as to further feed the inter-institutional tensions which have marred these policies. This also became apparent from the tensions and inter-institutional haggling which characterised the establishment of the European External Action Service, as well as the complex arrange-

²³ Art. 3 of Protocol on Permanent Structured Cooperation.

²⁴ See Editorial, 'New Links in the Union's Institutional Chain', (2009) 35 *ELRev* 1, and Editorial, 'Mind the gap!', (2008) 45 *CMLRev* 317.

ments finally agreed upon.²⁵ Similarly, viewed as a way of enabling the Union to shape its security and defence identity more efficiently, one may have hoped that the mechanism of permanent structured cooperation would have provided a clearer yardstick as to quite how the Member States may rely upon it. In both cases, the relevant legal provisions appear to acknowledge that their contribution to the Union's foreign affairs is merely to set out the broad parameters within which the Member States and the Union's institutional actors may determine how to proceed, at what pace and in which direction.

DEFENCE INDUSTRIES AND THE EVOLVING UNDERSTANDINGS OF LAW

The application of the mechanism for permanent structured cooperation outlined above relies upon the work of the European Defence Agency (EDA). Originating in the identical provisions of the Constitutional Treaty, the Lisbon Treaty is the first set of primary rules which provides for this organisation. Article 42(3) subparagraph 2 TEU provides that EDA

shall identify operational requirements, shall promote measures to satisfy those requirements, shall contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, shall participate in defining a European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities.

However, in yet another illustration of how the law may follow and merely formalise existing practice, the EDA had been established before the Constitutional Treaty was even signed, in July 2004.²⁶ The objective of the Agency is 'to support the Council and the Member States in their effort to improve the EU's defence capabilities in the field of crisis management and to sustain the ESDP as it stands now and develops in the future' without prejudice to either the competences of the EC or those of the Member States in defence matters.²⁷ The tasks carried out by EDA are in the areas of defence capabilities development, armaments cooperation, European Defence

²⁵ See Council Decision 2010/427/EU [2010] OJ L 201/30 which is accompanied by The Declaration by the High Representative on political accountability ([2010] OJ C 210/1, and [2010] OJ C 217/12) setting out the practicalities of the interactions between the High Representative and the European Parliament.

²⁶ Joint Action 2004/551/CFSP [2004] OJ L245/17.

²⁷ *Ibid.*, Articles 2(1), 1(2) and 2(2).

Technological and Industrial Base and defence equipment market, and research and technology.²⁸

Whilst limited in scope, the work of EDA has not been without controversy. The determination of its budget has been a constant source of disagreement: the United Kingdom has refused to agree on a three-year budget, the absence of which, according to other Member States, hampers EDA's work. In terms of specific outcomes, it is worth referring to the adoption of a voluntary code on defence procurement in November 2005. Having entered into force on 1 July 2006, this applies to contracts worth more than 1m which are subject to the special clause of Article 346 TFEU.²⁹ It sets out to establish a single online portal, provided by the EDA, which would publicise procurement opportunities. It is based on objective award criteria based on the most economically advantageous solution for the particular requirement. Furthermore, it provides for debriefing, whereby all unsuccessful bidders who so request will be given feedback after the contract is awarded. The regime provides for exceptions for reasons of pressing operational urgency, follow-on work or supplementary goods and services, and extraordinary and compelling reasons of national security. This development brings focus on defence industries and the extent to which their regulation may contribute to the CSDP. From a legal point of view this is a most interesting issue, as it straddles law and politics, and has been at the outer margins of European integration since the establishment of the European Communities. It is this story that the remaining part of this chapter will tell.³⁰

Primary Law and Defence Industries: Lingering Misconceptions

There is only one provision in the primary law of the EU which refers

²⁸ For early assessments, see: A. Georgopoulos, 'The New European Defence Agency: Major Development or Fig Leaf?' (2005) 14 *Public Procurement Law Review* 103; P. Koutrakos, *EU International Relations* (Oxford: Hart Publishing 2006) pp473–5; M. Trybus, 'The New European Defence Agency: A Contribution to a Common European Security and Defence Policy or a Challenge to the Community acquis?' (2006) 43 *CMLRev* 667.

²⁹ Contracts which fall beyond the scope of Art 346 TFEU are covered by the EC public procurement secondary legislation. According to Art 10 of Dir 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114, '[t]his Directive shall apply to public contracts awarded by contracting authorities in the field of defence, subject to Article [346 TFEU]'.

³⁰ This section draws upon P. Koutrakos, 'The Application of EC Law to Defence-related Industries: Changing Interpretations of Article 296 EC' in C. Barnard and O. Odudu (eds), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009) 307.

expressly to the defence industries, namely Article 346 TFEU (ex Article 296 EC). It reads as follows:

1. The provisions of the Treaties shall not preclude the application of the following rules:
 - (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
 - (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.
2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.

For a long time, this rather obscure provision of the Treaty was viewed as rendering defence industries beyond the reach of EU law entirely. A broad interpretation of its wording was used to substantiate this: on the one hand, the scope of products which fell within the scope of Article 346 TFEU was viewed as potentially unlimited; on the other hand, the circumstances under which Member States could deviate from EU law were ignored or viewed as merely indicative of the general status of the defence industries as directly linked to national sovereignty. Therefore, the Member States were only too keen to presume that measures regulating their defence industries would be beyond the scope of EU law.³¹ This approach was tolerated by the EU institutions.³² It is interesting that the European Parliament confined itself to arguing regularly for the deletion of Article 346 TFEU,³³ as if that would have been the only way of preventing the erroneous and misguided interpretation of its provision. The elusive character of the list mentioned in Article 346(2) TFEU did not help either: it was only published in the *Official Journal of the European Union* forty three years following its adoption in a response by the Commission to a question by the European Parliament.³⁴

³¹ In relation to public procurement, see COM (2004) 608 final *Green Paper on Defence Procurement*, p6.

³² See P. Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford: Hart Publishing 2001), 175–82.

³³ See, for instance, Resolution A3–0260/92 on the Community's role in the supervision of arms exports and the armaments industry [1992] OJ C/284/138 at 142 and Resolution on the need for European controls on the export or transfer of arms [1995] OJ C/43/89 at 90, Resolution A3–0260/92 [1992] OJ C/284/138 at 142.

³⁴ Written Question E-1324/01 [2001] OJ C/364E/85. In the meantime, it had only been published in academic analyses: see H. Wulf (ed), *Arms Industry Limited* (Oxford, Oxford University Press, 1993) at 214.

However, a careful reading of Article 346 TFEU suggests that this approach is misconceived. First, it is confined to the products which are described in the list mentioned in Article 346(2) TFEU. Therefore, the reference to 'the production of or trade in arms, munitions and war material' was not envisaged as an open-ended category of products. This suggests that at no point was it envisaged that dual-use goods, that is products which may be of both civil and military application, should be regulated by national measures deviating from the entire body of EU law. Such an argument is supported by both the content of the list mentioned in Article 346(2) TFEU and the reference to the effects that such measures should not have on 'products which are not intended for specifically military purposes' in Article 346(1)(b) TFEU.

Second, measures adopted by a Member State under Article 346 TFEU are not *ipso facto* justified; instead, the deviation from EU law which they entail must be 'necessary for the protection of the essential interests of [national] security'. This is quite an emphatic statement that, rather than being merely a public security clause, Article 346(1)(b) TFEU should be invoked only when the protection of the core of national sovereignty is at stake.

Third, any reliance upon Article 346 TFEU should take into account the effects which its deviation from EU law may have on the status and movement of other products which fall beyond its rather narrow scope. In effect, this provision suggests that national measures deviating from EU law as a whole should not be adopted in a legal vacuum. Instead, Member States are under a duty to consider the implications that such measures may have for the common market.

Fourth, Article 348(1) TFEU provides for the involvement of the Commission in cases where reliance upon Article 346 TFEU by a Member State would lead to distortions of competition. This provision should be interpreted in the light of the duty of loyal cooperation enshrined in Article 4(3) TEU (ex Article 10 EC). In other words, a Member State invoking Article 346 TFEU is under a legal duty to cooperate with the Commission in order to adjust any ensuing distortions of competition to the EU law.

Finally, any deviation from EU law under Article 346 TFEU is subject to the jurisdiction of the Court of Justice. The reference to the 'improper use of the powers provided for in Article ... 346' in Article 348 second subparagraph TFEU refers both to the substantive conditions which need to be met by a Member State invoking Article 346 TFEU (namely those regarding its scope of application, the assessment of 'essential interests of security') and to the procedural ones (that is the duty to cooperate with the Commission provided for in Article 348 first subparagraph TFEU).

It follows from the above that, according to a strict reading of Articles 346 TFEU and 348 TFEU, Member States may regulate their defence industries by deviating from EU law only in so far as such a deviation is confined to a

specific class of products, is exercised in accordance with certain principles and is subject to the jurisdiction of the Court of Justice to ascertain whether it amounts to an abuse of power. This interpretation has gradually been accepted as a matter of EU law. This has been due to a variety of factors, three of which are particularly significant, namely the case-law of the Court of Justice, the considerable structural and financial difficulties of the defence industries since the 1990s and the emerging political climate in the EU which is marked by the development of the Common Security and Defence Policy.

The Role of Europe's Judges

In its first judgment on the applicability of ex Article 296 EC (new Article 346 TFEU), the Court of Justice left no doubt as to the strict interpretation of this provision. In Case C-414/97 *Commission v Spain*,³⁵ the Court dealt with Spanish legislation exempting from VAT intra-Community imports and acquisitions of arms, munitions and equipment exclusively for military use. The Sixth VAT Directive excluded aircraft and warships. The action against Spain was brought because the relevant Spanish rules also covered an additional range of defence products. The Spanish Government argued that a VAT exemption for armaments constituted a necessary measure for the purposes of guaranteeing the achievement of the essential objectives of its overall strategic plan and, in particular, to ensure the effectiveness of the Spanish armed forces both in national defence and as part of NATO. In its judgment, the Court ruled as follows:

Spain has not demonstrated that the exemptions provided for by the Spanish Law are necessary for the protection of the essential interests of its security. It is clear from the preamble to [the relevant national] Law that its principal objective is to determine and allocate the financial resources for the reinforcement and modernization of the Spanish armed forces by laying the economic and financial basis for its overall strategic plan. It follows that the VAT exemptions are not necessary in order to achieve the objective of protecting the essential interests of the security of the Kingdom of Spain.³⁶

It then concluded that:

the imposition of VAT on imports and acquisitions of armaments would not compromise that objective since the income from payment of VAT on the transactions in question would flow into the State's coffers apart from a small percentage which would be diverted to the Community as own resources.³⁷

³⁵ Case C-414/97 *Commission v Spain* [1999] ECR I-5585.

³⁶ *Ibid.*, para. 22.

³⁷ *Ibid.*, para. 23.

This suggests a robust approach which, rather than viewing Article 346 TFEU as a *carte blanche* for Member States in the area of defence industries, requires that the Member States substantiate how the deviation from EU law they deem necessary meets the substantive conditions set out in primary law. This approach was adopted four years later by the Court of First Instance³⁸ and was reaffirmed by the Court of Justice more recently in Case C-337/05 *Commission v Italy*³⁹ and Case C-157/06 *Commission v Italy*.⁴⁰ These cases were about the purchase of Agusta helicopters for the use of police forces and the national fire service by a negotiated procedure in contravention of EC public procurement legislation which provided for a competitive tendering procedure.⁴¹ This was a long-standing practice in Italy, and the Government did not contest that the helicopters in question were clearly for civilian use, and that their military use was only potential. Both cases are about the same practice and raise the same issues. This analysis will focus on Case C-337/05 where the judgment was rendered by the Grand Chamber. The Court first reaffirmed the strict interpretation of the exceptional clauses set out in the Treaties:

It cannot be inferred from those articles that the Treaty contains an inherent general exception excluding all measures taken for reasons of public security from the scope of Community law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, would be liable to impair the binding nature of Community law and its uniform application.⁴²

It then pointed out that

It is clear from the wording of that provision that the products in question must be intended for specifically military purposes. It follows that the purchase of equipment, the use of which for military purposes is hardly certain, must necessarily comply with the rules governing the award of public contracts. The supply of helicopters to military corps for the purpose of civilian use must comply with those same rules.⁴³

The argument of the Italian Government that a deviation from the EC public procurement rules was necessary in order to protect the confidentiality of

³⁸ Case T-26/01 *Fiocchi* [2003] ECR II-3951.

³⁹ [2008] ECR I-2173.

⁴⁰ [2008] ECR I-7313. This, along with Case C-337/05, are annotated in M. Trybus, (2009) 46 CMLRev 973.

⁴¹ In particular, Articles 2(1)(b), 6 and 9 of Council Directive 93/36/EEC coordinating procedures for the award of public supply contracts [1993] OJ L 199/1.

⁴² n39 above, para. 43.

⁴³ Ibid, para. 47.

information about the production of the purchased helicopters was dismissed by the Court as disproportionate. It was pointed out that no reasons were presented to justify why the confidentiality of the information communicated for the production of the helicopters manufactured by Agusta would be less well guaranteed were such production entrusted to other companies, in Italy or in other Member States.⁴⁴

The Court was no more sympathetic to the final arguments by the Italian Government that, because of their technical specificity, the manufacture of the helicopters in question could be entrusted only to Agusta and that this was necessary to ensure the interoperability of its fleet of helicopters, in order, particularly, to reduce the logistic, operational and pilot-training costs. It responded as follows:

In this case, the Italian Republic has not discharged the burden of proof as regards the reason for which only helicopters produced by Agusta would be endowed with the requisite technical specificities. In addition, that Member State has confined itself to pointing out the advantages of the interoperability of the helicopters used by its various corps. It has not however demonstrated in what respect a change of supplier would have constrained it to acquire material manufactured according to a different technique likely to result in incompatibility or disproportionate technical difficulties in operation and maintenance.⁴⁵

The recent case-law of the Court of Justice makes it clear that reliance upon the notion of necessity may not justify *ipso facto* any deviation from EU rules. It is not only the subject-matter of these cases, which is an area long viewed as within the twilight zone between EU law and national sovereignty, that makes the above rulings noteworthy. It is also the rigour with which the Court responded to the vague arguments put forward by the national governments. Member States are required to explain what it is precisely which necessitates a deviation from an EU rule.

However, it would be wrong to assume that the Court has expressed its willingness to meddle with the substantive policy choices made by the Member States in areas which are close to the core of national sovereignty. Indeed, the above rulings should be viewed in their context. In the actions against Italy, for instance, the defences put forward by the Italian Government

⁴⁴ In Case C-157/06 *Commission v Italy*, the Court concluded that 'the mere fact of stating that the supplies at issue are declared secret, that they are accompanied by special security measures or that it is necessary to exclude them from the Community rules in order to protect the essential interests of State security cannot suffice to prove that the exceptional circumstances justifying the derogations provided for in Article 2(1)(b) of Directive 93/36 actually exist' (para. 32).

⁴⁵ n39 above, para. 59.

were staggering in their generality and the absence of any specific argument whatever which would substantiate, even remotely, their decision. Furthermore, the remoteness between the subject-matter of the action and the scope of Article 346 TFEU was not contested even by the Italian Government. After all, the helicopters were envisaged for the use of forces such as the Corps of Fire Brigades, the Carabinieri, the Coastguard, the Guardia di Finanza Revenue Guard Corps, the State Police and the Department of Civil Protection in the Presidency of the Council of Ministers. Put differently, the cases on which the Court has rendered the above rulings were about egregious violations of both the wording and spirit of Article 346 TFEU, violations which exemplified the presumption, widely held by Member States, that primary law granted them a *carte blanche* in the area. It by no means follows that the Court would adopt an intrusive and activist approach once substantive policy choices are explained properly in relation to the requirements set out in Article 346 TFEU.

Emerging Re-interpretations

In this context of gradual realisation of the constraints attached to primary law, and the willingness of the EU's judiciary to enforce them, two factors raised further interest in the status of defence industries. The first has been the development of the CSDP on which considerable time and energy has been spent since 1998.⁴⁶ For the purpose of this chapter, suffice it to recall the statement in the European Security Strategy about the European Union's ambition for '[a]n active and capable European Union [which] would make an impact on a global scale'⁴⁷ in terms of 'shar[ing] in the responsibility for global security'.⁴⁸ The second factor is the perilous state of the defence industries in the Member States. Following the end of the Cold War they have been suffering from considerable financial and structural problems, such as fragmentation and divergence of capabilities, excess production capability in certain areas and shortages in others, duplication, short production runs, reduced budgetary resources, and failure to engage in increasingly costly research.⁴⁹ This highly

⁴⁶ See the chapter in this book by Webber.

⁴⁷ *A Secure Europe in a Better World: European Security Strategy* (Brussels, December 12, 2003), p14. See also *Report on the Implementation of the European Security Strategy* (Brussels, 11 December 2008).

⁴⁸ *Ibid.*, 2.

⁴⁹ See, amongst others, A. Georgopoulos, 'The European Armaments Policy: A *conditio sine qua non* for the European Security and Defence Policy?' in M. Trybus and N. White (eds), *European Security Law* (Oxford, Oxford University Press, 2007) 198 at 203–5.

fragmented state has been exacerbated by the financial crisis which has made the most important military powers in the Union, namely the United Kingdom and France, cut back on their military spending,⁵⁰ and has forced the former to focus almost exclusively on its needs in the war in Afghanistan.

In the light of the above legal, political and economic developments, defence industries have been gradually brought to the centre of the attention of both the Union and its Member States. It is in this context that considerable developments have taken place under EU law. Two specific initiatives illustrate this: first, the Commission's statement that it intends strictly to enforce the proper interpretation of ex Article 296 EC (Article 346 TFEU); second, a host of legislative initiatives aiming to extend the application of EU law to defence industries.

In December 2006, the European Commission put forward its view as to the proper interpretation of ex Article 296 EC (Article 346 TFEU), and expressed its intention to apply it rigorously by enforcement proceedings before the Court of Justice.⁵¹ The aim of the document was 'to prevent possible misinterpretation and misuse of Article 296 EC in the field of defence procurement' and 'give contract awarding authorities some guidance for their assessment whether the use of the exemption is justified'.⁵² The Commission draws upon the wording of what is now Article 346 TFEU⁵³ and the case-law of the EU courts and states that 'both the field of and the conditions of application of Article [346 TFEU] must be interpreted in a restrictive way'. It acknowledges the wide discretion granted to a Member State in order to determine whether its essential security interests ought to be protected by deviating from EC law. However, this discretion is not unfettered. To that effect, it is argued that any interests other than security ones, such as industrial or economic, cannot justify recourse to Article 346 TFEU even if they are connected with the production of and trade in arms, munitions and war material. In relation to the role of the Member States, the Commission states that

It is the Member States' prerogative to define their essential security interests and their duty to protect them. The concept of essential security interests gives them flexibility in the choice of measure to protect those interests, but also a special responsibility to respect their Treaty obligations and not to abuse this flexibility.⁵⁴

⁵⁰ See *Financial Times*, 15 March 2010, p7.

⁵¹ COM(2006) 779 fin *Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement* (adopted on 7 December 2006).

⁵² *Ibid.*, p3.

⁵³ For instance, it points out that the reference to 'essential security interests' 'limits possible exemptions to procurements which are of the highest importance for Member States' military capabilities' (*ibid.*, p7).

⁵⁴ *Ibid.*

What are the implications of this approach in the area which has given rise to most of the cases before the Court, namely public procurement? According to the Commission,

the only way for Member States to reconcile their prerogatives in the field of security with their Treaty obligations is to assess with great care for each procurement contract whether an exemption from Community rules is justified or not. Such *case-by-case assessment* must be particularly rigorous at the borderline of Article 296 EC where the use of the exemption may be controversial.⁵⁵

In its initiative, the Commission makes a declaration of intent: national measures governing the defence industries would no longer be viewed as inherently above EU law, and any deviations from the Treaties would be pursued before the Court of Justice. In terms of the substance of its construction of Article 346 TFEU, there is nothing in the Communication which is revolutionary or which does not originate in the previous, albeit limited, case-law or the wording of the Article. In declaring its intention to no longer tolerate violations of EU law based on an expansive interpretation of Article 346 TFEU, the Commission seeks to strike a balance between the leeway with which national authorities are endowed when dealing with matters close to the core of national sovereignty, and the requirements set out by EU law in order to ensure that no abuse of this leeway occurs. In this context, it is interesting that the Commission should also engage in adjusting the list mentioned in Article 346(2) TFEU in a rather creative manner.⁵⁶ More importantly, one of the main tenets of the Communication is the acknowledgement by the Commission of the prerogative of the Member States to define their essential security interests. It is interesting, however, that it should shy away from developing this point further and elaborating on its implications for judicial review. Is the control which the Court may exercise on the substance of the national policy choices not inherently limited (provided, that is, that such choices do not constitute an abuse of the rights which are acknowledged in Article 346 TFEU)?⁵⁷ This is what Advocate General Jacobs had suggested in another related context, that is the adoption of national measures deviating

⁵⁵ Ibid, p8 (the emphasis in the original).

⁵⁶ It is stated in the Communication that the list should be interpreted in a way which recognises developments in technology since the list was drawn up and the different practices now employed to procure such items, such as 'modern, capability-focused acquisition methods' and the inclusion of contracts for related services and works (ibid, p5).

⁵⁷ See, for instance, the principles set out by the case-law on exports of dual-use goods outlined above.

from EU law when purporting to protect the essential interests of a Member State under Article 347 TFEU.⁵⁸

Both the tenor and the substance of the Commission's document suggest the proceduralisation of the ways in which Member States may exercise the leeway granted under primary law in the area of defence industries. In terms of the interpretation it sets out, it rather states what had clearly been the case since the entry into force of the original Treaty. Therefore, the significance of the document is that it reads like a declaration of intent, a statement of the Commission's willingness to step into areas of high political sensitivity.⁵⁹

The willingness of the Commission to enforce the proper interpretation of Article 346 TFEU, thus bringing the defence industries closer to the scope of the application of EU law, should be assessed in the light of the considerable policy activity which the EU institutions have shown in the area. The European Commission had advocated the use of EU law, along with other instruments, for the regulation of the defence industries since the mid-1990s. After a series of initiatives assessing the serious economic problems facing such industries,⁶⁰ and advocating the adoption of a wide range of measures,⁶¹ the Commission put forward its so-called 'defence package' in December 2007,⁶² following which two specific measures have been adopted by the Council, namely Directive 2009/43 on intra-EU transfers of defence products⁶³ and Directive 2009/81 on public procurement in the fields of defence and security.⁶⁴ The main rationale of these measures is twofold: on the one

⁵⁸ See Case C-120/96 *Commission v Greece (re FYROM)* where he argues that '[t]here is a paucity of judicially applicable criteria that would permit this Court, or any other court, to determine whether serious international tension exists and whether such tension constitutes a threat of war' (para 50), and then he goes on to argue that '[b]ecause of differences of geography and history each of the Member States has its own specific problems and preoccupations in the field of foreign and security policy. Each Member State is better placed than the Community institutions or the other Member States when it is a question of weighing up the dangers posed for it by the conduct of a third State. Security is, moreover, a matter of perception rather than hard fact. What one Member State perceives as an immediate threat to its external security may strike another Member State as relatively harmless' (para. 54).

⁵⁹ It is also stated that 'in evaluating possible infringements, the Commission will take into account the specific sensitivity of the defence sector' (p9).

⁶⁰ COM(96) 10 final *The Challenges facing the European Defence-Related Industry: A Contribution for Action at European Level* (adopted on 24 January 1996).

⁶¹ COM(97) 583 fin *Implementing European Union Strategy on Defence Related Industries* (adopted on 12 December 1987). See also COM(2003) 113 final *European Defence: Industrial and Market Issues. Towards an EU Defence Equipment Policy* (adopted on 11 March 2003).

⁶² See Editorial, 'The Commission's "Defence Package"', (2008) 33 ELRev 1.

⁶³ [2009] OJ L 146/1.

⁶⁴ [2009] OJ L 216/76.

hand, it is economic, that is to bring the benefits of the internal market to this area which has been untouched by EU law; on the other hand, it is pragmatic, in so far as it recognises the special features of the defence industries. The latter are not only political, as they relate to the duty and the ability of a State to protect its realm, but also economic, in so far as they relate to the special conditions which prevail in the manufacture of and trade in defence-related products. This is what Directive 2009/81 refers to as 'the specificity of the defence and security sector'.⁶⁵

CONCLUSION

This chapter has focused on the multifarious functions of legal rules in the area of the Union's security and defence policy. They may set out a political aspiration, as the mutual assistance clause does; they may set out a broad framework within which the Member States may decide how to act, as the provisions on the permanent structured cooperation do; and even in cases where they are clear as to their application, they may be ignored for a long time until a combination of political, economic and legal developments accepts their proper interpretation, as is the case with Article 346 TFEU.

For all their differing implications, these functions have something in common: they illustrate the limits of legal rules in this area.⁶⁶ In a Report by the International Institute for Strategic Studies drawn up in 2008, it is pointed out that 'almost everything about defence in Europe remains resolutely national'.⁶⁷ This conclusion suggests not only the link between this area and the core of national sovereignty, but also the practical and economic realities of defence. For instance, as the United Kingdom is one of the few major EU military powers, if the current Coalition Government followed up on the Conservative Party's earlier pledge and withdrew the UK from the EDA,⁶⁸ the significance of the work of that organisation would inevitably be reduced. Similar considerations apply to the usefulness of the provisions on the permanent structured cooperation.

The inherently limited function of legal rules in the area of security and defence policy is illustrated not only in the context of specific institutional

⁶⁵ Ibid, para. 40 of the preamble.

⁶⁶ See, more generally, P. Koutrakos, 'Primary Law and Policy in EU External Relations: Moving Away from the Big Picture?', (2008) 33 ELRev 666.

⁶⁷ 'European Military Capabilities: Building Armed Forces for Modern Operations' (London: IISS, 2008) 149.

⁶⁸ Shadow Foreign Secretary of the Conservative Party, William Hague, made this pledge in an interview with the *Financial Times* (9 March 2010).

innovations and mechanisms. Take, for instance, the general duty imposed on Member States under Article 24(3) TEU. This reads as follows: 'The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.' This provision suggests a twofold obligation: a positive duty to take action which would be in accordance with the Union's policy, and a negative duty not to engage in a behaviour which would run counter to the Union's action. In its second subparagraph, Article 24(3) TEU deals not with the definition of the term 'solidarity', but rather its development: 'The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.'

The reference to 'political solidarity' is noteworthy, for it raises the question whether its definition is as inherently indeterminate as it may appear at first sight. Compliance with the above principles is to be ensured by the High Representative and the Council. It is difficult to envisage how political solidarity may be developed pursuant to a legally binding obligation imposed by primary law. Involving a community of states each of which may have differing foreign policy interests but all of which are committed to respecting these interests and finding common ground, political solidarity may not emerge from the application of legal obligations. Instead, it is the outcome of a constantly evolving process of understanding and osmosis which is brought about gradually, incrementally and often subconsciously. What legal rules and procedures, such as those set out in Title V TEU, may do is to contribute to a culture of cooperation amongst Member States which is central to the development of political solidarity. However, they may not give rise to it on the basis of legal duties imposed on Member States.

The above is by no means to suggest the irrelevance of legal rules in this area. Instead, it is to acknowledge that they constitute a living phenomenon which should be understood as part of a gradually shifting, constantly evolving, multi-faceted legal and political space. This understanding of their function is particularly relevant in the light of the current existential crisis which the Union faces. In the wake of the international financial crisis, the Union has been going through its very own economic crisis in which it grapples with the distinct possibility of sovereign default, and the threat this poses for the euro. Having been forced to take extraordinary measures aiming to sustain its economic position and to rethink the model of its economic governance, the Union's leaders focus on what they consider the very identity and future of Europe. The German Chancellor, Angela Merkel, for instance, convinced the Bundestag to approve German financial aid to Greece arguing that that was

necessary for the future of Europe,⁶⁹ the same argument used by the Portuguese Prime Minister, José Sócrates, to justify the introduction of austerity measures by his government;⁷⁰ and the Commission President, José Barroso made the same point when he implored Chancellor Merkel to agree to the extraordinary process of setting up a permanent protective financial mechanism.

In this vein, it is noteworthy that the economic might of the Union was the starting point for the development of its international ambitions.⁷¹ Therefore, not only is it not surprising that the financial crisis has taken existential dimensions, but it is also bound to have serious repercussions for the Union's posture in the world. As the Union's success depends on various diverse factors – political will and ingenuity, economic developments and the markets' response, to name but a few – its management is bound to test the limits and effectiveness of legal rules and procedures. The area of security and defence would not be immune from these developments, as its effectiveness presupposes political will, economic investment, and outward-looking ambition stemming from internal stability – and no legal rules may substitute for these.

PART V

The European Union in international organizations

⁶⁹ *Financial Times*, 14 May 2010, p9.

⁷⁰ *Financial Times*, 13 May 2010, p8.

⁷¹ For instance, the very first sentence of the European Security Strategy reads as follows: 'Europe has never been so prosperous, so secure nor so free.'

remain. On the one hand, the connection between the CFSP and Article 194 TFEU requires clarification, and this contribution has made suggestions to that end. On the other hand, at the time of writing, signals from the EU diplomatic service which started work on 1 December 2010 indicate that the Union may have missed the opportunity to utilize this new institutional structure in support of its coherent external energy policy.

In sum, while some legal-institutional hurdles remain, treaty engineering can accomplish only so much. Implementation of the European Council conclusions at the 4 February 2011 Summit, as well as its follow-up and actual implementation will be the real test for the revamped common EU internal and external energy policy.

16. Towards a common defence? Legal foundations after the Lisbon Treaty

Erkki Aalto*

1. INTRODUCTION

The Lisbon Treaty offers several new elements – such as the provisions on permanent structured cooperation and on mutual assistance – to the discussion on the European Union's role in defence matters. The Lisbon Treaty also recognizes more clearly than before that a common defence is a possible outcome of European defence integration. So, has the Union taken new steps towards common defence?

The Treaty on the European Union (TEU) describes a process towards a possible common defence.¹ But what does common defence really mean in the EU context? One way of analysing the concept is to research how the Treaty presently regulates defence matters. Title V TEU is normally seen as the foundation for defence-related cooperation within the EU. However, this is not the only way the Union deals with defence matters. During the past ten years, a new kind of defence cooperation in the EU has emerged. This follows a different kind of logic than the intergovernmental one because it is based on the internal market aspects of defence.

The thesis of this chapter is that EU defence cooperation is based on two pillars: first, the development of the intergovernmental Common Security and Defence Policy (CSDP), and second, the creation of a supranational

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¹ Articles 24 and 42 TEU.

European Defence Technological and Industrial Base (EDTIB). The combination of intergovernmental and supranational elements is a unique feature of the European Union by comparison with other defence organizations, for example NATO. Defence integration in the EU is therefore even now a *sui generis* solution and will be more so in the future due to the interaction of CSDP and EDTIB.

This chapter can be seen as a kind of inventory of the tools for defence cooperation that are described in the EU Treaties. The drivers for using these tools come from elsewhere. The main driver for some time has been the economy.² The trend is that even the biggest European military powers are forced to deepen defence cooperation³ and that the EU Member States have to open up their defence markets in order to cope with economic realities. Thus economic realities demand new ideas for defence cooperation in Europe. Arguably some of them will be realized in the NATO context, some of them bilaterally, and some in the EU framework. Therefore, it is a good time to analyse what tools EU provisions offer for defence cooperation.

2. ON THE CONCEPT OF COMMON DEFENCE

The Maastricht Treaty introduced in EU law the concept of *common defence*.⁴ Ever since, the concept has caused some speculation on what its actual content is. The main problem is that it has not been defined in the Treaty and there is no political consensus about the content or desirability of it.⁵

Traditionally, the concept of *defence* refers to territorial self-defence against an armed attack.⁶ In practical terms one can detect various elements of defence by analysing national defence budgets. Of the 194 billion euro spent on defence in the European Union in 2009, 51 per cent was spent on personnel, covering salaries and pensions; 23 per cent on operations and

² The economic crisis in the past couple of years has forced almost all EU countries to make 10–20% cuts in their defence budgets.

³ See: UK–France Summit 2010 Declaration on Defence and Security Co-operation, 2 November 2010, available at: <http://www.number10.gov.uk> (accessed 1 June 2011).

⁴ Article B, Treaty on European Union (Maastricht Treaty).

⁵ See: Krieger, Heike (2006), 'Common European Defence: Competition or Compatibility with NATO?', in Martin Trybus and Nigel D. White (eds), *European Security Law*, Oxford: Oxford University Press, pp. 174–197, at 181–182.

⁶ von Kielmansegg, S. (2007), 'The European Union's Competences in Defence Policy – Scope and Limits', *European Law Review*, 32 (2), 213–231, at 219.

maintenance, covering spare parts and supplies of major equipment, other equipment and supplies, and costs related to maintaining utilities and infrastructure; 21 per cent on investment, covering procurement and R&D; and 5 per cent on other costs.⁷ Thus, the concept of defence could include, at least,⁸ elements of territorial self-defence, personnel costs, (out-of-area) operations and maintenance, research and development, and defence acquisitions. All these fields require rules to regulate their activities regardless of whether they take place within a nation or in an alliance of nations.⁹

EU law includes provisions which regulate – to various degrees – almost all of these areas. The CSDP includes provisions, among other things, on a common defence policy and a possibility for common defence,¹⁰ troops,¹¹ development of military capabilities,¹² a mutual assistance clause,¹³ crisis management operations,¹⁴ procurement cooperation,¹⁵ defence research and development,¹⁶ and development of a European defence technological and industrial base.¹⁷ In addition, the solidarity clause¹⁸ might also have implications for the CSDP. The provisions concerning the internal market also have an effect on various fields of defence, such as defence research,¹⁹ dual-use and defence exports,²⁰

⁷ European Defence Agency, 'defence data 2009', available at: <http://www.eda.europa.eu> (accessed 1 June 2011).

⁸ Defence also includes, for example, threat analysis and many strategic, tactical and operational level issues. For the purpose of this chapter an exact definition of the concept of defence is not needed. It is sufficient to conclude what elements are, at least normally, included in the concept of defence.

⁹ Trybus, Martin (2005), *European Union Law and Defence Integration*, Oxford and Portland OR: Hart Publishing, at 1–2.

¹⁰ Articles 24 (1) and 42 (2) TEU.

¹¹ Articles 42 (3) and 42 (5) TEU.

¹² Article 42 (3) (2) TEU.

¹³ Article 42 (7) TEU.

¹⁴ Article 43 TEU.

¹⁵ Article 45 (1) (c) TEU.

¹⁶ Article 45 (1) (d) TEU.

¹⁷ Article 45 (1) (e) TEU.

¹⁸ Article 222 Treaty on Functioning of the European Union (TFEU).

¹⁹ See Articles 179 (3) TFEU and also 45 (1) (d) TEU.

²⁰ See cases: C-70/94, *Fritz Werner Industrie-Ausrüstungen GmbH v Germany* [1995] E.C.R. I-3189; and C-83/94, *Criminal Proceedings against Peter Leifer* [1995] E.C.R. I-3231. See also: Dual-use Regulation 1334/2000/EC and European Union Code of Conduct on Arms Export, Council Decision 8675/2/98, DG E-PESC IV, Brussels, 5 June 1998.

intra-Community transfers,²¹ public procurement,²² state aids,²³ offsets,²⁴ mergers²⁵ and gender equality in the armed forces.²⁶ One could thus conclude that the European Union is dealing with a wide range of questions connected to the concept of *defence*.²⁷

A *common* defence can be defined as 'the organisation of the armed forces of the member states in common'²⁸ or as a factual status like a joint army, or as a normative status like specific legal rights and duties.²⁹ Thus intended, it is evident that the EU does not have a common defence. However, it has a process which will lead to a common defence – when the European Council unanimously so decides³⁰ – and several legal provisions regulating defence cooperation.

One can also find some guidance on the concept of *common defence* in EU history. The first example could be the European Defence Community (EDC) Treaty – signed by six Member States but later rejected by France.³¹ This included several elements: common institutions,³² common armed

²¹ Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community.

²² Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

²³ See for example: Heuninckx, B. (2009), 'Defence Procurement: The Most Effective Way to Grant Illegal State Aid and Get Away With It ... Or Is it?', *Common Market Law Review*, 46 (1), 191–211. See also note 111.

²⁴ See note 112.

²⁵ See for example: the European Commission's 'Eurocopter-decision', case IV/M.017 Aérospatiale/MBB [1991] and Trybus, *supra*, fn. 9, at 235–248.

²⁶ See: Directive 76/207/EEC on the implementation of the principle of equal treatment of men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40 and cases C-285/98, *Tanja Kreil v Federal Republic of Germany* [2000] E.C.R. I-69 and C-273/97, *Sirdar v The Army Board* [1999] E.C.R. I-7403; and C-186/01, *Alexander Dory v Germany* [2003] E.C.R. I-2479.

²⁷ Krieger, *supra*, fn. 5, at 180.

²⁸ Roper, John (1995), 'Defining a Common Defence Policy and Common Defence', in Laurence Martin and John Roper (eds), *Towards a Common Defence Policy*, Paris: WEU Institute for Security Studies, pp. 7–13, at 9.

²⁹ von Kielmansegg, *supra*, fn. 6, at 221.

³⁰ Article 42 TEU.

³¹ The signatories were Belgium, Germany, France, Italy, Luxemburg and the Netherlands. See for example: Trybus, *supra*, fn. 9, at 22–50 for an analysis of the EDC.

³² The Board of Commissioners, the Assembly, the Council and the Court.

forces³³ and a common budget. The EDC was to become a supranational common defence solution. One of its novelties was its comprehensive scope, ranging from politics to economics.³⁴ The second example is the Western European Union (WEU) which was created in 1954 by seven countries³⁵ soon after the failure of the EDC. This was based on a mutual assistance clause.³⁶ The WEU treaty was terminated on 31 March 2010.³⁷

The most widely known example of the concept of common defence is the North Atlantic Treaty Organization (NATO) which is an intergovernmental defence alliance based on collective defence.³⁸ There is a strong practical link between the EU and NATO, as 21 of 27 EU Member States are also Members of NATO. From the EU law perspective, the relationship between the EU and NATO is defined in Article 42 (7) TEU which states that commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organization and that NATO remains the foundation for collective defence of its Members. There are, however, significant differences between the two organizations. For example, while NATO concentrates on defence policy and some foreign policy questions and its logic keeps it traditionally intergovernmental, the EU deals with a wide range of different policies and its integration logic means eventual supranationalization of defence.³⁹ From a military perspective, the main difference is that the EU has no command structure.

The potential creation of an EU common defence is a political question. It is about strategic culture, threat assessments and a wide range of foreign, security and defence policy questions.⁴⁰ Some consider that the EU will not

³³ The EDC Treaty was to establish a permanent European army, and no Member State could recruit or maintain national armed forces other than those for which the EDC Treaty had made a special provision. See: Trybus, Martin (2006), 'The Vision of the European Defence Community and a Common Defence for the European Union', in Martin Trybus and Nigel D. White (eds), *European Security Law*, Oxford: University Press, pp. 13–42, at 26.

³⁴ Trybus, *supra*, fn. 9, at 42.

³⁵ On the basis of the Brussels Treaty (1948).

³⁶ Article 5, Modified Brussels Treaty.

³⁷ See: Statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty – Belgium, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom. Brussels, 31 March 2010.

³⁸ See: North Atlantic Treaty, 1949.

³⁹ Ojanen, H. (2006), 'The EU and Nato: Two Competing Models for a Common Defence Policy', *Journal of Common Market Studies*, 44 (1), 57–76, at 69–70.

⁴⁰ See one example of a list of possible issues that should be addressed if a common EU defence is planned in Salmon, Trevor C. and Alister J.K. Shepherd

transform itself into a collective defence alliance as long as the United States remains committed to the existential defence of European states.⁴¹ Some see the creation of an EU common defence as inevitable, as in the 'genes' of the European Union.⁴² Some consider that UK–France bilateral cooperation has sparked a temptation towards a 'leave it all to NATO' attitude.⁴³ Public opinion is also an important factor. Seventy-six per cent of EU citizens are in favour of the idea of a common defence and security policy.⁴⁴ However, opinions about the desirability of EU common defence vary greatly in Member States and these differences lead to different legal interpretations of the defence provisions of the Treaty.

3. CSDP: AIM AND PROCEDURES

The strategic long-term aim of Union defence cooperation is stated in Article 42 TEU: 'the common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides'.

The old wording of the clause 'this might lead' has been replaced in the Lisbon Treaty by the wording 'this will lead'. This change highlights the existence of a political will for the stronger wording, although the new formulation does not offer anything new on the content of possible common defence. The move to common defence would require a unanimous decision of the European Council and ratification by all Member States.⁴⁵

Common foreign and security policy is still subject to specific rules and procedures after the Lisbon Treaty. The abolition of the pillar structure did

(2003), *Toward a European Army – A Military Power in the Making?*, London: Lynne Rienner, at 185–186.

⁴¹ de Vasconcelos, Álvaro (2009), 'Introduction – 2020: Defence Beyond the Transatlantic Paradigm', in Álvaro de Vasconcelos (ed.), *What Ambitions for European Defence in 2020?*, Paris: European Union Institute for Security Studies, pp. 15–26, at 19.

⁴² Maulny, Jean-Pierre (2009), 'Behind the Politics of France's Relationship to NATO', in Alexis Crow (ed.), *France's NATO Reintegration – Fresh Views with the Sarkozy Presidency?*, RUSI Occasional paper, pp. 5–8, at 6.

⁴³ Gnesotto, Nicole (2010), 'The EU and NATO: Beyond Appearances', in Álvaro de Vasconcelos (ed.), *What Europeans Want from NATO?*, Paris: European Union Institute for Security Studies, Report nr 8 November, pp. 10–12, at 10.

⁴⁴ Eurobarometer 69, 2008.

⁴⁵ Article 42 (2) TEU. See also Piris, Jean-Claude (2010), *The Lisbon Treaty – A Legal and Political Analysis*, Cambridge: University Press, at 274–275.

not change this fact. CSDP decisions must be made unanimously,⁴⁶ except in three cases: start-up fund;⁴⁷ a decision on the European Defence Agency (EDA) statute;⁴⁸ and a decision on permanent structured cooperation (PESCO).⁴⁹ All three are useful practical tools in their fields: launching an operation (start-up fund), developing capabilities (EDA) and preparing capabilities for more demanding missions (PESCO). They open up legal possibilities for the Member States that are willing to deepen defence cooperation within the EU. As before, adoption of legislative acts in the field of CSDP is excluded⁵⁰ and the Court of Justice has a limited role in the field of CSDP.⁵¹

A major change in the institutional setting is the well-known invention of the double-hatted role of the Council High Representative of the Union for Foreign Affairs and Security Policy and the Vice-President of the European Commission.⁵² The role of the HR/VP is important for defence cooperation because it emphasizes the link between the Council and the Commission in this field, on the one hand, while ensuring consistency of EU external action on the other hand.

4. TOWARDS A EUROPEAN ARMY?

The idea of a European Army is not new.⁵³ Under the Lisbon Treaty, the possible creation of a European army faces many hurdles. First of all, the concept of a *European army* is not mentioned in the Treaty. The absence of this concept also confirms the practical fact that the EU relies only on the capabilities of its Member States. Second, even in the most federalist Member States the idea of a European army has faced legal challenges. A particular example is Germany where political calls for a European army have been presented, but the constitutional court has set strict limitations

⁴⁶ Article 24 (1) TEU.

⁴⁷ Article 41 (3) TEU.

⁴⁸ Article 45 (2) TEU.

⁴⁹ Article 46 (2) TEU.

⁵⁰ Article 24 (1) TEU.

⁵¹ See Articles 275 TFEU, 24 (1) TEU and 40 TEU.

⁵² Article 18 (1) and (4) TEU. In fact, HR/VP actually serves in many other roles as well, among others: Head of the EDA, Head of European External Action Service and President of the External Relations Council.

⁵³ See for example: Mérand, Frédéric (2008), *European Defence Policy – Beyond the Nation State*, Oxford: Oxford University Press, at 1–3.

on such cooperation.⁵⁴ Third, and this is most likely the biggest hurdle, the simple fact is that there is not enough political appetite for it, mainly due to the existence of NATO. For example, even a political understanding about the need for a permanent EU operational headquarters has not yet been reached.⁵⁵

Nevertheless, the TEU includes other opportunities to form a group that could be used for possible military operations according to the so-called Petersberg+ tasks.⁵⁶ When analysing these tasks, it is noteworthy to comment that the combination of national capabilities could be used only outside the EU.⁵⁷

The TEU presently gives two main options to form a group for CSDP military operations. First, a voluntary offer, in which '(t)hose Member States which together establish multinational forces may also make them available to the common security and defence policy'.⁵⁸ For example, this could be an EU battle group or another multinational formation, like EUROCORPS. The second option is delegation to a group in which '(t)he Council may entrust the execution of a task, within the Union framework, to a group of Member States'.⁵⁹ This option actually institutionalizes a practice that was used in the *Artemis* mission led by France.⁶⁰

The Lisbon Treaty introduces two new possibilities for deepening defence cooperation between Member States. The first is the possibility for enhanced cooperation which was not possible earlier within the CSDP.

⁵⁴ See: German Federal Constitutional Court, BVerfG, 2 BvE 2/08 vom 30.6.2009, and, for example, Ehrhart, Hans-Georg (2009), *Goodbye, European Army? – Consequences of the German Constitutional Court's Ruling on the Lisbon Treaty*, at 3, available at: <http://www.isis-europe.org> (accessed 1 June 2011).

⁵⁵ The EU has a 200-strong Military Staff (EUMS) to prepare its crisis management decision-making and strategic planning. However, the EUMS does not lead operations.

⁵⁶ Article 42 (1) and 43 (1) TEU: joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilization.

⁵⁷ Article 42 (1) TEU. National capabilities could be used – outside the scope of Article 42 TEU – within the Union in a case when a solidarity or mutual assistance clause has been invoked.

⁵⁸ Article 42 (3) TEU.

⁵⁹ Article 42 (5) TEU.

⁶⁰ Dagand, S. (2008), 'The Impact of the Lisbon Treaty on CFSP and ESDP', *European Security Review*, ISIS Europe, Number 37, March 2008, at 4–5, available at: <http://www.isis-europe.org> (accessed 1 June 2011).

However, this is not a likely option because of the very strict conditions set for cooperation.⁶¹

The second option, permanent structured cooperation (PESCO),⁶² is an innovation of the Treaty. In simple terms the purpose is to give willing Member States – who fulfil higher criteria and are ready for more binding commitments – a framework for developing capabilities for more demanding missions. PESCO is a flexible tool which can be launched with a qualified majority voting decision.⁶³ There are several opinions about PESCO. It has been called the 'Schengen of Defence', the 'Eurozone of Defence'⁶⁴ or even a 'Defence G6'.⁶⁵ Some see it as 'a window of opportunity to further ESDP [the European Security and Defence Policy]'⁶⁶ or a political motor for improving European defence capabilities available to both EU and NATO,⁶⁷ or even as a basis for an army, without calling PESCO a European Army.⁶⁸ It has also been described as a potential risk because it could create a two-speed Europe or might leave one or more Member States out of it through qualified majority voting.⁶⁹ Be that as it may, the PESCO provisions offer various opportunities for defence cooperation.

5. ENHANCING CAPABILITIES

Developing defence capabilities is a cornerstone of the CSDP. The main tool in this field is the European Defence Agency which operates in four

⁶¹ Unanimity in starting cooperation (Article 329 (2) TFEU) and participation of at least nine Member States and use of enhanced cooperation as a last resort (Article 20 (2) TEU).

⁶² Articles 42 (6), 46 TEU and the Protocol on permanent structured cooperation.

⁶³ Article 46 (3) TEU.

⁶⁴ Piris, *supra*, fn. 45, at 276.

⁶⁵ See Dagand, *supra*, fn. 60, at 4–5.

⁶⁶ Biscop, Sven (2008), 'Permanent Structured Cooperation for a Permanently Capable ESDP', in Sven Biscop and Franco Algieri (eds), *The Lisbon Treaty and ESDP: Transformation and Integration*, Egmont Paper 24, pp. 15–17, at 16.

⁶⁷ House of Lords (2008), *European Union Tenth Report*, Chapter 7, EU Foreign, defence and development policies, at para. 7.126.

⁶⁸ Blockmans, S. and R.A. Wessel (2009), 'The European Union and Crisis Management: Will the Lisbon Treaty Make the EU More Effective?', *Journal of Conflict & Security Law*, 14 (2), 265–308, at 303–305.

⁶⁹ House of Lords, *supra*, fn. 67, at para. 7.123.

areas.⁷⁰ Although the EDA is recognized in Treaty language for the first time, it was already set up in 2004 by Joint Action.⁷¹

The EDA's role in capability development work is interesting. It is the only EU Agency with a legal basis in the Treaties. This probably gives an indication of the political expectations of the role of the Agency. The Agency is mainly a tool of the Defence Ministers. The Council in Defence Ministers formation – held for the first time during the Belgian presidency in 2010 as a session of the Foreign Affairs Council configuration – gives guidelines to the Agency's work once a year.⁷² These broad guidelines are the basis for the Agency's detailed work programme which is approved by the Agency's Steering Board. This process emphasizes the ownership of the Defence Ministers of the capability development work and gives defence ministries some flexibility for cooperation in this area.

EDA's Joint Action also includes some innovations for defence cooperation. One of them is decision-making in the Agency which is by qualified majority voting.⁷³ Nevertheless, Joint Action also enables the use of an emergency brake mechanism,⁷⁴ in which case the decision must be made in the Council unanimously. The decision-making system thus includes the possibility of being outvoted or facing political consequences of derogating from the normal decision-making process by sending a draft decision to the Council for unanimous approval. Finally, it is interesting to note that, while Joint Action states that the mission of the Agency is to support the Council and the Member States in their effort to improve EU defence capabilities in the field of crisis management, Articles 42 (3) and 45 TEU do not contain that kind of reference to crisis management. Indeed, one can state that the EDA is working in a broader field than just one for improving crisis management capability.⁷⁵

⁷⁰ Article 42 (3) and Article 45 (1) TEU: identifying operational requirements and defining and evaluating European capabilities, industrial matters, research and technological questions and armaments policy. The EDA yearly budget is roughly 30 million euro and the total sum of signed contracts in 2007–2009 was 294 million euro (EDA Annual report 2009) available at: <http://www.eda.europa.eu> (accessed 1 June 2011).

⁷¹ Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency.

⁷² Recital 11, Articles 8 (2) and 4 (3), Joint Action 2004/551/CFSP, *supra*, fn. 71.

⁷³ Article 9(2), Joint Action 2004/551/CFSP, *supra*, fn. 71. See also footnotes 46–49.

⁷⁴ Article 9(3), Joint Action 2004/551/CFSP, *supra*, fn. 71.

⁷⁵ From www.eda.europa.eu one can detect a range of issues which EDA is dealing with: for example European Defence Technological and Industrial Strategy, maritime surveillance, and integration of unmanned aerial systems into non-segregated airspace.

The Lisbon Treaty provides two important aspects concerning budgeting. First, Article 41 TEU might also enable coverage of EDA administrative expenditure from the Union budget.⁷⁶ Presently, the budget is funded by the Member States according to their GNP. Second, defence research could now be funded from the Union budget,⁷⁷ which was not possible before the Lisbon Treaty. These two opportunities are legally available but have not yet sparked a real political debate. Union funding in these areas would naturally integrate other players – like the European Parliament – more closely to EU defence cooperation.

6. INCREASING INTERDEPENDENCE

Solidarity is one of the main features of the European Union. This is also reflected in the Treaty in many different ways. For example, Article 4(3) TEU mentions sincere cooperation and Article 24(3) TEU states that 'the Member States shall work together to enhance and develop their mutual political solidarity'.

Common defence is normally based on some kind of mutual assistance clause or a collective defence arrangement. The Treaty of Lisbon introduces two clauses – a mutual assistance clause and a solidarity clause – thereby also emphasizing at the legal level the increasing solidarity between Member States. The clauses share two common features. First, they state – for the first time – the EU's security responsibility for its own area. Second, the clauses are commitments between Member States, with a limited role for EU Institutions.⁷⁸ This is a noteworthy development when compared to two other collective defence organisations, NATO and the WEU. These started their function as collective defence organizations and later engaged in different security operations. The EU has done the opposite by concentrating on external crisis management before establishing a mechanism to defend its own Member States.⁷⁹

⁷⁶ This depends on whether EDA administration costs can be seen as expenditure arising from operations having military or defence implications.

⁷⁷ See Articles 179 (3) TFEU and Article 45 (1) (d) TEU. Politically this question might be discussed in relation to preparation of the eight framework programme for research.

⁷⁸ Tiilikainen, Teija (2008), *The Mutual Assistance Obligation in the European Union's Treaty of Lisbon*, Publications of the Ministry for Foreign Affairs of Finland, at 24–25.

⁷⁹ Blockmans and Wessel, *supra*, fn. 68, at 301–302.

The mutual assistance clause is essentially a symbolic and a political statement.⁸⁰ It seems to be clear that no disagreement exists about the priority of NATO's collective defence obligation when compared to the EU's obligation.⁸¹ Thus, for the foreseeable future, the mutual assistance clause has a limited role as a basis for common defence. However, it might have some influence, for example on discussions about how to create the required trust between Member States for pooling and sharing defence capabilities and how to guarantee military security of supply.

The solidarity clause has a link to the CSDP as the Union 'shall mobilise all the instruments at its disposal, including the military resources made available by the Member States'⁸² in the case of a terrorist attack, a natural or man-made disaster. However, as with the mutual assistance clause, the political obligation and pressure to act would probably be stronger than a legal requirement due to the interdependence of the Member States' security situations through the single currency or common external borders.⁸³

7. INTERNAL MARKET ASPECTS OF DEFENCE

Defence items and companies have a major impact on the EU internal market. Member States spend roughly 200 billion euro annually on defence, of which around 20 per cent is used for procurement of new defence material.⁸⁴ The European defence industry employs more than 300 000 people and has an annual turnover of over 55 billion euro.⁸⁵

Defence was, however, *de facto* exempted from the scope of internal market rules for a long time. The main reason for this was the use of Article 346 TFEU⁸⁶ as a national security exemption. This led to a situation where Member States made most of their defence purchases on a national basis, and most defence industry related activities were exempted from the reach

⁸⁰ Piris, *supra*, fn. 45, at 275.

⁸¹ Tiilikainen, *supra*, fn. 78, at 31.

⁸² Article 222 TFEU.

⁸³ Tiilikainen, *supra*, fn. 78, at 7.

⁸⁴ European Defence Agency, *supra*, fn. 7.

⁸⁵ European Commission, *A Strategy for a Stronger and More Competitive European Defence Industry*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2007) 764 final, Brussels, December 2007, at the introduction.

⁸⁶ Article 346 TFEU (ex-Article 296 EC). The wording of Article 346 TFEU has remained unaltered in all the Treaty modifications.

of EU competition law. Article 346 TFEU entitles a Member State to derogate from all Treaty provisions under certain conditions if that Member State sees its essential security as threatened. Member States have been in favour of a wide interpretation of Article 346 TFEU.⁸⁷ This interpretation has been reinforced by a provision in the Lisbon Treaty which states that 'in particular, national security remains the sole responsibility of each Member State'.⁸⁸ However, economic problems have pushed Member States to reconsider to what extent real essential security interests are involved in different kinds of defence activity. As a voluntary and non-binding tool, Member States have opened up the European defence market with an intergovernmental political initiative: the EDA Code of Conduct on Defence Procurement.⁸⁹

On its part, the Commission has taken another view as to the interpretation of Article 346 TFEU. The Commission sees defence as part of the internal market and concludes that Member States' right to derogate from the market must be set to a minimum.⁹⁰ The European Court of Justice has agreed with the Commission's narrow interpretation of Article 346 TFEU. The Court has developed several principles on the correct interpretation of this provision. First, Article 346 TFEU does not lend itself to wide interpretation.⁹¹ Second, it is not a general and automatic national security exception from the Treaty.⁹² Third, a Member State has a particularly wide discretion in assessing the needs of its security.⁹³ Fourth, the Court has a right to review the justification for invoking Article 346 TFEU.⁹⁴ Fifth, the Court has put the burden of proof on Member States to demonstrate the

⁸⁷ See Aalto, Erkki (2008), 'Interpretations of Article 296' in Daniel Keohane (ed.), *Towards a European Defence Market*, Chaillot Paper No.113, Paris: EU Institute for Security Studies, pp. 13–49.

⁸⁸ Article 4 (2) TFEU. Nevertheless, the exact scope of the provision is presently unclear; for example, whether it only refers to internal security of a Member State or something else.

⁸⁹ European Defence Agency, *The Code of Conduct on Defence Procurement of the EU Member States participating in the European Defence Agency* approved on 21 November 2005.

⁹⁰ European Commission, *Interpretative Communication on the Application of Article 296 of the Treaty in the Field of Defence Procurement*, COM(2006) 779 final, Brussels, 7 December 2006.

⁹¹ Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986], E.C.R. 1651, at para. 26.

⁹² Case 222/84, *supra*, fn. 91, at para. 26.

⁹³ Case T-26/01, *Fiocchi munizioni SpA v Commission* [2003] E.C.R. II-3951, at para. 58.

⁹⁴ Case C-414/97, *Commission of the European Communities v Kingdom of Spain* [1999] E.C.R. I-5585, at para. 22.

legality of the measure used.⁹⁵ Sixth, the Court has stated that 'it is becoming increasingly less possible to look at the security of a State in isolation, since it is closely linked to the security of the international community at large'.⁹⁶ Seventh, Member States do not have to notify in advance of use of Article 346 TFEU.⁹⁷ The Court of Justice has also applied these principles in later cases.⁹⁸ As these principles show, the Court has tried to find a balance between the security interests of the Member States and the interests of the Union. Nevertheless, some of the principles are somewhat conflicting, for example: no wide interpretation of Article 346 TFEU versus the Member States' wide discretion in assessing their needs of security. The main reason for the present situation is that there have been, so far, relatively few cases on the interpretation of Article 346 TFEU. Especially there have not been cases directly involving a procurement of defence items which are normally linked to the use of the article.

The Commission has complemented the Court's case law by stating that only essential, but not simply any security interests or industrial and economic interests, can justify invoking Article 346 TFEU. In addition, Member State security interests should also be considered from a European perspective,⁹⁹ so that general references to the geographical and political situation, history and Alliance commitments are not sufficient when Article 346 TFEU is invoked.¹⁰⁰

Defence is part of the internal market. However, its role in the market is for the time being open. The Court of Justice will play a crucial role in defining the limits of the internal market for defence. It can be asserted that in the future the number of defence related court cases will increase.¹⁰¹ This will, however, depend greatly on how rigorously the Commission will enforce its interpretative communication and its policies related to EDTIB

⁹⁵ Case C-414/97, *supra*, fn. 94, at para. 22.

⁹⁶ Case C-70/94, *supra*, fn. 20, at para. 26; and C-83/94, *supra*, fn. 20, at para. 27. This statement has also caused some calls for Europeanization of essential security interests. See: Eisenhut, D. (2008), 'The Special Security Exemption of Article 296 EC: Time for a New Notion of "essential security interests"?' *European Law Review*, 33 (4), 577–585, at 585.

⁹⁷ Case T-26/01, *supra*, fn. 93, at para. 59.

⁹⁸ See for example judgments from the cases: C-372/05, *Commission v Germany*; and C-239/06 *Commission v Italy*.

⁹⁹ European Commission, *supra*, fn. 90, p. 7.

¹⁰⁰ European Commission, *supra*, fn. 90, p. 8.

¹⁰¹ See for example: press statement *Commission refers the Czech Republic to the EU Court of Justice for not complying with EU rules in the purchase of military transport aircraft*, IP/10/1438, Brussels, 28 October 2010. See also: Georgopoulos, A. (2010), 'The New Defence Procurement Directive Enters into Force', *Public Procurement Law Review*, 19 (1), NA1–3, at NA3.

and how actively undertakings will use, for example, remedies in procurement processes and complaints in state aid cases.

8. EDTIB: THE ECONOMIC FOUNDATIONS OF DEFENCE

The discussion about essential security interests and about the correct interpretation of Article 346 TFEU has not stopped practical work on developing a European defence equipment market as part of a European defence technological and industrial base. This is understandable because Europe is rapidly losing its means of producing defence capabilities and responses are needed for preserving EDTIB.¹⁰² This situation also has a direct impact on the CSDP whose success depends heavily on the existence of a competitive and rationalized EDTIB.¹⁰³

Two legislative instruments – directives on defence and security procurement and on intra-community transfers¹⁰⁴ – are part of a plan to preserve EDTIB. The aim of the defence and security procurement directive is to increase transparency and competition for defence procurement at the European level. This could bring benefits to many: 'taxpayers' money will be spent more efficiently, armed forces will get better value for money, and industry will get better access to new markets'.¹⁰⁵

The defence and security directive is tailored to the specific needs of procurement in defence and security markets. It includes among other things: a negotiated procedure with prior publication as standard procedure and special provisions on security of information and on security of supply.¹⁰⁶ The Commission has also published guidance notes on six topics whose purpose is to: 'ensure correct transposition and application of the

¹⁰² See for example: Verheugen, Günther (2009), 'Industry Policy as a Contribution to European Security', in Karl von Wogau (ed.), *The Path to European Defence: New Roads and Horizons*, London: John Harper, pp. 138–145, at 138–145.

¹⁰³ Georgopoulos, Aris (2006), 'The European Armaments Policy: A *conditio sine qua non* for the European Security and Defence Policy?', in Martin Trybus and Nigel D. White (eds), *European Security Law*, 198–222, at 198.

¹⁰⁴ Directive 2009/81/EC, *supra*, fn. 22; Directive 2009/43 EC, *supra*, fn. 21.

¹⁰⁵ Internal Market and Service Commissioner Charlie McCreevy, European Commission, press release *New Directive on defence and security procurement enters into force*, IP/09/1250, Brussels, 25 August 2009.

¹⁰⁶ European Commission, press release *New Directive on defence and security procurement enters into force*, IP/09/1250, Brussels, 25 August 2009. See also for example: Gabriel, M. and K. Weiner (2010), 'The European Defence Procurement Directive: Toward Liberalization and Harmonization of the European Defense Market', *Procurement Lawyer*, 45 (1), 22–26.

Directive'.¹⁰⁷ By introducing guidance notes, the Commission has also raised the political stakes to ensure compliance with the new rules. The real test will begin after the transposition period in August 2011.

The aim of the Intra-Community Transfers Directive is to simplify the rules and procedures applicable to intra-Community transfer of defence-related products in order to ensure proper functioning of the internal market.¹⁰⁸ The task of the directive is to tackle problems such as heterogeneous national licensing regimes which have hampered security of supply between Member States and cost over €400 million a year when only a minority of licences have been rejected.¹⁰⁹ The aim is to induce Member States to replace as far as possible their existing individual licences with general licences for those intra-Community transfers. Member States will have to transpose the directive by 30 June 2011 at the latest. They will have to apply the Directive from 30 June 2012.¹¹⁰

The Commission is also increasingly working in the other sectors of EDTIB. State aids¹¹¹ and offsets¹¹² are often raised as examples. These affect the level playing field in the defence market and thereby also EDTIB. Furthermore, the Commission is investigating European defence companies' access to third markets, for example the United States.¹¹³ The Commission's role in third country trade might re-open the debate on the

¹⁰⁷ The notes are: field of application, exclusions, research and development, security of supply, security of information, subcontracting and offsets. Notes are available at: http://ec.europa.eu/internal_market/publicprocurement/dpp_en.htm (accessed 1 June 2011).

¹⁰⁸ Article 1, Directive 2009/43 EC, *supra*, fn. 21.

¹⁰⁹ See: http://ec.europa.eu/enterprise/sectors/defence/documents/index_en.htm (accessed 1 June 2011). Applications for intra-EU transfer stand at around 12 000 yearly of which only a few are rejected: in 2003, 15 cases, and in the following years the figure went down to zero. See: Verheugen, *supra*, fn. 102, at 144.

¹¹⁰ See: http://ec.europa.eu/enterprise/sectors/defence/documents/index_en.htm (accessed 1 June 2011).

¹¹¹ See for example: Commission decision of 24 March 2009 on state aid C 47/05 (ex NN 86/05) implemented by Greece for the Hellenic Vehicle Industry SA (ELVO) Official Journal of the European Union 12.5.2010 L 118/81.

¹¹² The following statement from the Commission will most likely have legal implications: 'offset requirements are restrictive measures which go against the basic principles of the Treaty' in *Guidance note on offsets*, available at: http://ec.europa.eu/internal_market/publicprocurement/docs/defence/guide-offsets_en.pdf (accessed 1 June 2011).

¹¹³ European Commission, DG Enterprise and Industry, Aerospace Industries, GMES, Security & Defence, 2009. *The Nature and Impacts of Barriers to Trade with the United States for European Defence Industries*. Final report No ENTR 08/040, December, available at: http://ec.europa.eu/enterprise/sectors/defence/files/final_report_trans_en.pdf (accessed 1 June 2011).

relationship between common commercial policy and export of defence-related goods.¹¹⁴

9. CONCLUDING REMARKS

The Treaty includes possibilities to create many of the elements that could be needed for common defence. CSDP provisions offer opportunities to arrange military operations and work on capability development. Furthermore, different solidarity clauses emphasize the interdependence between Member States. Nevertheless, the political reality is that no major appetite exists at the moment to deepen cooperation in CSDP matters towards common defence.

This chapter has hopefully been able to contribute to the view that from a legal perspective defence cooperation in the EU can no longer be described as the same thing as CSDP. Internal market provisions affecting defence also offer a new kind of standpoint on possible EU common defence, due to their supranational effects. Indeed, the internal market aspect of defence is something that needs to be more often included in the discussion on the defence dimension of the EU.

Practical interdependence between Member States is growing regardless of whether they want to deepen their defence cooperation within the EU. The main factor in this is economic developments. The need to reconstruct a European technological and industrial base calls for action.

The combination of CSDP provisions and defence related internal market rules forms a unique combination, a *sui generis* EU defence cooperation. Ultimately, however, whether the full potential of the provisions will be implemented is a matter of political will.

¹¹⁴ See Eikenberg, K. (2000), 'Article 296 (ex 223) E.C. and External Trade in Strategic Goods', *European Law Review*, 25 (2), 117–138.

European Convention and those of the Charter, while not preventing the EU from developing more extensive protection than is provided for under the Convention:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

This provision does not specifically address the question of the relationship between the two European Courts, the ECtHR and the ECJ, although it seems likely to be intended to promote deference—or at least close attention—on the part of the ECJ to the case law of the ECtHR, and thus far the ECJ is certainly paying such attention.²²⁴ The explanatory memorandum declares that the EU legislator must comply with the standards laid down in the ECHR 'without thereby adversely affecting the autonomy of Union law and that of the Court of Justice', but it also indicates that the meaning of the rights is determined in part by the ECtHR.

The Lisbon Treaty added four further paragraphs to Article 52 of the Charter. Article 52(4) stipulates that the provisions of the Charter derived from national constitutional traditions should be interpreted in harmony with those traditions. Paragraph (6) complements this by stipulating that 'full account' should be taken of national laws and practices as specified in the Charter. Article 52(7), together with Article 6(1) TEU, gives some legal weight to the explanatory memorandum to the Charter which was drafted by the secretariat.²²⁵ This is an interesting development, since although the 'explanations' frequently provide a helpful account of the background to a provision, they were not drafted with a view to having legal force.

However, the most contentious and much-debated amendment made by the Lisbon Treaty to the Charter as originally adopted in 2000 is that contained in Article 52(5), which seeks to distinguish provisions of the Charter containing 'principles', and stipulates that provisions containing 'principles' will be 'judicially cognisable' only when they have been implemented by legislative or executive acts of the EU or the Member States, and only in relation to interpretation or rulings on the legality of such acts. Although this amendment was somewhat complicated and unclear, it seems to have been intended to introduce into the Charter some version of the traditional (and often-criticized) distinction between negatively-oriented civil and political rights and positively-oriented economic and social rights, with a view to rendering the latter largely non-justiciable.

Article 53 of the Charter contains a kind of general non-regression clause which is similar in ways to that in Article 53 of the ECHR, and which refers not only to the ECHR but also to national constitutions and international agreements:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

It was queried whether the presence of this clause and the absence of a 'supremacy' clause in the Charter guaranteeing the primacy of EU law could call into question the long-established supremacy

²²⁴ For ECJ cases referring to Art 52(3) of the Charter see (n 28).

²²⁵ Art 52(7) reads: 'The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States'.

doctrine.²²⁶ Such a concession seems highly unlikely, even if the general wording of Article 53(3) preserves the existing tension between the autonomy of the EU legal order, on the one hand, and the claims of Member States to the authority of their fundamental constitutional provisions, on the other.

Finally, Article 54 contains a clause modelled on Article 17 of the ECHR, which provides that no provision of the Charter shall imply the right to engage in any activity aimed at the destruction or excessive limitation of any of the rights contained therein.

9 THE EU AND THE ECHR

(A) ACCESSION BY THE EU TO THE ECHR

The long-debated question whether the EU should accede to the European Convention on Human Rights was finally settled by the Lisbon Treaty's amendment to Article 6(2) TEU, which declares that the EU 'shall' accede to the ECHR. The decision to accede did not rest in the power of the EU alone, however, since the Council of Europe's statute also had to be amended, requiring the assent of some forty-seven Council of Europe member states. Following many years of blockage by Russia's failure to ratify Protocol 14 to the ECHR, the provision of Article 59(2) ECHR permitting EU accession finally came into force in 2010. Given that the EU now has its own Charter of Rights, much of which is closely modelled on the ECHR, the question arises why EU accession to the ECHR is still considered to be necessary or desirable. There are several possible answers.

First, the EU has continued to encounter criticism of its human rights role, and scepticism as to whether its commitment to promoting human rights (rather than only EU economic and political interests) is genuine. The ECJ was prominently accused of using human rights discourse in an attempt to extend the influence of EU law over areas which should remain the primary concern of the Member States, given their political, cultural, and ideological diversity.²²⁷ Accession to the ECHR could help to signal the credibility of the EU as far as human rights commitments are concerned.

A second accusation was that the Court had used the rhetorical force of the language of rights, while in reality mainly advancing the commercial goals of the internal market, being biased in favour of 'market rights' instead of protecting values which are genuinely fundamental to the human condition, or being concerned mainly with promoting the integration goals of the EU.²²⁸ A further objection was that the ECJ should not in any case model itself as a European Human Rights Court, since this was not its main function under the EU Treaties, and because another European Court, the ECtHR in Strasbourg, was specifically entrusted by the Member States of the Council of Europe with the task of monitoring their compliance with the commitments of the ECHR.²²⁹ The ECtHR was established with an express human rights jurisdiction, and has acquired expertise and a moral stature which the ECJ does not yet share.

Thirdly, the ECJ's extension of EU power to require national laws to comply with fundamental rights also highlighted the possibility of conflict between the pronouncements of the two European

²²⁶ J. L. L. J. 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38 CML Rev 1171.

²²⁷ See, eg, the controversy over the Irish abortion information Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685, which led to an attempt by the Irish government to insulate the Irish constitutional prohibition on abortion, and on information and referral services, from the possible impact of EU law; see Protocol No 35 to the TEU and TFEU. See also the debate between Coppel and O'Neill and Weiler and Lockhart (n 59).

²²⁸ For a combination of both concerns see Coppel and O'Neill (n 59), and compare Weiler and Lockhart (n 59).

²²⁹ See, eg, the argument of the UK Government in Case 118/75 (n 20) 1191 (ECR).

Courts.²³⁰ Some took the view that any serious conflict of interpretation between the two Courts was unlikely,²³¹ but others cautioned that it was possible.

Finally, the desirability of being able to challenge acts of the EU directly before the ECtHR has been presented as a clear argument in favour of accession. Accession will thus mean that the ECJ will no longer be the final official arbiter of the lawfulness of EU action which is alleged to violate human rights. The EU will have its own judge on the ECtHR, as each Member State of the Council of Europe does. According to the European Commission, accession will:

- Help develop a common culture of fundamental rights in the EU.
- Reinforce the credibility of the EU's human rights' system and EU external policy.
- Show that the EU puts its weight behind the Strasbourg system of fundamental rights protection.
- Ensure that there is a harmonious development of the case law of the European Court of Justice and the European Court of Human Rights.²³²

The Commission, which was formally given a negotiating mandate by the Council of Ministers, began negotiations over accession with the Council of Europe in July 2010. The procedure will result eventually in an agreement on accession to be concluded by the Committee of Ministers of the Council of Europe and unanimously by the Council of the EU. The process is likely to take some time, since the assent of the European Parliament will be required, and the agreement will have to be ratified by all forty-seven contracting parties to the ECHR, including those which are EU Member States.

At the time of writing, various issues remain to be addressed, including: (i) whether a mechanism can be introduced to ensure the ECtHR does not rule on the compatibility of an EU act with the Convention until such time as the ECJ has first ruled on the matter; (ii) whether the EU should accede to all the ECHR protocols; (iii) how the EU's judge will be elected; (iv) in what circumstances the EU will be a co-defendant before the ECtHR when a complaint is brought against an EU Member State; and (v) whether EU Member States will be formally barred from bringing inter-state complaints against one another under the ECHR.

(B) INDIRECT REVIEW OF EU ACTS BY THE ECtHR PRIOR TO ACCESSION

While EU accession to the ECHR will mean that complaints can be brought directly against the EU before the Strasbourg Court, the ECtHR in fact for some years has been prepared in certain circumstances to entertain *indirect* complaints against EU acts when they are brought against one or all Member States.²³³

In 1999, the ECtHR ruled in *Matthews v UK* that, while the Convention did not preclude the transfer by a state of national competences to an international organization such as the EU, the responsibility

of the states for violations of the ECHR would continue even after such a transfer.²³⁴ *Matthews* was in some ways an unusual case, because the law which was found to be in violation of the Convention was an international agreement entered into by all EU Member States. It was an agreement which could not be reviewed by the ECJ, and one for which each Member State could plausibly continue to be held responsible.

However, in a subsequent series of cases involving various EU acts, such as *Guérin*,²³⁵ *Senator Lines*,²³⁶ *Segi/Gestoras Pro-Amnistía*,²³⁷ and *Emesa Sugar*,²³⁸ the ECtHR seemed willing in principle to entertain indirect challenges against a variety of such acts, a Commission decision, an ECJ judgment, a Common Position of the CFSP, although in most cases it dismissed the challenge for other reasons, such as the lack of a victim or the non-applicability of the substantive right claimed. In no case did the ECtHR reject the application on the ground that it lacked jurisdiction to examine violations which emanated from an act of the EU.

The most important ruling of the ECtHR concerning its jurisdiction over EU acts, however, is the *Bosphorus* case against Ireland.²³⁹ This case was brought by a Turkish company against Ireland for the impounding, without compensation, of an aircraft which the applicant company had leased from the national airline of the former Yugoslavia. The Irish authorities had impounded the aircraft in reliance on an EU regulation, following the interpretation of that regulation by the ECJ on a reference from the Irish Supreme Court,²⁴⁰ which implemented the UN sanctions regime against the former Yugoslavia during the civil war in the early 1990s. The ECtHR took the view that the alleged violation was committed by Ireland due to the state's compliance with a binding and non-discretionary EU law obligation: in other words, the EU regulation was the real source of the alleged violation. The ECtHR went on to set out the approach which it should adopt when complaints of this kind were made to it:

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1. The question is therefore, whether, and if so to what extent, that important general interest of compliance with EC obligations can justify the impugned interference by the State with the applicant's property rights.

²³⁴ App No 24833/94 *Matthews v UK*, judgment of 18 Feb 1999, esp [34]–[35]; R Harmsen, 'National Responsibility for EC Acts under the ECHR: Recasting the Accession Debate' (2001) 7 EPL 625. See also App No 43844/98 *TI v UK*, decision of 7 Mar 2000, on the UK's responsibility under the Dublin Convention, an agreement signed between all EU Member States concerning asylum procedures, for continuing to secure ECHR rights.

²³⁵ App No 51717/99 *Guérin Automobiles v les 15 Etats de l'Union Européenne*, 4 July 2000.

²³⁶ App No 56672/00 *DSR-Senator Lines GmbH v the 15 Member States of the European Union*, admissibility decision of the ECtHR of 10 Mar 2004. A challenge to the decision of the Commission which was the subject of the ECHR complaint had earlier been brought before the EU CFI, but both the CFI and the ECJ had rejected an application for interim relief: Case T-191/98 *R DSR Senator Lines v Commission* [1999] ECR II-2531 and, on appeal, Case C-364/99 *P R* [1999] ECR I-8733.

²³⁷ App Nos 6422/02 and 9916/02 *SEGI v the 15 Member States of the EU*, admissibility decision of the ECtHR of 23 May 2002.

²³⁸ App No 62023/00 *Emesa Sugar v Netherlands*, admissibility decision of the ECtHR of 13 Jan 2005. The relevant decision of the ECJ which was the subject of the complaint in this case was in Case C-17/98 *Emesa Sugar v Aruba* [2000] ECR I-665.

²³⁹ App No 45036/98 *Bosphorus v Ireland*, 30 June 2005; S Douglas Scott, Note (2006) 43 CMLRev 243; A Hinarejos Parga, Note (2006) 31 ELRev 251.

²⁴⁰ Case C-84/95 *Bosphorus v Minister for Transport* [1996] ECR I-3953.

²³⁰ R Lawson, 'Confusion and Conflict? Diverging Interpretations of the ECHR in Strasbourg and Luxembourg' in R Lawson and M de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe* (Kluwer, 1994); D Spielman, 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Inconsistencies and Complementarities' in Alston, Heenan, and Bustelo (n 5).

²³¹ P van Dijk and G van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer, 3rd edn, 1998) 21; A Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2007) 1 EJLS 1.

²³² http://ec.europa.eu/commission_2010-2014/reading/pdf/echr_background.pdf.

²³³ For decisions of the previously existing Commission on Human Rights on this and on several related questions see App No 13258/87 *Melcher (M) v Germany*, 64 D & R 138; App No 21090/92 *Heinz v Contracting States and Parties to the European Patent Convention*, 76 AD & R 125; App No 21072/92 *Gestra v Italy*, 80 BD & R 93.

2. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue co-operation in certain fields of activity (the *M. & Co.* decision, at p. 144 and *Matthews* at § 32, both cited above). Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party...

3. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations...

4. In reconciling both these positions and thereby establishing the extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards (*M. & Co.* at p. 145 and *Waite and Kennedy*, at § 67). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention...

5. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see the above-cited *M. & Co.* decision, at p. 145, an approach with which the parties and the European Commission agreed). By 'equivalent' the Court means 'comparable': any requirement that the organisation's protection be 'identical' could run counter to the interest of international co-operation pursued (paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection.

6. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights...

7. It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. The numerous Convention cases cited by the applicant at paragraph 117 above confirm this. Each case (in particular, the *Cantoni* judgment, at § 26) concerned a review by this Court of the exercise of State discretion for which EC law provided... The *Matthews* case can also be distinguished: the acts for which the United Kingdom was found responsible were 'international instruments which were freely entered into' by it (§ 33 of that judgment)...

8. Since the impugned act constituted solely compliance by Ireland with its legal obligations flowing from membership of the EC (paragraph 148 above), the Court will now examine whether a presumption arises that Ireland complied with its Convention requirements in fulfilling such obligations and whether any such presumption has been rebutted in the circumstances of the present case.

The ECtHR went on in paragraphs 159–165 to survey the EU's system of protection for fundamental rights, and to rule that the presumption that Ireland complied with its ECHR obligations did indeed arise, on the basis that the EU provided human rights protection 'equivalent' to that of the

ECHR system, and that there was no dysfunction in the EU's control system such as to rebut that presumption in the case at hand.²⁴¹

Two separate opinions were signed by seven judges in the case, however, expressing certain reservations about the approach of the majority. These opinions, while concurring with the substantive ruling that no violation of the right to property had occurred, expressed varying views about the approach taken to the 'presumption of compliance' with the ECHR of national acts adopted pursuant to international legal obligations. In particular, they expressed concern about the idea of abandoning a case-by-case review of compliance for a largely abstract review of the organization's general system of 'equivalent protection' for human rights. They also drew attention to the deficiencies in the EU's system of judicial protection due to the limited *locus standi* for private parties before the ECJ, a limitation which has been partly addressed but not cured by Article 263 TFEU after the Lisbon Treaty, and they raised the question whether this amounted to a violation of Article 6(1) of the ECHR.²⁴²

Pending EU accession to the ECHR, the circumstances in which the ECtHR will indirectly review EU action appears to be as follows: where an EU act, such as a directive, which was at issue in the case of *Cantoni*,²⁴³ leaves discretion in implementation to Member States, or where it is 'an international agreement freely entered into by the Member State' as in *Matthews*, a challenge can be brought before the ECtHR against the implementing state, which remains responsible for any violation of ECHR obligations.²⁴⁴ Where however an EU act, as in the case of the regulation in *Bosphorus*, leaves no discretion in implementation to the Member State, the state will be presumed (in the absence of contrary evidence of a dysfunction in control) to have acted compatibly with the ECHR so long as the EU control system overall provides an equivalent level of protection for human rights to that provided by the ECHR. Finally, where an EU act, as in *Senator Lines*, is one which is not subject to implementation by the states but is adopted by an autonomous EU institution such as the Commission or the Court, it seems that an applicant will have to bring an action against all of the Member States collectively as the author of the act, and it seems likely (although perhaps not certain²⁴⁵) that the ECtHR would apply the presumption of compatibility.

Notably however, despite the presumption of compliance of EU acts with the ECHR in *Bosphorus*, the ECtHR in the recent case of *MSS v Belgium and Greece* found these states to be in violation of Article 3 ECHR on account of the inadequacy of Greece's conditions and procedures for dealing with

²⁴¹ For a critical comment see K. Kuhnert, 'Bosphorus—Double Standards in European Human Rights Protection?' (2006) 2 *Utrecht Law Review* 177, and for a more approving assessment see C. Costello, 'The Bosphorus Ruling of the ECtHR: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 *HRLR* 87.

²⁴² The question whether the restricted access of individuals to direct actions before the ECJ under Art 230 EC violates the principle of effective judicial protection, including that expressed by Art 6 of the ECHR, has been raised many times before the CFI and ECJ: Case C-263/02 *P. Jégo-Quéré v Commission* [2004] ECR I-3425; Case C-50/00 *UPA v Council* [2002] ECR I-6677; Case T-370/02 *Alpenrhein-Camembert-Werk v Commission* [2004] ECR II-2097; Case T-338/02 *Segi v Council* [2004] ECR II-1647; Case C-141/02 *P. Commission v T-Mobile Austria* [2005] ECR I-1283; Case T-231/02 *Gonnelli and AIFO v Commission* [2004] ECR II-1051.

²⁴³ App No 17862/91 *Cantoni v France*, judgment of the ECtHR, 15 Nov 1996. The case concerned a claim of violation of Art 7(1) of the ECHR on retroactivity of criminal liability, due to the allegedly inadequate definition in a provision of the French Public Health code, which implemented EU Dir 65/65, of the term 'medical product'.

²⁴⁴ App No 30696/09 *MSS v. Belgium and Greece*, discussed at (n 246).

²⁴⁵ It is possible, although unlikely, that the ECtHR might refuse to apply the presumption of compatibility in the case of such 'self-executing' EU acts if they are for some reason not subject to adequate review within the EU itself—as was true of the measure at issue in *Matthews*. It is possible also to imagine a non-reviewable CFSP measure (like that in *Segi*) which does not require any implementation being treated by the ECJ like the international agreement in *Matthews*. Another possibility, however, is that the ECtHR would apply the presumption of compatibility to such self-executing EU acts, but would treat the lack of reviewability as a consideration such as to rebut the presumption of ECHR compatibility.

asylum-seekers, in a ruling which clearly casts doubt, as Judge Rozakis's concurring opinion indicates, on the viability of the EU's Dublin Regulation on the transfer of asylum-seekers.²⁴⁵

One question which remains is whether the ECtHR might continue, even after EU accession to the ECHR, to apply the deferential *Bosphorus* approach by allowing EU acts to benefit from a presumption of compatibility of its acts with the ECHR. Given that this presumption of compatibility has already met significant criticism, and that there will be no formal limits on the ECtHR's jurisdiction to scrutinize EU acts following accession, there seems to be no reason for the EU to benefit from any presumption of compatibility of its acts with the ECHR, or to escape full scrutiny by the Court of Human Rights.

(c) MUTUAL INFLUENCE OF THE ECJ AND THE ECtHR PRIOR TO ACCESSION

We have seen above how the ECJ regularly cites and pays increasingly close attention to ECHR rulings.²⁴⁷ And as the scope of EU law has expanded, the number of cases in which rights claims are raised has similarly expanded, which means that claims based on ECHR and Charter rights are increasingly brought before the ECJ.

The potential for differences in interpretation between the two European Courts on the same issue can be seen in a range of earlier cases of the ECJ and ECtHR respectively. Compare, for example, the judgment of the ECtHR in *Open Door Counselling*²⁴⁸ with the Opinion of the Advocate General in *Grogan*,²⁴⁹ or the approach of the ECJ in *ERT*²⁵⁰ with that of the ECtHR in *Lentia v Austria*,²⁵¹ or the decision of the ECJ in *Hoechst*²⁵² with that of the ECtHR in *Niemietz*,²⁵³ or the ECJ in *Orkem*²⁵⁴ with the ECtHR in *Funko*,²⁵⁵ and the subsequent series of ECJ and CFI cases concerning various rights of the defence in EU competition proceedings in *SKC*,²⁵⁶ *Limburgse Vinyl Maatschappij*,²⁵⁷ *Baustahlgewebe*,²⁵⁸ and *Roquette Frères*.²⁵⁹

²⁴⁴ App No 30696/09 *MSS v. Belgium and Greece*, judgment of the Grand Chamber of 21 Jan 2011. For an earlier ruling of the ECtHR dealing with the implementation of the Dublin Reg as between the UK and Greece which, despite similar evidence, had found no violation of the Convention at the time see App No 32733/08 *KRS* (n 122).

²⁴⁷ The ECJ itself has said that 'the Court of Justice regularly applies the Convention and refers in that connection, more and more precisely in recent years, to the case-law of the European Court of Human Rights'. Discussion document of the ECJ on certain aspects of the accession of the EU to the ECHR, Luxembourg, 5 May 2010, [3].

²⁴⁸ *Open Door Counselling Ltd and Dublin Well Woman Centre v Ireland*, Series A, no 246.

²⁴⁹ Case C-159/90 (n 227).

²⁵⁰ Case C-260/89 *ERT* (n 22).

²⁵¹ *Informationsverein Lentia v Austria*, Series A, no 276. In this case the ECtHR found that the radio and television monopoly of the Austrian Broadcasting Corporation constituted a violation of Art 10 of the Convention, whereas the ECJ in Case C-260/89 (n 22) left the Art 10 issue to be decided by the national court. See also Case C-23/93 *TV10 SA v Commissariaat voor de Media* [1994] ECR I-4795, concerning Dutch broadcasting restrictions, in which the ECJ referred to its conclusion in an earlier case, Case C-353/89 *Commission v Netherlands* [1991] ECR I-4069, that the maintenance of the pluralism which the broadcasting policy sought to safeguard was precisely what the ECHR was designed to protect. See the similar conclusion of the Commission on Human Rights in its Decision of 11 Jan 1994 in App No 21472/93 *X v The Netherlands*, 76A D & R 129.

²⁵² Cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859.

²⁵³ *Niemietz v Germany* (n 109). See however the subsequent decision of the ECJ in Case C-94/00 *Roquette Frères* (n 110) citing the later ECHR judgment in *Colas Est v France*, 16 Apr 2002.

²⁵⁴ Case 374/87 (n 107).

²⁵⁵ *Funko v France* (n 112).

²⁵⁶ Cases T-213/95 and 18/96 *SKC* (n 103) [56]–[57].

²⁵⁷ Cases T-305/94–335/94 *Limburgse Vinyl Maatschappij NV v Commission* [1999] ECR II-931, [420].

²⁵⁸ Case C-185/95 *P. Baustahlgewebe* (n 103); *Lenaerts and de Smijter* (n 222).

²⁵⁹ Case C-94/00 *Roquettes Frères* (n 110).

Another indication of the potential for conflict arose in the *Emesa Sugar* litigation, concerning whether the lack of opportunity for a party to reply to the Advocate General's Opinion before the ECJ constituted a violation of the right to adversarial proceedings in Article 6(1) ECHR.²⁶⁰ The ECJ sought to distinguish the relevant ECtHR jurisprudence on which the applicant relied,²⁶¹ finding it inapplicable to the situation of the Advocate General, so that there was no violation of Article 6(1).²⁶² In the later EU case of *Kaba*,²⁶³ however, which raised a similar challenge to the role of the Advocate General by relying on a later ECHR ruling,²⁶⁴ Advocate General Colomer was highly critical of the ECtHR and its case law on this issue.²⁶⁵ The ECJ however did not address the issue and decided the *Kaba* case on a different ground, and the ECtHR later dismissed the application by *Emesa Sugar* as inadmissible on the basis that Article 6(1) ECHR did not cover customs duties procedures.²⁶⁶ In other words, despite the lurking conflict underpinning the case, both the ECJ and the ECtHR in their different ways sought to avoid giving contradictory rulings without finding the jurisprudence of the other European Court to be at fault.

What can be seen is a determination on the part of both European Courts to avoid conflict in their respective case law, and to demonstrate deference to the other court in relation to similar questions arising before them.²⁶⁷ This is certainly the approach which Article 52(3) of the Charter of Fundamental Rights encapsulates.²⁶⁸ And while, as we have seen, the ECJ and the General Court continue to make many approving references to the jurisprudence of the ECtHR, the ECtHR too has occasionally cited EU law and ECJ judgments with approval in cases such as *Stec*²⁶⁹ and *DH v Czech Republic*.²⁷⁰

It is assumed by many that accession by the EU to the ECHR will bring about greater harmony between the two systems, by formally subjecting the EU to the binding force of the ECHR, and by formally subjecting the ECJ to the binding force of judgments of the ECtHR.²⁷¹ On the other hand, it has been suggested that the ECJ may wish to leave itself a 'margin of appreciation' in this respect,²⁷² and the Declaration annexed by the Lisbon IGC to the EU Treaties is ambiguous.²⁷³ Nor does the ECHR itself provide a clear answer, since Article 46 ECHR specifies only that 'the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'. The ECJ made no comment on the question whether it will be formally bound by the case law of the ECtHR in its recent memorandum on

²⁶⁰ Case C-17/98 *Emesa Sugar* (n 238); R Lawson, Note (2000) 37 CMLRev 983.

²⁶¹ The relevant case was *Vermeulen v Belgium* [1996] I Reports of Judgments and Decisions 224.

²⁶² Case C-17/98 *Emesa Sugar* (n 238).

²⁶³ Case C-466/00 *Kaba v Home Secretary* [2003] ECR I-2219.

²⁶⁴ App No. 39594/93 *Kress v France*, judgment of the ECtHR of 11 June 2001.

²⁶⁵ *Ibid* [104]–[106]. See also the Opinion of AG Colomer in Case C-480/99 *P. Plant v Commission* [2001] ECR I-265, esp [36].

²⁶⁶ (N 238).

²⁶⁷ For a case in which the ECtHR drew support from the human rights approach of the EU by looking not at the ECJ's jurisprudence but at the provisions of the Charter of Fundamental Rights see App No 28957/95 *Goodwin v UK*, judgment of the ECtHR of 11 July 2002, [100], on the right of transgendered persons to marry. See also App No 34503/97 *Demir and Baykara v Turkey*, judgment of the ECtHR of 12 Nov 2008, [47], [150].

²⁶⁸ See (n 28) and accompanying text.

²⁶⁹ App Nos 65731/01 and 65900/01 *Stec v UK*, judgment of the ECtHR of 12 Apr 2006, [58].

²⁷⁰ App No 57325/00 *DH and Others v Czech Republic*, judgment of the Grand Chamber of 13 Nov 2007, [85]–[91], [187]. See also the interesting admissibility decision of the ECHR in App No 15073/03 *John v Germany*, decision of 13 Feb 2007, where the ECJ dismissed a claim for breach of Art 6(1) ECHR based on a national court's refusal to make a preliminary reference to the ECJ.

²⁷¹ T Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 Law and Practice of International Courts and Tribunals 375.

²⁷² Rosas (n 231) nn 43–44 and text.

²⁷³ Declaration No 2 on Art 6(2) TEU provides: 'The Conference agrees that the Union's accession to the ECHR should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention'.

accession to the ECHR, but argued strongly for a mechanism to be established to ensure that before the ECHR is called on by a litigant to provide an 'external' review of an EU act for compatibility with the ECHR, one of the EU Courts must have the opportunity to give a prior 'internal' review.²⁷⁴

10 CONCLUSIONS

- i. Human rights issues occupy an increasingly significant place within EU law and policy today. The Charter of Fundamental Rights has been given binding legal force. The EU is currently negotiating its accession to the ECHR. Compliance with human rights standards is a condition for the admission of new Member States, and serious non-compliance forms the basis for the symbolic sanction mechanism in Article 7 TEU. The Commission is developing instruments such as human-rights mainstreaming and human-rights impact assessment, and an EU Fundamental Rights Agency has been established.
- ii. The case law of the ECJ and the CFI/General Court dealing with human rights matters has grown exponentially. A series of high-profile rulings annulling anti-terrorist sanctions has garnered particular attention, but there have been many other notable, if less publicized, cases dealing with fundamental rights, on issues ranging from asylum and refugee claims to child custody disputes, criminal procedure, media pluralism, data protection, and employment rights. While Member States' governments remain ambivalent about the EU's role in relation to human rights matters within the EU, it is clear that the ECJ has not retreated from its assertion of jurisdiction to undertake human right review of all Member State action which falls 'within the scope of EU law', despite the somewhat narrower wording of Article 51 of the Charter.
- iii. Accession by the EU to the ECHR within the next few years will formalize the complex but cooperative relationship between the ECJ and the European Court of Human Rights. It is clear that both the Strasbourg and the Luxembourg Courts have, in their different ways, sought to avoid conflict between their respective bodies of case law, and that both Article 52(3) of the Charter and accession by the EU to the ECHR are viewed as further moves in the direction of jurisprudential harmony between the two systems. Nevertheless, the ECJ is clearly concerned to maintain its autonomy (and the autonomy of the EU legal order) after accession, and it also seems clear that—despite the deferential *Bosphorus* ruling—the ECHR will not compromise its standards under the Convention to accommodate particular EU laws and goals, as the recent *MSS v Belgium and Greece* ruling suggests.

11 FURTHER READING

(a) Books and Collections

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WILLIAMS, A., *EU Human Rights Policies: A Study in Irony* (Oxford University Press, 2004)

(b) Articles

BESSELINK, L., 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 CMLRev 629

²⁷⁴ (N 247) [11]–[12].

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Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon

Wolfgang Weiß*

Treaty of Lisbon – Fundamental Rights Charter – European Convention on Human Rights – Partial incorporation of Convention in Charter – Incorporation of Charter into EU law with Lisbon – Questions of loss of autonomy for the EU legal order – Gain in direct effect of Convention in EU member states

INTRODUCTION: THE CONVENTION IN THE LISBON TREATY IN DIFFERENT CONTEXTS

The Lisbon Treaty changed the situation regarding protection for human rights in the EU. One consequence of the Lisbon Treaty is that, by virtue of Article 6(1) of the Treaty on European Union (TEU), the Fundamental Rights Charter (FRC) has become a legally binding instrument of primary EU law ('same legal value as the Treaties'); its binding force on the EU institutions (and the member states) is confirmed by Article 51(1) of the Charter. The Lisbon Treaty also provides for an accession to the European Convention on Human Rights (ECHR). It is not, however, only the EU's accession that will bring about a new legal significance of the Convention for and within EU law. The importance of the Convention for EU law has already changed with the entry into force of the Lisbon Treaty due to Article 52(3) of the Charter, which provides that the meaning and scope of those rights in the Charter which correspond to rights guaranteed by the Convention is the same as those in the Convention. This provision materially incorporates core norms of the Convention (*see infra*, The legal status of the ECHR under the Lisbon Treaty, p. 69). The Convention, however, is also referred to in Article 6(3) TEU, which states that the fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the member states, constitute general principles of EU law. This provision, which corresponds, almost

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literally, to Article 6(2) TEU-Nice, mentions the Convention as one of the sources for the identification of general principles of EU law.¹ Hence, the Lisbon Treaty presents the Convention in different roles and contexts with different legal significance within Article 6 TEU: in paragraph 1 (read in conjunction with Article 52 of the Charter) the Convention at least partly became a source of EU law; whereas in paragraph 2 the same Convention is mentioned as an international treaty to which the EU will accede, and finally, in paragraph 3, the Convention appears in its traditional role in EU fundamental rights protection where the Convention was a mere source of inspiration (*see infra*, Challenges to the substance and methodology of human rights protection in the EU, p. 75).

These changes, and the somewhat contradictory statements in Article 6 TEU on the legal role and significance of the Convention with regard to protection of fundamental rights, prompt the need to reconsider the role of the Convention in EU human rights protection after the Lisbon Treaty. The partial incorporation of the Convention into EU law produces several challenges to the role of the Convention in the application of human rights by EU institutions and with regard to its domestic status, which this contribution will analyse in more detail. The EU fundamental rights regime, inherited from Nice and currently reflected in the practice of the EU institutions, appears not yet to have taken full account of all the changes brought about by Lisbon. First, these challenges refer to both the substance and the methodology of human rights protection in the EU provided for by the practice of the European Commission and ECJ case-law. Secondly, there are, closely related, challenges to the role and importance of human rights in the interpretation and application of EU law. Thirdly, the incorporation of many articles of the Convention into EU primary law alters the role and significance of the Convention within the member states' national legal orders. Finally, an accession of the EU to the Convention will challenge the approach adopted by the European Court of Human Rights (ECtHR) in its well-known *Bosphorus* decision, which showed a considerable, and unique, deference to the EU human rights

¹ That Art. 6(3) TEU refers only to the ECHR does not rule out other international human rights instruments (as questioned by M. Dougan, 'The Lisbon Treaty', *CMLRev* (2008) p. 617 at p. 665, n. 234) because the same wording of Art. 6(2) TEU-Nice did not hinder the ECJ from referring to other instruments, ECJ, Case C-540/03 *Parliament v. Council* [2006] ECR I-5769, para. 37; A. Rosas, 'The EU and International Human Rights Instruments', in Kronenberger (ed.), *The EU and the International Legal Order* (T.M.C Asser Press 2001), p. 53. The ECJ always interpreted Art. 6(2) TEU as a reaffirmation of its methodology: ECJ, Case C-415/93, *Bosman* [1995] ECR I-4921, para. 79; *see also* S. Douglass-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Aquis', *CML Rev* (2006) p. 629 at p. 633; R. Alonso Garcia, 'The General Provisions of the Charter of Fundamental Rights of the EU', *ELJ* (2002), p. 492 at p. 493 et seq. The same applies to the new Art. 6(3) TEU, cf. Dutheil de la Rochère, 'The Protection of Fundamental Rights in the EU: Community of Values with Opt-Out', in I. Pernice et al. (eds.), *Ceci n'est pas une constitution. Constitutionalisation without a Constitution?* (Nomos 2009), p. 119 at p. 122.

standards. At least with the accession, this recognition of autonomy will become highly questionable. Before these challenges to the EU human rights situation can be analysed, however, one has to clarify the position of the Convention within the triple layer of human rights protection under the Lisbon Treaty.

THE DIFFERENT LAYERS OF FUNDAMENTAL RIGHTS UNDER THE LISBON TREATY

The different contexts in which the Convention plays a role in the Lisbon Treaty are closely related to a problem that emerged very early in the codification process – the problem of maintaining a coherent, workable fundamental rights regime in the EU, which has become quite complicated with the advent of the Lisbon Treaty.² The Nice Treaty knew only one source for fundamental rights, the general principles (apart from the few fundamental rights enshrined in the Treaties, like the right to equal pay (Article 141 ECT, now Article 157 of the Treaty on the Functioning of the European Union, – TFEU). In contrast, the Lisbon Treaty simultaneously recognises different sources, which raises the problem of defining the relationship between the different layers of fundamental rights in the EU: fundamental rights stemming from general principles of EU law, fundamental rights enshrined in the Charter, and those of the Convention. While the maintenance of the general principles on fundamental rights, the recognition of the Charter and the reference to the Convention might be confusing at first glance, one should bear in mind that even in domestic constitutional orders the fundamental rights situation might not be less complicated. Usually, there are explicit constitutional fundamental rights existing alongside non-written constitutional principles which give rise to further constitutional rights developed in the case-law of domestic courts. Additionally, as all EU member states are parties to the Convention, the Convention plays a different role in each domestic order. Taking Germany as an example, there are not only the human rights contained in the explicit human rights catalogue of the German Constitution (Articles 1-19 Basic Law), but also additional constitutional fundamental rights derived from the rule of law (e.g., the right not to incriminate oneself or the presumption of innocence) though not explicitly mentioned. Furthermore, the Convention has to be integrated within the domestic regime of fundamental rights protection (mainly by a harmonising interpretation). These different sources coexist simultaneously in a mutually complementary way. The parallel coexistence of the different sources, however, might not be the case in EU law, because the Charter provides for general horizontal rules on the interpretation and application of the Charter rights

² See Dougan, n. 1 at p. 663.

(Articles 51–53); which also contain, in Article 52(2) to (4), explicit provisions on the relationship of Charter rights to other sources of fundamental rights. Whereas Article 52(2) and (4) of the Charter provide for harmony³ between the Charter rights, on the one hand, and the other fundamental rights explicitly enshrined in the Treaties or recognised by the ECJ as general principles of EU law, on the other. This appraisal is confirmed by the fact that, before Lisbon, the ECJ made reference to the Charter as an inspirational source in determining general principles, aligning the Charter rights and its settled case-law. Article 52(3) of the Charter is slightly different, as it has two consequences. First, Article 52(3) provides that '[i]n so far as this Charter contains rights corresponding to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention.' This not only requires harmony between Charter rights and corresponding Convention rights, but absorbs these rights into the EU legal order (*infra*, The (partial) substantial incorporation of the ECHR by the Lisbon Treaty, p. 69). Secondly, Article 52(3) provides that it 'shall not prevent EU law from providing more extensive protection', which in essence means that the Convention is the minimum standard (*infra*, ECHR as a minimum standard: drawing consequences for other sources of EU fundamental rights and for the autonomy of EU law, p. 72). Other sources of EU fundamental rights (like the general principles) may provide for farther-reaching standards but must not be interpreted or applied so as to fall short of Convention standards. The application of the interpretive rules in Article 52(2) and (4) must not deviate from this. Thus, Article 52(3) expresses an hierarchical interpretive principle thus far.⁴

Looking beyond the doctrinal issues of clarifying the relationship between the different sources of fundamental rights, the maintenance of those sources of fundamental rights in the EU is deeply rooted in their genealogy and draws further legitimacy there from. The different sources reflect the foundations and the jurisprudential beginnings of EU human rights, and in a wider view also the legitimacy of the whole process of European unification. Whereas in the beginning the legitimacy for establishing the EEC was vested with the member states and their transfer of public powers (which is reflected in the source of EU fundamental rights being general principles derived from national constitutional traditions and international human rights instruments to which the EU member states were parties), legitimacy has shifted gradually towards the European citizenry. Where-

³ See S. Peers, 'Taking Rights Away? Limitations and Derogations', in S. Peers and W. Ward (eds.), *The EU Charter of Fundamental Rights* (Hart 2004), p. 141 at p. 164, 169, 173 et seq.; W. Weiß, 'Grundrechtsquellen im Verfassungsvertrag', *Zeitschrift für Europarechtliche Studien* (2005), p. 323 at p. 327, 333.

⁴ In essence this view is in line with the view by Peers, *supra* n. 3 at p. 175, who applies Art. 52(3) FRC exclusively in case of overlap with the other paragraphs of Art. 52.

as, under the Treaty of Maastricht, the EU was created as a Union of the peoples of Europe (*see* Article A, TEU⁵), with the Treaty of Lisbon it became a Union of the citizens as well,⁶ which is not least reflected in the existence of a new human rights catalogue.

The multiple legitimacy claims of the European integration process are reflected in the multiply anchored EU fundamental rights order, and here one can observe a parallelism. On the one hand, there is the multilevel European constitutional development and its multiple 'anchorage' in nation states, peoples and citizens. On the other, there is the development of a multi-layered EU fundamental rights protection system resulting from the resort, first, to national constitutional traditions, secondly to the Convention, and finally now to the Charter. This multiple 'anchorage' of the EU fundamental rights standards brought about by the Lisbon Treaty still has its meaning in the current phase of European integration, because it corresponds to the specific constitutional situation of the EU, whose legitimacy derives from both the will of the citizens and of the member states (and no longer of the member states alone). The reference to common constitutional traditions and international human rights treaties, and their inclusion as a yardstick of fundamental rights protection in addition to the Charter, also reflects the recognition of different constitutional traditions and identities of the member states as confirmed in Article 4(2) TEU. Constitutional structures fundamental to the member states are expressed above all in their fundamental rights standards. This nexus is reasserted in the Preamble to the Charter and in Article 67(1) TFEU and it necessitates the preservation of national traditions as a source in the development of the EU's fundamental rights regime, besides the Charter as a human rights catalogue for the European *citoyens*. Therefore, a triple-layered fundamental rights protection in the EU remains to be welcomed in the perspective of legal and constitutional theory. Difficult as the clarification of the relationship of these different layers may be, the multiple 'anchorage' of EU fundamental rights protection nevertheless remains important, due to the specific constitutional characteristics of European integration.

⁵ 'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe.'

⁶ The citizens are mentioned in conjunction with the EU in Arts. 3(2), 9, 10(2), (3) and 11(1) TEU.

THE LEGAL STATUS OF THE CONVENTION UNDER THE LISBON TREATY

The (partial) substantial incorporation of the Convention by the Lisbon Treaty

Incorporation by virtue of Article 52(3) of the Charter

The Charter changed the legal value of the Convention, a novelty brought about by the Lisbon Treaty which is perhaps generally unnoticed. Article 52(3) Charter provides that 'in so far as this Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those [Charter] rights shall be the same'. This provision pays tribute to the fact that the Charter was drafted in the image of the Convention, as is recognized in the Fifth Recital of its Preamble and Declaration No. 1 to the Lisbon Treaty; half of the fifty substantial Charter provisions are taken over from the Convention and relevant Strasbourg case-law.⁷ It intends to ensure consistency between the rights under the Charter and the Convention. The legal consequence of Article 52(3) of the Charter, however, is not beyond doubt because the Explanations to Article 52(3) of the Charter stress the autonomy of EU law (compliance with the Convention does not 'adversely affect...the autonomy of Union law and of that of the [ECJ]'). Thus, there are two mutually exclusive ways of interpreting Article 52(3) of the Charter. On the one hand, one could understand Article 52(3) as an interpretational guideline which takes care of 'interpreting' in harmony between the Charter and the Convention.⁸ As an interpretational guideline, Article 52(3) might serve to ensure the autonomy of EU human rights law and the human rights methodology of the ECJ. On the other hand, one could interpret this rule as a material, substantial incorporation of the Convention into the Charter and, by virtue of Article 6(1) TEU, into primary EU law, in so far as its rights are reflected in the Charter. As Article 52(3) refers to both the meaning and the scope of the rights under the Convention, Article 52(3) goes beyond a mere interpretational guideline. Referring to meaning and scope encompasses the limits and possible justifications for interferences with a right which have become part of the fundamental rights regime of the EU even in the absence of any link to the wording of the corresponding Charter right. Thus, the wording of Article 52(3) of the Charter clearly speaks in favour of an incorporation of Convention standards,⁹ all the more since substantive incorporation is the best way to harmonise Charter rights and Convention

⁷ J. Callewaert, 'Unionisation and "Conventionisation" of Fundamental Rights in Europe', in J. Wouters et al. (eds.), *The Europeanisation of International Law* (TMC Asser Press 2008) p. 109 at p. 116.

⁸ See I. Pernice, 'The Charter of Fundamental Rights in the Constitution of the European Union', WHI Paper 14/02, at p. 10; reprinted in D. Curtin et al. (eds.), *The Emerging Constitution of the EU* (Oxford UP 2003).

⁹ Callewaert, *supra* n. 7 at p. 117: 'indirect adoption'.

standards. The reference to the autonomy of the EU law contained in the Explanations to Article 52(3) of the Charter is a purely jurisdictional point on the lack of subjection to the jurisdiction of the ECtHR of the EU.¹⁰ Therefore, Article 52(3) is not merely an interpretational guideline but a substantial incorporation of corresponding Convention rights which have become legally binding on the EU institutions.¹¹ Further consequences with regard to the binding force of the jurisprudence of the ECtHR and the significance of the Convention rules on limitations will be developed below (*infra*, Consequence: authoritative value of Strasbourg's interpretations and limitation provisions, p. 82). Article 52(3) of the Charter, however, does not lead to a complete and comprehensive incorporation of the Convention. The incorporation of the Convention is limited to those specific rights that have corresponding twin provisions in the Charter.

What are the corresponding rights? Or: the authoritative value of the Explanations

The question instantly following the above is the determination of those rights which correspond to rights under the Convention. The 'Explanations' relating to the Charter¹² are a very helpful instrument in this respect. These Explanations were adopted by the Praesidium of the Convention and were later updated by the Praesidium of the European Convention that drafted the failed Constitutional Treaty. These Explanations are a valuable tool for the interpretation of the Charter, as they have been intended to clarify the provisions of the Charter. Thus, they are not just one point of reference in the interpretation of the rights, but the Charter has to be interpreted 'with due regard to the Explanations' according to Article 52(7) of the Charter and the final sentence of the Fifth Recital to its Preamble. Paragraphs 4 to 7 of Article 52 and the final sentence of the Fifth Recital have been added to the original version of the Charter by the Constitutional Treaty. The Charter referred to in Article 6(1) TEU is the amended version adopted by the Strasbourg European Council in 2007¹³ taking over the amendments to the Charter by the Constitutional Treaty. One core characteristic of the amendments is the strengthened relevance of the Explanations for the interpretation of the Charter. The legal significance of the Explanations as authoritative interpretative tools is confirmed not only by the latter provisions of the Charter, but also by the Lisbon Treaty itself. Article 6(1) subparagraph 3 TEU provides that the Charter rules 'shall be interpreted in accordance with the general provisions in Title VII of the Charter' (which comprises Article 52(7)), and repeats that 'due regard' must be given 'to the explanations referred to in the Charter, that set out the sources of

¹⁰ Peers, *supra* n. 3 at p. 170.

¹¹ *Ibid.*, p. 171.

¹² OJ 2007 C 303/17.

¹³ Republished in OJ 2010 C 83/389.

those provisions.' Thus, the guiding force of the Explanations for the interpretation of the Charter is confirmed three times in EU primary law (the Preamble and Article 52(7) of the Charter, and Article 6(1) TEU being placed prominently among the basic principles and objectives of the EU). This does not render the Explanations legally binding but grants an authority to them that makes it difficult to deviate from the interpretational hints and approaches contained in the Explanations, at least for the practical application of the Charter rights.¹⁴ A deviation from the interpretations given in the Explanations might be possible for mandatory reasons only. It is hard, however, to imagine this, given the quite general character of the Explanations, which explain intentions and sources of the Charter provisions and refer to landmark decisions of the European Courts.

For this reason, the Explanations to the Charter are the authoritative source of interpretation also with regard to Article 52(3) and the related question as to which rights correspond to those of the Convention. In this regard, the Explanations of Article 52 clarify that the reference to the Convention comprises its protocols as well. Furthermore, they contain a list of provisions of the Charter which correspond to the Convention, *inter alia* Article 7, on the respect for private and family life (corresponding to Article 8 ECHR), Article 17 on the right to property (corresponding to Article 1 of the Convention protocol), Article 48 on the presumption of innocence and the rights of defence (corresponding to Article 6(2) and (3) ECHR) and Article 49 on legality and proportionality of (criminal) offences and penalties (corresponding to Article 7 ECHR). With regard to the right to a fair trial (Article 47(2), (3) of the Charter), the Explanations state a meaning that corresponds to Article 6(1) ECHR, but a scope of application that goes beyond the limitations inherent in that article (the latter only applying to the determination of civil rights and obligations or to criminal charges). Thus, these Convention provisions became legally binding on EU entities (and also on national authorities) as from 1 December 2009. Consequently, there is no leeway on the part of the EU institutions to depart from the Convention level of human rights protection.

Legal rank of incorporated Convention rights

One has to add here that the incorporation of these Convention rights is at the level of EU primary law, since the Charter shares the same legal value as the Treaties. This is all the more noteworthy since the accession of the EU to the Convention could not add more legal significance to these rights. On the contrary, from a formal standpoint, the effect of the accession of the EU to the Convention would

¹⁴I. Pernice, 'The Treaty of Lisbon and Fundamental Rights', in S. Griller and J. Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (Springer 2008), p. 235 at p. 242.

be formally to grant to the provisions of the Convention a rank in between primary and secondary EU law by virtue of Article 216(2) TFEU, according to which 'agreements concluded by the Union are binding upon' the EU institutions and the member states. Conversely, this has been interpreted by the ECJ as granting a legal status to the agreements which is below that of primary law, but has primacy over secondary EU law.¹⁵ Furthermore, given the character of the incorporated convention rights in EU law, they share the priority and direct effect as well as the direct applicability of EU law as the cornerstones of the legal effects of EU law within the domestic legal orders of the EU member states.

The Convention as a minimum standard: drawing consequences for other sources of EU fundamental rights and for the autonomy of EU law

The second sentence of Article 52(3) of the Charter makes clear that the incorporation of the Convention does not prevent EU law providing more extensive protection: the Convention standards reflected in Charter rights serve as a minimum guarantee in the EU,¹⁶ so that other EU standards of fundamental rights can be more far-reaching, but must never fall short of the level of the Convention. Article 53 of the Charter confirms this, without being restricted to the corresponding rights, as is Article 52(3) of the Charter.¹⁷ Article 53 of the Charter, with its broader scope and uneasy drafting technique,¹⁸ is a general provision of harmony between fundamental rights protection in the EU and the complete Convention.

As a consequence of the Convention being the EU minimum standard – even prior to accession of the EU to the Convention¹⁹ –, the Convention prevails in case of multiple protection of the same fundamental right in the general principles, the Convention and maybe also in the Treaties (as with equal pay of men and women, see Article 157 TFEU). In the case of conflict between the different levels of protection, the standards of Convention rights have priority.²⁰ In practical terms,

¹⁵ ECJ, Case C-61/94, *Commission v. Germany* [1996] ECR I-3989, para. 52.

¹⁶ See also ECtHR 30 June 2005, Appl. No. 45036/98, *Bosphorus*, para. 159.

¹⁷ See also the joint concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlickito ECtHR, *Bosphorus*, *ibid.*, para. 4.

¹⁸ There is much debate about Art. 53 FRC and its interpretation, cf. Alonso Garcia, *supra* n. 1 at p. 507 et seq. Since it is drafted in the image of the safeguard clause of Art. 53 ECHR, one may at least conclude that the ECHR is intended to be a minimum standard. See Callewaert, *supra* n. 7 at p. 117.

¹⁹ Conversely, the European Parliament, in its resolution of 19 May 2010, on the institutional aspects of the EU's accession to the ECHR, opined that this Convention would constitute the minimum standard of protection for human rights, only after accession to it (2009/2241(INI), in no. 17).

²⁰ See Alonso Garcia, *supra* n. 1 at p. 498, footnote 35; C. Grabenwarter, 'Die Grundrechte', in *Verfassungsvertrag der EU* (FS Ohlinger 2004) p. 469 at p. 476.

this means that the general principles on EU fundamental rights will never be interpreted in such a way as to contradict Convention standards. The exception is where the general principles or Charter rights provide a higher level of fundamental rights protection,²¹ or grant rights that do not exist in the Convention. Although the Preamble to Protocol No. 30 on the application of the Charter to Poland and the UK states that the Charter makes the rights recognized in the EU more visible and does not create new rights or principles, the Charter introduces new rights and principles into the EU's legal order by providing a greater spectrum of rights than the Convention.²² For example, Title IV of the Charter on solidarity, contains rather new social and economic rights,²³ admittedly sometimes with less binding force, due to Article 52(5) of the Charter.²⁴ If the Charter introduced no new rights, there would not have been any need for amendments to the Charter in 2004, such as Article 52(5), which excludes the direct enforceability of principles and which was a consequence of British concerns.²⁵ Thus, one has to confine the meaning of this preamble to stating that the Charter does not contain completely novel rights the scope of which would depart strongly from the pre-Lisbon human rights situation.

In the case of additional rights, or rights with a higher level of protection, the general principles, and hence the settled ECJ case-law on fundamental rights issues, can be maintained without further ado. Thus, the Charter leaves room for the further development of EU fundamental rights through the recognition of novel rights or the extension of the level of protection of existing standards. It might not be the Charter itself that functions as a basis for further development of the EU human rights situation, but the other sources, in particular the case-law of the ECJ on general principles.²⁶ One example of a recent courageous human rights development was the postulation of a right against age discrimination as a general principle by the ECJ,²⁷ which was later confirmed by reference to Article 21 of the Charter.²⁸ Another is the extensive charging of EU citizenship with

²¹ See also P. Craig and G. de Burca, *EU Law*, 4th edn. (Oxford UP 2008) p. 386.

²² Dougllass-Scott, *supra* n. 1 at p. 662.

²³ T. Blanke and B. Veneziani, in B. Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights* (Nomos 2006) p. 258 et seq., p. 295. Art. 28 on collective action, for example, is quite new and has subsequently been identified as a general principle of EU law; see recently ECJ, Case C-341/05, *Laurel* [2007] ECR I-11767, para. 91 et seq. Another example is Art. 36 on access to services of general economic interest, the interpretation of which is very contentious.

²⁴ Art. 52(5) ECHR is far from being precise and clear cut, see Dougan, *supra* n. 1 at p. 663-664.

²⁵ See Dutheil de la Rochère, *supra* n. 1 at p. 123.

²⁶ See D. Chalmers and G. Monti, *European Union Law. Updating Supplement* (Cambridge UP 2008) p. 69.

²⁷ ECJ Case C-144/04, *Mangold* [2005] ECR I-9981, para. 75.

²⁸ ECJ 19 Jan. 2010, Case C-555/07, *Kücükdeveci*, para. 21 et seq.

social rights.²⁹ Within the limits demanded by the Convention as a minimum standard, the legal autonomy of the EU fundamental rights area is maintained, and the independence of the ECJ case-law retained, in the same way as domestic constitutional fundamental rights' protection is not interfered with by the standards of the Convention.

The autonomy retained by the EU fundamental rights order as regards a higher level of protection might suggest a method of dealing with the drafting deficiencies of the Charter. If the scope and legal effects of ECJ case-law leads to a higher level of protection, then the case-law is decisive and not the Charter text, all the more so since Article 52(4) of the Charter aligns the Charter with the general principles.³⁰ For example, the EU member states are bound to respect EU fundamental rights, not only with regard to their implementation of EU law (as provided for in Article 51(1) of the Charter), but even beyond in all matters within the scope of EU law, including derogations from fundamental freedoms – as is demanded by ECJ case-law.³¹ The recent application of the principle of non-discrimination on grounds of age (Article 21 of the Charter) demonstrates that the ECJ applies the Charter rights to cases that fall under the scope of EU law and does not confine itself to the limited wording of Article 51(1) of the Charter.³² This is all the more so since the codification of rights in Article 21 of the Charter is treated as a mere confirmation of a previously recognized general principle of EU law.

CONCLUSION

Generally speaking, the different sources of EU fundamental rights are equal and should be interpreted in harmony. There is no hierarchy apart from the fact that the Convention plays a prominent role in that it is a minimum standard. Two consequences emerge from this: The standards of the Convention will have an impact on the identification and interpretation of general principles and on the interpretation of the Charter. General principles and the Charter rights, however, will prevail over Convention standards only if they grant a higher level of protection. The special significance of the Convention for the fundamental rights protection in the EU to which the case-law of the ECJ regularly refers³³ is nevertheless retained by the Lisbon Treaty, but at a higher level. No longer is it a (mere) inspi-

²⁹ ECJ, Case C-456/02, *Trojani* [2004] ECR I-7573, paras. 37–46.

³⁰ See the proposal by Dougan, *supra* n. 1 at p. 665, to treat the FRC as the authoritative source for fundamental rights and to overcome its deficiencies by *interpretive* perseverance.

³¹ ECJ, Case C-260/89, *ERT* [1991] ECR I-2925, paras. 42–43.

³² ECJ, *Küçükdeveci*, *supra* n. 28 at paras. 21–23.

³³ See, *inter alia*, ECJ, *ERT*, *supra* n. 31 at para. 41.

rational source (albeit a prominent one), but it forms the main substantial foundation of EU fundamental rights.

For this reason, it is not contradictory to mention the Convention in different contexts and to attribute different roles to it. Indeed, it can make sense. Whereas the reference to the Convention in Article 52(3) of the Charter incorporates part of the Convention as a minimum standard, Article 6(3) TEU's maintenance of general principles of EU law allows for the recognition of more far-reaching rights by the ECJ with a higher level of protection. In this process the Convention – together with domestic constitutional traditions – serves as an inspirational source. The accession of the EU to the Convention, envisaged in Article 6(2) TEU, will ensure that EU law not only includes the substantive contents of the Convention standards, but also that the Convention system of judicial protection as provided for by the ECtHR applies to the EU. Thus, the various references to the Convention attribute different roles to it in a number of respects and provide space for the continued – though limited – autonomy of EU human rights standards.

CONSEQUENCES FOR AND CHALLENGES TO THE APPLICATION OF EU FUNDAMENTAL RIGHTS

The partial incorporation of the Convention into the EU's legal order by virtue of Article 52(3) of the Charter produces several challenges to the identification and application of EU human rights and, as a consequence, to human rights standards relevant for the application of EU law. These challenges will be explored here in more detail.

Challenges to the substance and methodology of human rights protection in the EU

First, there are challenges with regard to the current situation in human rights standards provided for by the practice of the Commission and ECJ case-law. These challenges refer to both the substance and the methodology of human rights protection in the EU because the ECJ case-law (and the Commission's practice derived from it) is based on an approach to the Convention that is no longer tenable because of the partial incorporation of the Convention into EU primary law.

The ECJ's pre-Lisbon methodical autonomy

As is well known, the fundamental rights standard in the EU in pre-Lisbon times was created by the ECJ case-law developing fundamental rights as general principles, by referring to the constitutional traditions common to the member states and to international human rights treaties binding on the member states.³⁴ The

³⁴ ECJ, Case 4/73, *Nold* [1974] ECR 491, para. 13; Case 44/79, *Hauer* [1979] ECR 3727, para. 20.

Convention was held to be 'of particular significance in that regard'³⁵ on four grounds:

1. The Convention as a European legal instrument allows for accord between the European domestic legal systems with respect to human rights.
2. The standards of the Convention for national administrative and criminal proceedings are increasingly acknowledged and will be found within the domestic legal orders as a consequence of their implementation.
3. The EU is bound to consider the legal problems resulting from the binding force of the Convention for the member states in their implementation of EU law (see Article 351 TFEU on pre-existing agreements with third countries³⁶).
4. Finally, the Convention perceives itself, as expressed by the ECtHR,³⁷ as the nucleus of a common European constitutionalisation process in the area of human rights.

Despite its particular character, the Convention formerly served as a mere source of inspiration in the determination of general principles on EU human rights, since it was not legally binding for the EU,³⁸ neither formally (the EU was and still is not a Convention member) nor materially (since, prior to the Lisbon Treaty, the only sources of fundamental rights were the general principles of EU law). Accordingly, the EU Courts declined to assess the conformity of EU acts with the provisions of the Convention.³⁹ The ECJ uses an autonomous method in the determination of EU human rights.⁴⁰ The human rights enshrined in domestic law or the Convention serve as an inspirational, non-binding, source in the identification of EU general principles and thus do not represent in themselves a binding source of EU law. The ECJ did not feel bound, but reserved an adaptation to the structure, aims and peculiar circumstances of the respective area of EU law

³⁵ ECJ, Joined Cases 46/87 & 227/88, *Hoechst* [1989] ECR 2859, para. 13.

³⁶ For more detail on the impact of Art. 351 TFEU, see J. Klabbbers, *Treaty Conflict and the EU* (Cambridge UP 2009), p. 163 et seq.

³⁷ ECtHR 23 March 1995, Appl. No. 15318/89, *Loizidou*, para. 75: 'constitutional instrument of European public order.'

³⁸ CFI, Case T-54/99, *maxi mobil* [2002] ECR II-313, para. 48; Case T-99/04, *AC Treuhand* [2008] ECR II-1501, para. 45.

³⁹ CFI, Case T-99/04, *AC Treuhand* [2008] ECR 1501, para. 45. See already CFI, Case T-112/98, *Mannesmann Röhrenwerke* [2001] ECR II-729, paras. 59, 75.

⁴⁰ Recently exemplified in ECJ, *Mangold*, *supra* n. 27 at para. 74-5. For a detailed discussion, see T. Tridimas, *The General Principles of EU law*, 2nd edn. (Oxford UP 2007) p. 6, 23 ('creative and eclectic judicial process'); W. Weiß, *Verteidigungsrechte im EG-Kartellverfahren* (Heymann 1996) p. 31-61. Similarly A. Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar 2008) p. 10, and A.G. Mazák, opinion in Case C-411/05 *Palacios de la Villa*, para. 87 et seq.

in which a human rights issue arises because, 'the protection ... must be ensured within the framework of the structure and objectives of the Community.'⁴¹

Accordingly, the ECJ sometimes develops general principles by a generalisation of specific rules enshrined in EU law or starts with an analysis of secondary law instead of constitutional traditions.⁴² The personal scope of the legal professional privilege, for example, was developed by reference to fundamental freedoms (so that the privilege does not apply to third country lawyers not established in the EU).⁴³ Thus, general principles are often specifically tailored to the peculiarities or needs of the EU's legal order.

The pre-Lisbon 'particular significance' of the Convention

The particular significance of the Convention is reflected in the attitude of the ECJ, which, to a great extent, tries to respect the rights enshrined in the Convention. It appears that, in particular during the last decade, the ECJ has increasingly aligned its jurisprudence on fundamental rights towards the Convention. Reference to the Convention and the respective ECtHR case-law has increased. The first reference to the case-law of the ECtHR and an alleged lack of case-law took place in 1989 in the well-known *Hoechst*⁴⁴ and *Orkem* decisions⁴⁵ (on the right to respect for one's business premises under Article 8 ECHR and the right to remain silent under Article 6 ECHR in competition enforcement proceedings). After around ten years of silence, in temporal, and maybe also causal, coincidence with the adoption of the Charter, the EU Courts greatly increased their references to and discussions of the case-law of the ECtHR in their judgments, the *Conolly* case being the most pronounced one in this regard.⁴⁶ An in-depth examination of the judgments, however, reveals that the EU Courts still do not feel legally obliged to follow the Convention and the ECtHR case-law completely and in every respect. Though the ECJ stated that developments in the case-law of the

⁴¹ ECJ, Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 4. CFI, Case T-112/98, *Mannesmann Röhrenwerke* [2001] ECR II-729, para. 59; Case T-43/02, *Jungbunzlauer* [2006] ECR II-3435, para. 74, with further references to judgements of the ECJ.

⁴² See, e.g., ECJ, Case 117/76, *Ruckdeschel* [1977] ECR 1753, para. 7; Case C-36/92, *SEP* [1994] ECR I-1911, para. 36; Case 155/79, *AM&S* [1982] ECR 1575, para. 13.

⁴³ ECJ, Case 155/79, *AM&S* [1982] ECR 1575, para. 25-6; the ECtHR appears to be more generous, Andreangeli, *supra* n. 40 at p. 120.

⁴⁴ ECJ, Joined Cases 46/87 and 227/88, *Hoechst* [1989] ECR 2859, para. 18. In contrast, ECtHR confirmed the protection of business premises under Art. 8 ECHR in a decision adopted some months before, Appl. No. 10461/83, *Chappel v. UK*, judgment of 30 March 1989, paras. 51, 64.

⁴⁵ ECJ, Case 374/87, *Orkem* [1989] ECR 3283, para. 30.

⁴⁶ ECJ, Case C-274/99 P, *Conolly* [2001] ECR I-1611, paras. 39-49.

ECtHR must be taken into account by the EC judicature,⁴⁷ this does not necessarily lead to a change in its previous case-law.⁴⁸

One example is the right to remain silent in antitrust enforcement.⁴⁹ In *Orkem*, the ECJ decided that undertakings cannot be forced to admit their commission of an infringement, but they are in any event obliged to answer factual questions and to disclose self-incriminating documents.⁵⁰ After the ECJ in 2004 repealed its statement in the *Orkem* decision that neither the wording of Article 6 ECHR nor the case-law of the ECtHR recognized any right not to give evidence against oneself, the ECJ stated that the EC judicature must take into account further developments in the case-law of the ECtHR when interpreting fundamental rights.⁵¹ Some commentators then, prematurely, identified a change in jurisprudence.⁵² The Court, however, had still rejected the complaint of a violation of a right to remain silent in this case, for the reason that the self-incriminating documents were handed over to the Commission in conformity with a non-compelling request for information instead of a compelling formal decision.⁵³ In a later decision, the ECJ confirmed that the duty of an undertaking to cooperate with the Commission also meant that the undertaking may not evade requests for documents on the ground that it was being required to give evidence against itself.⁵⁴ The ECJ explicitly did not assess the case-law of the ECtHR as demanding an alteration of the *Orkem* principles,⁵⁵ although there is a divergence between ECJ and ECtHR case-law. Article 6 ECHR's right to remain silent encompasses a right not to be forced to contribute to one's own incrimination. The Convention does not differentiate with regard to the type of information requested, whether purely factual or other. Article 6 ECHR protects both from compulsion to answer factual questions as well as leading questions.⁵⁶ Also Court of First Instance

⁴⁷ ECJ, Case C-238/99 P et al., *LMV* [2002] I-8375, para. 274; CFI, Case T-236/01, *Tokai Carbon* [2004] ECR II-1181, para. 405.

⁴⁸ See CFI, Case T-236/01, *Tokai Carbon* [2004] ECR, II-1181, para. 405, with regard to the right to remain silent.

⁴⁹ This is one area where inconsistencies between the ECJ and the ECtHR are observed: F van den Berghe, 'The EU and Issues of Human Rights Protection', *European Law Journal* (2010) p. 112 at 120 et seq.

⁵⁰ ECJ, Case 374/87, *Orkem* [1989] ECR 3283, paras. 29, 34 et seq.

⁵¹ See ECJ, Case 238/99 P et al., *LMV* [2004] ECR I-8375, para. 271, 274.

⁵² E.g., M. Araujo, 'The Respect for Fundamental Rights within the European Network of Competition Authorities', in B.E. Hawk (ed.) *Antitrust Law and Policy* (Fordham Corp. L. Inst. 2005), p. 511 at 520 et seq.; Van den Berghe, *supra* n. 49 at p. 121 (with regard to protection of business premises).

⁵³ See ECJ, Case 238/99 P et al., *LMV* [2004] ECR I-8375, para. 279.

⁵⁴ ECJ, Case C-301/04 P, *SGL Carbon* [2006] ECR I-5915, para. 48.

⁵⁵ *Ibid.*, para. 43.

⁵⁶ ECtHR, Appl. No. 10828/84, *Funke*, para. 44; Appl. No. 19187/91, *Saunders*, paras. 69, 71, 76; Appl. No. 31827/97, *J.B. v. Switzerland*, paras. 64-71; recently, Appl. Nos. 15809/02 and 25624/02, *O'Halloran and Francis*, paras. 45 et seq.

(CFI – now General Court): case-law shows that the ECJ's exhortation to consider ECtHR case-law was not meant to reverse the *Orkem* doctrine. The CFI still applies the *Orkem* doctrine and does not understand the ECJ's *LMV* judgment as a reversal of previous case-law either.⁵⁷ The CFI even assumes that the *Orkem* standard is equivalent to the standard under Article 6 ECHR,⁵⁸ which definitely is not the case insofar as ECJ case-law differentiates fact from opinion.⁵⁹ Thus, the EU case-law falls short of Convention standards,⁶⁰ which, however, have now become binding by virtue of Article 52(3) of the Charter. That the binding nature of Convention standards comprises the relevant ECtHR jurisprudence will be explained *infra*, *Consequence: authoritativeness of Strasbourg's interpretations and limitation provisions*, p. 82).

Further evidence of the rather loose perception of ECtHR judgments by the ECJ emerged with regard to the protection of business premises. Although the ECJ in *Roquette Frères*⁶¹ took note of the change of jurisprudence in the ECtHR regarding protection of business premises,⁶² and said that 'regard must be had to the case-law' of the ECtHR in the light of the judgment in *Hoechst*, the ECJ⁶³ still did not indicate whether the *Hoechst* ruling should be altered.⁶⁴ The ECJ merely ruled that the protection in Article 8 ECHR may in certain circumstances be extended to cover business premises, and that the state may intervene in a more far-reaching way. In the subsequent *Varec* decision the ECJ stated, in a carefully worded way, that the notion of private life could not be taken to mean that the

⁵⁷ CFI, Case T-236/01, *Tokai Carbon* [2004] ECR II-1181, para. 405.

⁵⁸ See CFI, Case T-112/98, *Mannesmann Röhrenwerke* [2001] ECR II-729, para. 77; *Tokai Carbon*, *supra* n. 57 at para. 406.

⁵⁹ See Andreangeli, *supra* n. 40 at p. 147, 149.

⁶⁰ S. Brammer, *Cooperation between National Competition Agencies in the Enforcement of the EC Competition Law* (Hart 2009), p. 250 et seq., p. 510, footnote 92.

⁶¹ ECJ, Case C-94/00, *Roquette Frères* [2002] ECR I-9011, para. 29.

⁶² The ECtHR held that Art. 8 ECHR also applies to business premises (Appl. No. 13710/88, *Niemitz*, para. 29).

⁶³ See ECJ, Case C-238/99 P, *LVM* [2002] ECR I-8375, para. 251. In this case the ECJ did not rule on the merits of the CFI's statement (in Case T-305/94, *LVM* [1999] ECR II-931, para. 420) that the 'development of the case-law of the ECtHR relating to Art. 8 of the ECHR has no direct impact on the merits of the solutions adopted in *Hoechst*.'

⁶⁴ For a concurring view, see H. Scheer, 'The Interaction between ECHR and EC Law', *Zeitschrift für Europarechtliche Studien* (2004) p. 663 at 677, footnote 64; C. Nowak, 'Grundrechte im europäischen Konstitutionalisierungsprozess', in T. Bruha and C. Nowak (eds.), *Die Europäische Union: Innere Verfasstheit und globale Handlungsfähigkeit* (Nomos 2006) p. 107 at p. 134. Other scholars contend that the ECJ conformed to Strasbourg case-law, see, e.g., Callwaert, *supra* n. 7 at p. 113; F. Jacobs, 'The ECHR, the EU Charter of Fundamental Rights and the ECJ', in I. Pernice et al. (eds.) *The Future of the European Judicial System in a Comparative Perspective* (Nomos 2006) p. 291 at p. 292.

professional or commercial activities of either natural or legal persons are excluded from the protection of Article 8 ECHR.⁶⁵

These decisions prove that the ECJ technically feels bound neither by the Convention nor by the relevant case-law of the ECtHR. Though one can observe a well developed human rights dialogue in Europe which results in a 'growing European human rights *acquis*'⁶⁶ and in 'progressively more common standards of protection'⁶⁷ and which has achieved a 'fair amount of harmonisation between the Convention and EU law',⁶⁸ some standards still are unharmonised:⁶⁹ the conformity of EU human rights standards to that of the Convention thus largely depends on the willingness of the ECJ to follow the ECtHR. Accordingly, the relationship between the EU and the Convention has been described as 'symbiotic, incremental and even messy and unpredictable'.⁷⁰ The fact that the ECJ can sometimes be perceived as scrupulously following the line of reasoning of the ECtHR (as exemplified by the above-mentioned *Conolly* judgment) or recognizing a decision of the ECtHR,⁷¹ adds to the unpredictability and confusion concerning the application of Convention requirements to EU law by the ECJ.

Methodical change demanded by Lisbon

This generally rather loose, to some extent even contradictory, approach of the ECJ towards the Convention, which gave rise to concerns about discrepancies between EU and Convention human rights standards, is no longer acceptable, because of the formal legal force of core rules of the Convention by virtue of Article 52(3) of the Charter. The incorporation of core rules of the Convention raises the intricate question whether the ECJ is now also technically bound by the decisions of the ECtHR interpreting the incorporated Convention rules, to the effect that the ECJ is legally obliged to interpret the corresponding Charter provisions in the same way. If so, ECtHR case-law would have become binding on the ECJ and would deprive the ECJ of any flexibility about adopting a divergent interpretation of an incorporated Convention right.

The incorporation of Convention provisions as mandatory law unavoidably has a bearing on the treatment of the relevant case-law of the ECtHR. A clear indication in this regard is the mention made of the case-law of the ECtHR in the

⁶⁵ ECJ, Case C 450/06, *Varec* [2008] ECRI-581, para. 48.

⁶⁶ Douglass-Scott, *supra* n. 1.

⁶⁷ Andreangeli, *supra* n. 40 at p. 8.

⁶⁸ J. Callewaert, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony', *EHRLR* (2009) p. 768 at p. 769.

⁶⁹ See *ibid.*, p. 774 et seq., where Callewaert mentions in particular the right to remain silent in antitrust enforcement.

⁷⁰ Douglass-Scott, *supra* n. 1 at p. 665.

⁷¹ Cf. ECJ, Case C-145/04, *Spain v. UK* [2006] ECRI-7917, para. 95.

fifth recital of the Preamble to the Charter and the usage by and references to the case-law of the ECtHR in the Explanations relating to the Charter. The Explanations of Article 52(3) state that the meaning and scope of the Convention rights are determined by the normative text of the relevant Convention provisions (including protocols) and by the respective ECtHR case-law. Admittedly, this sentence also mentions the case-law of the ECJ, which might cause confusion about the decisive significance of the Strasbourg case-law. As already explained above (*supra*, Incorporation by virtue of Article 52(3) FRC, p. 69), the reference to ECJ case-law and to the autonomy of EU law makes a purely jurisdictional point.

Incorporated Convention rights are interpreted for the EU first of all by the ECJ which, however, has to follow the interpretation of a fundamental right adopted by the Strasbourg court if contentious issues have already been clarified by the latter.⁷² This is so because the incorporation of Convention provisions has simultaneously incorporated the relevant ECtHR case-law, as its decisions interpret the norms of the Convention in an authoritative way.⁷³ The Convention provisions have been embraced by the EU legal order with the same meaning as they enjoy in Strasbourg. Otherwise, the aim of ensuring consistency between the Charter and the Convention would not have been attained, and the incorporation of core norms of the Convention would be incomplete, even counteracted, at least in practical terms. One cannot reconcile incorporation and full application of Convention rights with the ECJ retaining discretion over the scope and interpretation of these rights.⁷⁴ A merely static incorporation of (part of) the Convention would contradict the very nature of the Convention as a 'living instrument'⁷⁵ which evolves as the case-law of the ECtHR progresses. Thus, the teleology of Article 52(3) speaks in favour of a binding interpretational force of the ECtHR jurisprudence. Consequently, the incorporation of the Convention implies a considerable change to the ECJ's attitude towards the judgments of the ECtHR. The ECJ's perception of the Convention and the treatment of the case-law of the ECtHR has to change.

⁷² See also Alonso Garcia, *supra* n. 1 at p. 499, footnote 36.

⁷³ The interpretation given in a case is binding upon the parties to the dispute (Art. 46(1) ECHR), but enfolds a quasi *ergo-omnes*, *de-facto* binding effect beyond the individual case, because the observations made by the ECtHR are generally applicable to comparable situations in all state parties (N. Lavranos, *Legal Interaction between Decisions of International Organisations and EU Law* (Europa Law 2004) p. 168); and the ECtHR may authoritatively interpret its judgments, Art. 46(3) ECHR.

⁷⁴ A.W. Heringa and L. Verhey, 'The EU Charter: Text and Structure', *Maastricht Journal of European and Comparative Law* (2001) p. 11 at p. 17; C. Lenaerts and E. de Smijter, 'The Charter and the Role of the European Courts', *Maastricht Journal of European and Comparative Law* (2001) p. 90 at p. 99; Peers, *supra* n. 3 at p. 171.

⁷⁵ See ECtHR 25 April 1978, Appl. No. 5856/72, *Tyrer*, para. 31.

Consequence: authoritativeness of Strasbourg's interpretations and limitation provisions

The authoritativeness of the ECtHR's interpretation is relevant with regard to defining the personal scope, i.e., the applicability, of fundamental rights to legal entities, in contrast to natural persons. This is not explicitly dealt with in the Charter (apart from specific references, as in Article 42 of the Charter). The Charter rights apply to every person (*see, e.g.,* the right to good administration, Article 41 of the Charter) or everyone (Articles 47 and 48 on fair trial, presumption of innocence and rights of defence) which might include legal persons. With regard to the Convention, the situation is much clearer since the right to individual applications (Article 34 ECHR) applies to any person, non-governmental organisation (NGO) or group of individuals so that the rights can be enforced not only by natural but also by juridical persons. According to ECtHR case-law regarding several Convention rights, they apply also to business companies or business premises — for example as regards the protection of private life and home (*see* Article 8 ECHR — but with looser standards for the scrutiny of state measures than in the case of an application of Article 8 ECHR to private homes).⁷⁶ Even the intrinsic nature of a right cannot prevent it from being claimed by a juridical person, as was decided with regard to Article 10 ECHR, the freedom of expression which applies also to commercial activities.⁷⁷ The rights enshrined in Article 6 ECHR apply also to corporations.⁷⁸

Another corollary of the integration of the corresponding provisions of the Convention into the EU's legal order is the significance of the Convention's limitation provisions for these rights. Though the Charter contains its own rules on the application and limitation of its rights and principles in Articles 51 and 52, the incorporation of the corresponding rights of the Convention also integrated the relevant rules on interpretation and, in particular, the relevant limitations as provided for in the Convention. This is a consequence of Article 52(3) referring to the meaning and scope of the Convention rights, which necessarily implies the relevant limitations to these rights as well. Otherwise the meaning and scope of the rights would not be the same and the aim of consistency between EU law and ECHR standards would not be attained. This understanding of Article 52(3) of the Charter corresponds to the intentions of the drafters, as Article 52(3) was

⁷⁶ *See* Andreangeli, *supra* n. 40 at p. 15 et seq.

⁷⁷ ECtHR, Appl. No. 12726/87, *Autronic*, para. 47.

⁷⁸ Report of the European Commission on Human Rights of 30 May 1991, Appl. No. 11598/85, *Sternit*, para. 66; implicitly ECtHR, Appl. No. 53892/00, *Lilly France*, para. 23 et seq. *See also* Brammer, *supra* n. 60 at p. 253 et seq., 301. *Contra*, with regard to the right to remain silent, *see* W. Wils, 'Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement', *World Competition* (2006) p. 3 at p. 19, footnote 66.

introduced intentionally, in order to avoid the risk of reducing the level of human rights protection under the ECHR by applying the general limitation provision of Article 52(1) of the Charter.⁷⁹ The Explanations of Article 52(3) state that the reference to meaning and scope includes 'authorised limitations'. This is significant, as several of the incorporated rights have very specific limitation provisions (e.g., Article 8(2) ECHR), whereas others do not contain limitations at all (see Article 6 ECHR), although this does not necessarily imply that no limitations to those rights are possible. The relevance of the Convention limitation provisions to the corresponding Charter rights is noteworthy because the Convention limitations depart from Article 52(1) of the Charter, the general rule which provides for limitations in a rather broadly worded way: It suffices that the limitation is provided for by law and respects the essence of the right and the principle of proportionality. Since the limitation shall meet objectives of general interest only, the grounds for limitations are limitless.⁸⁰ Article 52(1) reflects the ECJ case-law, which recognizes any public interest as a viable public policy objective capable of limiting the enjoyment of EU fundamental rights.⁸¹ The situation under the Convention is different. Some Articles are subject to carefully drafted limitation provisions, like Article 8(2) ECHR, exhaustively listing the policy objectives suitable for justifying interference with the protection of privacy. Other Convention rights, like Article 6 ECHR, do not contain limitations. The ECtHR, however, clarified that the right to access to a court contained in Article 6(1) ECHR is not absolute (in contrast to other Convention rights like Article 3) but subject to limitations due to the need for regulation of this right. In regulating access to courts, states enjoy a latitude that is not, however, so broad as to impair the essence of the right. Furthermore, any limitation must serve a legitimate aim and respect proportionality.⁸² Complying with international obligations like the sovereign immunity of states is a legitimate aim.⁸³ Thus, although the starting point of the ECtHR for limitations to Article 6(1) is different (as it refers to the need for legislation on the ways to gain access to courts), the practical result appears to be more or less in

⁷⁹ Alonso Garcia, *supra* n. 1 at p. 497 et seq; P. Lemmens, 'The Relation between the Charter of Fundamental Rights of the EU and the European Convention on Human Rights – Substantive Aspects', *MJ* (2001) p. 49 at p. 54 et seq. See also Peers, *supra* n. 3 at p. 164; W. Sadurski, 'The Charter and Enlargement', *ELJ* (2002) p. 340 at p. 354.

⁸⁰ Peers, *supra* n. 3 at p. 166.

⁸¹ Peers (ibid. p. 153 et seq., p. 166) observes a difference between ECJ case-law and Art. 52(1) FRC, in that the necessity requirement and the 'prescribed by law' requirement were new. The necessity requirement, however, is part of the proportionality assessment usually made by the ECJ, and the 'prescribed by law' requirement has sometimes also been addressed by the ECJ (cf. ECJ, Case 46/87, *Hoechst* [1989] ECR 2859, para. 19). It is possible that, in the future, Art. 290 TFEU might have an impact: it explicitly reserves the essential elements of an area for legislative acts.

⁸² See ECtHR 21 Nov. 2001, Appl. No. 35763/97, *Al Adsani v. UK*, para. 53.

⁸³ Ibid., para. 54.

conformity with Article 52(1) of the Charter. But this might not always be the case. It is, for example, contested whether an interference with the exercise of a right under the Convention not containing explicit limitations could be justified by referring to the protection of conflicting Convention rights of others.⁸⁴ In contrast, under Article 52(1) of the Charter, any objective of general interest suffices as a limitation.

Another consequence is that the ECJ can no longer apply its (quite broad) rules on limitations of EU rights when subsuming Convention rights, as has happened several times.⁸⁵ Instead, the ECJ has to follow diligently the relevant rules on limitations in the Convention. Due to the differences between the Convention and the Charter, the leeway for justifying interference with a Convention right is more restrained than in the case of Charter rights. Consequently, one can expect that the application of the Convention's rules on limitations will result in an increase in the level of effective human rights protection in the EU.⁸⁶

Challenges to the role and importance of human rights in the interpretation and application of EU law

Secondly, there are challenges to the role and importance of human rights in the interpretation and application of EU law. This will be exemplified by the EU antitrust procedure Regulation 1/2003, which demonstrates more respect for human rights than the previous Regulation 17/62. Its 37th recital, which gives an interpretational guideline, 'respects the ... rights of the [Charter]' and provides that 'this Regulation should be interpreted and applied with respect to' the Charter, and—more importantly—its Article 27(2) contains a recognition of 'full respect' for the rights of the defence.

Interpreting the concept of rights of the defence

As the regulation does not define the rights of the defence, the Charter and the Convention become relevant and guide its interpretation and application. Article 48(2) of the Charter, providing for respect for the rights of defence of anyone who has been charged, materially incorporates the rights enshrined in Article 6(2) and

⁸⁴ See C. Grabenwarter and T. Marauhn, in Grothe and Marauhn (eds.), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (2006), ch. 7, mn. 17.

⁸⁵ Cf. Peers, *supra* n. 3 at p. 147 et seq., p. 178 et seq. Examples: CFI, Joined Cases T-222/99, T-327/99, and T-329/99, *Martinez and de Gaille* [2001] ECR II-2823, paras. 230 et seq. (upheld by the ECJ, Case C-488/01, *Martinez* [2003] ECR I-3355, para. 78 et seq.), where the CFI mentions Art. 11 ECHR and does not refer to Art. 11(2) but applies the general EU limitations. ECJ, Case C-112/00, *Schmidberger* [2003] ECR I-5659, paras. 77-80 refer to Arts. 10 and 11 ECHR and their limitation provisions but applies only the general limitation standards of EC law.

⁸⁶ Peers, *supra* n. 3 at p. 141.

(3) ECHR (see the Explanations of Article 48); Article 47(2) of the Charter on the rights to a fair trial correspond to Article 6(1) and incorporate the right of anyone charged to remain silent. The decisive question for the applicability of Article 6(2) and (3) ECHR is then whether an antitrust enforcement procedure relates to a criminal charge. This depends on the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the so-called Engel criteria. Article 23(5) Regulation 1/2003 (fines 'shall not be of a criminal law nature') is not decisive, since the term 'criminal' in Article 6 ECHR is interpreted autonomously. EU antitrust procedures are quasi-criminal procedures by nature, due to the increased emphasis on deterrence,⁸⁷ the use of core criminal law concepts, and the considerable amount of fines,⁸⁸ thus falling under the scope of Article 6 ECHR embracing 'non-hard' criminal law.⁸⁹ The ECJ acknowledged the fact that the presumption of innocence, as guaranteed, *inter alia*, in Article 6(2) ECHR applies to EU antitrust enforcement, since a company investigated is comparable to a person charged with a criminal offence.⁹⁰ Thus, the rights enshrined in Article 6 ECHR apply to EU antitrust procedures and are incorporated into the EU if corresponding Charter rights exist, as is the case with the presumption of innocence (Article 48(1) of the Charter) and other detailed rights of defence, like the right to have adequate time and facilities for the preparation of defence, the right to examine, or have examined, witnesses and to obtain the attendance and examination of witnesses, and the legal professional privilege.⁹¹

The Charter contains further rights relevant for antitrust enforcement and which could – at least partly – be designated as rights of defence in the context of

⁸⁷ See the Commission's Guidelines on the method of setting fines, *OJ* 2006 C 210/2, paras. 4, 30, 37.

⁸⁸ See D. Slater et al., 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform', Global Competition Law Centre Working Paper 04/08, p. 12-15, and the riposte by W. Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the ECHR', *World Competition* (2010) p. 5.

⁸⁹ ECtHR, Appl. No. 73053/01, *Jussila*, para. 43. This judgment raised some debate about what exactly Art. 6 ECHR demands in the case of 'non-hard' criminal law, as the ECtHR opined that 'the criminal-law guarantees will not necessarily apply with their full stringency.' See, on the one hand, Wils, *supra* n. 88 at p. 20 et seq., and, on the other, A. Riley, 'The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?', *ECLR* (2010) p. 191 at p. 199.

⁹⁰ ECJ, Case C-235/92 P, *Montecatini* [1999] ECR I-4539, para. 176, where the Court makes reference to the criteria of the leading *Öztürk* case on the applicability of Art. 6 ECHR on quasi-criminal procedures by the ECtHR. See also European Human Rights Commission, *YECHR* (1990) p. 46 at p. 52; Wils, *supra* n. 88 at p. 18.

⁹¹ For its implication in Art. 6(3) ECHR, see ECtHR, Appl. Nos. 12629/87 and 13965/88, *Sv. Switzerland*, para. 48; E. Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings', in B. Hawk (ed.), *International Antitrust Law and Policy* (Fordham Int. L. Inst. 2005) p. 587 at p. 613 et seq.

Article 27(2) Regulation 1/2003, like the right to remain silent, which is discussed by the CFI in the context of rights of defence,⁹² the right to respect for home and communications (Article 7 of the Charter, corresponding to Article 8 ECHR) and the right to good administration (Article 41 of the Charter), in particular a right to fair treatment, a right to be heard and a right to have access to files (see Article 41(2) of the Charter).

Higher value of fundamental rights against exigencies of effective enforcement

Generally speaking, as a consequence of the existence of a fundamental rights 'catalogue' and the partial incorporation of the Convention, there is no longer room for manoeuvre for the European Commission or the EU Courts to balance fundamental rights against the need for the effective enforcement of EU competition law.⁹³ The latter without any doubt is a public good, but it can be pursued by the Commission in the exercise of its investigative powers only insofar as the limits and inherent constraints of fundamental rights/rights of defence allow room for considering efficiency or expediency of enforcement. It is no longer tenable to see the rights of defence of the undertakings concerned only as restraints of and 'unjustified hindrance'⁹⁴ to the Commission's duty to enforce competition law. It is the other way round: it is not the extent and scope of rights of defence which need to be justified, but the scope and intensity of the Commission's investigative powers and the way the Commission makes use of them. Unfortunately, the EU Courts perceive the rights of defence as the exception in need of justification. A very telling statement was made by the CFI (in a pre-regulation 1/2003 case) which

recalled that the protection of the legal professional privilege is an exception to the Commission's powers of investigation. Therefore, the protection ... affects the conditions under which the Commission may act in a field as vital ... as ... competition ... For those reasons, the [EU Courts] have been at pains to develop a Community concept of legal professional privilege.⁹⁵

Such a statement is not in line with the full respect for the rights of defence demanded by Article 27(2) Regulation 1/2003 and the incorporation of the relevant rights as set out by the Convention.

⁹² See CFI, Case T-112/98, *Mannesmann Röhrenwerke* [2001] ECR II-729, paras. 66 et seq.

⁹³ An example of this is CFI, Case T-112/98, *Mannesmann Röhrenwerke* [2001] ECR II-729, paras. 66 et seq.

⁹⁴ Ibid.

⁹⁵ CFI, Joined Cases T-125/03 and T-253/03, *Akzo Nobel* [2007] ECR II-3523, para. 176.

Interpreting the Commission's powers in conformity with Convention standards

The incorporation of Convention standards into EU law offers further challenges to the Commission's use of its investigative and decision-making powers. The Convention's requirements have to be respected when applying EU law, all the more so since investigative and decision-making powers were extended.⁹⁶ More sophisticated powers imply a higher interference with fundamental rights. Hence, the Commission, in applying its extended powers, has to respect human rights more carefully than before. The procedural exigencies of 'due process' increase when the weapons of the investigator become sharper. Secondary law, like Regulation 1/2003, however, often only partly reflects the exigencies of applicable Convention standards, as can be shown by an analysis of Article 20, Regulation 1/2003 on the right to protect one's home. An EU right to privacy and to the inviolability of private homes of natural persons⁹⁷ is clearly reflected in Article 21, Regulation 1/2003, which allows for an inspection only in case of reasonable suspicion that relevant records are being kept in any premises. Prior authorisation from the national judicial authority is required. In that respect, the standards conform to Article 8 ECHR and the Charter. Still subject to debate, however, is the protection of business premises. With the entry into force of the Lisbon Treaty, the Charter's protection of private and family life, home and communications, in Article 7, became part of the fundamental rights to be respected when inspecting business premises under Article 20, Regulation 1/2003. By virtue of Article 52(3), Article 7 of the Charter incorporates Article 8 ECHR and the respective case-law, as explained above. With regard to Article 8 ECHR, the ECtHR decided that, in certain circumstances, Article 8 ECHR includes the right to respect for business premises.⁹⁸ Consequently, the authorities have to conform with the limitations contained in Article 8(2) ECHR. The respective standards, as interpreted by the ECtHR, in particular as regards its requirements for proportionality, will play an important role in the interpretation of Article 20 Regulation 1/2003 in the case of enforced inspections. If a targeted undertaking opposes an inspection, the national authorities shall afford the necessary enforcement assistance: Article 20(6) Regulation 1/2003. A judicial authorisation is not generally prescribed by the Regulation, or by general principles of EU law, but is necessary for the enforcement if such authorisation is required by national rules (Article 20(7) Regulation 1/2003). In several EU member states, domestic law does not require judicial authorisation, so inspections could be enforced by the officials of national competition authorities or by police officers. This could conflict with the requirement of proportionality because, according to the ECtHR, the exceptions to Article 8 ECHR have to be interpreted narrowly and they must be convinc-

⁹⁶ Commission Staff Working Paper accompanying the Report on the Functioning of Regulation 1/2003, SEC (2009) p. 574 final, p. 21 et seq.

⁹⁷ See ECJ, Joined Cases 46/87 & 227/88, *Hoechst* [1989] ECR 2859, para. 17.

⁹⁸ ECtHR, Appl. No. 37971/97, *Stés Colas Est SA*, para. 41.

ingly established.⁹⁹ This requires that the national rules afford adequate and effective safeguards against the abuse of public powers to interfere with the undertaking's right to respect for its premises.¹⁰⁰ In assessing this, the ECtHR considers whether the authorities have very wide powers giving them exclusive competence to determine the expediency, length and scale of inspections, and whether a prior warrant was issued by a judge, or the inspections were undertaken in the presence of a senior police officer. These limits apply also to antitrust enforcement, although the ECtHR acknowledges that the entitlement of public authorities is more far-reaching in the case of business premises.¹⁰¹ Thus, the Convention requires material as well as institutional safeguards against the abuse of powers of inspection. Given the extensive investigative powers in Article 20 Regulation 1/2003 and the severe consequences of enforcement proceedings under Regulation 1/2003, one must conclude that the Convention also calls for considerable safeguards against abuses in EU competition enforcement. Thus, dawn raids by the Commission under Article 20 Regulation 1/2003 are not beyond doubt as regards Article 8 ECHR.¹⁰² The Commission has to take care, that enforcement of inspections under Article 20 Regulation 1/2003 are in conformity with these standards, even though the relevant national rules may allow for easy enforcement. The wording of Article 20(6), (7) Regulation 1/2003 does not reflect these requirements either: Article 20(6) Regulation 1/2003 provides for 'assistance of the police or of an equivalent enforcement authority' only 'where appropriate.' This means that this assistance is neither compulsory, nor is it necessary for a senior police officer to be present. Article 20(7) Regulation 1/2003 refers only to national rules, not to Article 8 ECHR.

CONSEQUENCES FOR THE ROLE OF THE CONVENTION WITHIN THE NATIONAL LEGAL ORDERS

Harmonisation of legal value in the member states

As another consequence, the incorporation of many articles of the Convention into EU law alters the role and significance of the Convention within the domestic legal orders of the EU member states. The partial incorporation of the Convention leads to a primary law status of these rights, as they are part of the Charter by virtue of Article 52(3) of the Charter. Being part of EU primary law, the in-

⁹⁹ Ibid., para. 47.

¹⁰⁰ Ibid., para. 48.

¹⁰¹ Ibid., para. 49.

¹⁰² See also I. Aslam and M. Ramsden, 'EC Dawn Raids: A Human Rights Violation?', *Comp. Law Review* (2008) p. 61 at p. 76 et seq.; M. Lienemeyer and D. Waelbroeck, 'Case Comment', *CML Rev* (2003) p. 1481 at p. 1496.

corporated Convention rights enjoy priority over the domestic law of the EU member states and are directly effective due to their sufficient precision and unconditionality. This has an impact on the domestic role of the Convention as well.

Before the entry into force of the Lisbon Treaty, the constitutional orders of the member states defined the domestic legal status of the Convention. Whereas few member states ascribe constitutional rank to the Convention, most of them formally see the Convention only as a binding international instrument with limited legal value within the domestic legal order. In Germany, for example, according to the prevailing opinion, the Convention rights enjoy the status of a federal statute only, below constitutional level.¹⁰³ Nevertheless, fundamental rights in Germany have to be interpreted in harmony with those of the Convention. The Federal Constitutional Court does not, however, oblige courts to implement ECtHR decisions strictly in cases which Germany has lost, but has restrained the legal value of the Convention's stipulations more or less to a point of consideration in legal argument. The Convention and the relevant Strasbourg case-law have to be considered, but there is no need to follow the interpretation given by a judgment of the Strasbourg court finding a violation of the Convention by Germany. Courts are free to deviate if the grounds for doing so are compelling.¹⁰⁴ In contrast, in Austria, the Convention is directly applicable constitutional law, filling the human rights gap in the Austrian Constitution, which gives the ECtHR decisions an immense impact on the Austrian legal order.¹⁰⁵ In the Netherlands, the Convention, being an international treaty, has a supreme position, also in relation to the Constitution.¹⁰⁶ Hence, the Netherlands *Hoge Raad* accords primacy to ECtHR decisions, over all conflicting Dutch law.¹⁰⁷

¹⁰³ For more detail, see C. Tomuschat, 'The Effects of the Judgments of the European Court of Human Rights according to the German Constitutional Court', *German Law Journal* (2010) p. 513 at p. 518.

¹⁰⁴ Decision of the Federal Constitutional Court, Vol. 111, p. 287 at p. 324: The official English translation (available at <www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html>, last visited 7 June 2010) reads in the relevant part (para. 50): 'If, in ... proceedings in which ... Germany is involved, the ECtHR establishes that there has been a violation of the Convention ... and if this is a continuing violation, the decision of the ECtHR must be taken into account in the domestic sphere, that is the responsible authorities or courts must discernibly consider the decision and, if necessary, justify understandably why they nevertheless do not follow the international law interpretation of the law.' For a riposte, see Tomuschat, *supra* n. 103 at p. 522-525.

¹⁰⁵ D. Thurnherr, 'The Reception Process in Austria and Switzerland', in H. Keller and A. Stone Sweet (eds.) *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford UP 2008), p. 311 at p. 312, 325, p. 344-351.

¹⁰⁶ E. de Wet, 'The Reception Process in the Netherlands and Belgium', in H. Keller and A. Stone Sweet (eds.), *A Europe of Rights*, *supra* n. 105 at p. 229, 235 and 253.

¹⁰⁷ Lavranos, *supra* n. 73 at p. 180-181.

Due to the new status of some Convention rights as part of EU primary law, relevant decisions of the ECtHR become binding in a material sense insofar as they interpret these incorporated provisions of the Convention. As shown above (*supra*, Methodological change demanded by Lisbon, p. 80), the incorporation of the corresponding Convention provisions by virtue of Article 52(3) of the Charter encompasses the relevant ECtHR case-law. In the same way as domestic courts have to follow Luxembourg case-law, they now have to implement Strasbourg decisions. This legal effect of Strasbourg decisions will be generalised to all Convention rights once the EU accedes to the Convention. For the time being, prior to the accession, the binding force of Strasbourg case-law is limited to those Convention rights corresponding to Charter rights. To that extent, the adoption of Convention rights by EU law has the capacity strongly to harmonise the variety of impacts of the Convention on the domestic legal orders of the EU member states. The incorporation will supersede the different mechanisms chosen by those states to implement the Convention into domestic law and – by virtue of their priority and direct effect – will enhance the effectiveness of the Convention all the more since national reservations will not apply. The reluctance shown by the German Federal Constitutional Court in following precisely the judgments of the ECtHR is no longer tenable in relation to incorporated Convention rights.

The new dimension of the legal effect within the domestic legal order of the corresponding Convention rights applies only within the scope of the Charter, i.e., only if the EU member states implement EU law or act within the scope of EU law. EU member states are bound by the EU human rights standards if acting in cases to which EU law applies. The limited wording of Article 51(1) of the Charter is not an obstacle to this conclusion, because the Explanations on Article 51 of the Charter refer to decisions of the ECJ which define the obligations of the EU member states in broader terms than Article 51(1) of the Charter and stress the binding force of EU human rights also with regard to all domestic actions within the scope of EU law. That Article 51(1) of the Charter did not alter the received case-law is confirmed by a recent ECJ judgment in which the Court did not take issue with the limited wording of Article 51(1) of the Charter but referred to Article 21 of the Charter within the scope of EU law (*supra*, ECHR as a minimum standard: drawing consequences for other sources of EU fundamental rights and for the autonomy of EU law, p. 72).

As a consequence of the above, national reservations to the Convention and the particularities of national implementation mechanisms remain decisive only with regard to the application of corresponding Convention rights outside the scope of EU law or in relation to Convention rights not incorporated by Article 52(3) of the Charter.

Impact of the EU's accession to the Convention

As regards the *latter* limitation on the new significance of the Convention within the domestic legal orders, the situation will change only with the EU's accession. Once the Convention applies as an international treaty of the EU, all provisions of the Convention become part of EU law, with binding effect on the member states, by virtue of Article 216(2) TFEU. The binding effect of EU treaties on the EU member states applies not only with regard to the legal instruments themselves, which become an integral part of EU law,¹⁰⁸ but also with regard to decision-making bodies thereby created.¹⁰⁹ Thus, the judgments of the ECtHR take effect within the binding force and the primacy and direct effect of EU law upon the domestic legal orders.¹¹⁰

As regards the *former* limitation on the new significance of the Convention (i.e., the limited scope of EU law), one might assume that the significance of the Convention as EU law will still be limited to cases within the scope of EU law and that national particularities could still, therefore, be decisive outside its scope. There are two arguments in favour of such a view. First, the restriction contained in Article 6(2) TEU, according to which accession shall not affect the EU's competences as defined in the Treaties and which in this respect might mean that the binding force of EU fundamental rights, and the related competences of the ECJ, will not reach beyond the scope of EU law. Secondly, according to Article 2 of the related Protocol No. 8 to the Treaty of Lisbon, the accession agreement shall affect neither the powers of the institutions (in this regard, the jurisdiction of the ECJ might be relevant), nor the situation of each member state in relation to the Convention. In this context, specific mention is made of the reservations to the Convention made by the EU member states. The final answer to these issues will depend on the content of the accession agreement and on whether the EU will also accede to the Convention's protocols.

CONCLUSION: INCORPORATING THE CONVENTION AND THE AUTONOMY OF EU LAW

The entry into force of the Lisbon Treaty engendered some uneasy developments with regard to human rights in the EU. While at first glance the introduction of the Charter as a binding human rights 'catalogue' ameliorated the human rights

¹⁰⁸ ECJ, Case 181/73, *Haegeman* [1974] ECR 449, para. 5; Opinion 1/91 *EEA Agreement* [1991] ECR I-6079, para. 37 (on ex-Art. 300(7) ECT, now Art. 216(2) TFEU).

¹⁰⁹ See ECJ, Case 30/88, *Greece v. Commission* [1989] ECR 3711, para. 13; Case C-188/91, *Shell* [1993] ECR I-363, para. 17; Case C-192/89, *Sevince* [1990] ECR I-3461, para. 9. For the well-known exception of WTO law, see Craig and de Burca, *supra* n. 21 at p. 206 et seq.

¹¹⁰ See Lavranos, *supra* n. 73 at p. 53.

situation, it added specific problems, like the need to clarify the relationship of the different sources of human rights in the EU. Furthermore, the Convention is mentioned – somehow contradictorily – in different contexts. This paper shows that, at the current stage of European integration reached by the Lisbon Treaty, the different layers of EU fundamental rights and the references to the Convention in different contexts both reflect the multiple legitimacy claims of the EU and impart different roles to the Convention. Beyond that, the binding force of the Charter has brought about a new legal importance for the Convention. The Charter materially incorporated corresponding rights of the Convention into the EU's legal order as part of primary EU law by virtue of Article 52(3) of the Charter. As analysed above, this new development produces several consequences challenging the status quo of the human rights jurisprudence of the ECJ, the interpretation of EU law, in particular the use of the Commission's powers under secondary law instruments like Regulation 1/2003, and, finally, the legal status of the Convention within the domestic legal orders of the EU member states. The EU Courts are now bound by the standards of those Convention provisions corresponding to Charter rights. The incorporation also encompassed the limitation provisions enshrined in the Convention and the relevant ECtHR case-law. Other sources of EU fundamental rights, in particular the general principles, are retained and become significant if they provide for a higher standard of protection or for additional rights, since the Convention serves only as a minimum standard. While all of these developments considerably promote further homogeneity in the European human rights area, the autonomy of the EU human rights order is maintained insofar as the ECJ can identify standards higher than, or additional to, those contained in the corresponding rights of the Convention.

Nevertheless, the partial incorporation of the Convention may give rise to concerns about the autonomy of human rights protection in the EU against the background of specific national traditions. The tension between accession to the Convention and the autonomy of EU law has also been recognized in the European Parliament (EP), which in its resolution,¹¹¹ expressed the hope that 'accession will not in any way call into question the principle of the autonomy of the Union's law'. For the Parliament, the ECJ 'will remain the sole supreme court adjudicating on issues relating to EU law and the validity of [its] acts,' and the ECtHR 'must be regarded not only as a superior authority but rather as a specialised court exercising external supervision over the Union's compliance' with the Convention; 'the relationship between the two European courts shall not be hierarchical but rather a relationship of specialisation; thus the [ECJ] will have a status analogous to that currently enjoyed by the supreme courts of the member states in relation to the [ECtHR].' This statement fails, however, to take note of the direct effect of the

¹¹¹ Resolution of 19 May 2010, *supra* n. 19, sub. 1, last recital.

Convention and the binding force of ECtHR decisions upon the EU and its member states by virtue of Article 216(2) TFEU, so that the relation between the ECtHR and the ECJ cannot be compared with that of domestic constitutional courts to the ECtHR.

Additionally, the Lisbon Treaty increased the attention given to the respect for national identities. Article 4(2) TEU provides that the EU 'shall respect ... [the] national identities inherent in their fundamental structures, political and constitutional.' The Charter in its preamble explicitly recognizes that the development of EU fundamental rights intends to respect 'the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the member states' (Article 67(1)). The TFEU, also, creates a nexus between fundamental rights and the diversity of the member states.

Such peculiarities also give rise to different standards of fundamental rights to which the ECJ may defer, as exemplified in the *Omega* case,¹¹² in which the ECJ recognized that the principle of respect for human dignity has a particular status in Germany as a fundamental right. The Court added that the member state is not under an obligation to follow a common conception shared by all member states as regards the way in which a fundamental right is protected. States may choose different levels of protection, in particular if the level of protection is guaranteed by the constitution. The constitutional specific of the high rank of human dignity within Germany thus played a role in assessing the proportionality of interference with fundamental freedoms. This case witnesses the sensitivity of the EU legal order for the variety of human rights standards in the member states and other constitutional *specifics*.¹¹³

This sensitivity might collide with a uniform standard developed in the Convention which is interpreted and applied uniformly to all parties.¹¹⁴ There is no leeway for parties to justify interferences with Convention rights by constitutional specifics, because the formulations in the Convention are interpreted autonomously, within a framework of an equality of obligations on all State Parties.¹¹⁵ The ECtHR does not consider the specifics of individual State Parties – except in cases where provisions of the Convention refer to national law (e.g., Articles 7 and 12 ECHR). Deference to a member state's assessment also takes place under the theory of a national margin of appreciation developed by the ECtHR, according to which a member state's initial assessment of proportionality in certain cases will

¹¹² ECJ, Case C-36/02, *Omega Spielhallen GmbH* [2004] ECR I-9609; for what follows, see paras. 34–39.

¹¹³ See L. Besselink and J.H. Reestman, 'Editorial', *EuConst* (2008) p. 199 at p. 204.

¹¹⁴ See the statements by its former president, L. Wildhaber, in an interview conducted by S. Greer, *EHRLR* (2010) p. 165 at p. 170, 174 et seq.

¹¹⁵ F. Matscher, 'Methods of Interpretation of the Convention', in R. Macdonald et al. (eds.), *The European System for the Protection of Human Rights* (Kluwer 1993), p. 63 at p. 70 et seq.

be respected.¹¹⁶ Apart from these two cases, the ECtHR adopts an autonomous interpretation which considers all or a majority of domestic legal concepts when interpreting Convention formulations, in order to find European denominators which stem from the *corpus* of national legal systems.¹¹⁷

Such uniform standards might collide with the respect for diversity enshrined in EU law. This collision is not avoided by the fact that the Convention standards are only minimum standards allowing for higher levels of protection. The *Omega* case was not an issue of higher versus lower fundamental rights standards in the EU. On the contrary, the case dealt with justifications and specific proportionality assessments motivated by the constitutional specifics of a member state which play a role in balancing conflicting fundamental rights (human dignity as a positive obligation of public authorities to interfere with economic activities versus economic freedom). The ECJ was faced with a particular national definition of a high level of protection of a public good against which the proportionality of a national interference with a fundamental freedom of the then ECT had to be assessed. The theory of margin of appreciation is not helpful in such a situation, because a margin of appreciation applies in the balancing of conflicting rights, but not with regard to defining those rights; also, there is no room for a margin of appreciation if a uniform European standard exists.¹¹⁸ In contrast, the ECJ in *Omega* explicitly stated that Germany was not under an obligation to follow a conception common to all member states.¹¹⁹

The only instance in which the ECtHR recognized the sufficiency of different, but comparative, fundamental rights standards is that of the *Bosphorus* decision, which in essence declined to use the Convention as a yardstick for assessing the conformity of (the national implementation of) EU law with the Convention standards because the level of EU human rights protection was perceived to offer equivalent protection.¹²⁰ This is a considerable deference to EU human rights standards and ECJ case-law¹²¹ and amounts to a limited recognition of the autonomy of EU standards of fundamental rights. The problem of the *Bosphorus* decision, however, is that, after the EU's accession, it might no longer be accept-

¹¹⁶ See ECtHR, Appl. No. 5493/72, *Handyside*, para. 48; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford UP 2007) p. 86, 90 et seq.; F. Ost, 'The Original Canons of Interpretation of the European Court of Human Rights', in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights* (Kluwer 1992) p. 283 at p. 305-306, 308-309.

¹¹⁷ Ost, *supra* n. 115 at p. 305.

¹¹⁸ See ECtHR 30 March 2004, Appl. No. 74025/01, *Hirst*, para. 40; Ost, *supra* n. 115 at p. 306; Letsas, *supra* n. 115 at p. 91; A. Torres Pérez, *Conflicts of Rights in the European Union* (Oxford UP 2009) p. 30.

¹¹⁹ See ECJ, *supra* n. 112 at para. 37.

¹²⁰ ECtHR 30 June 2005, Appl. No. 45036/98, para. 155 et seq.

¹²¹ F. van den Bergh, *supra* n. 49 at p. 117.

able to other parties of the Council of Europe, because the ECtHR does not accord the same respect to the domestic human rights system of any State party to the Council of Europe. Currently, the specific treatment of the EU by *Bosphorus* can be justified by the fact that the EU is not a party to the Convention. After its accession, however, the *Bosphorus* line of dealing with the domestic human rights systems of individual parties to the Convention will prove no longer to be tenable. One may doubt whether *Bosphorus* will provide a durable guideline for deciding competence conflicts between the ECJ and the ECtHR. In addition, it is doubtful whether the *Bosphorus* approach will be applied also with regard to other Convention parties that have a sophisticated and sufficiently high level of fundamental rights protection (assessment of which requires consideration of the material as well as the procedural fundamental aspects of the human rights situation). At any rate, the increased importance of the Convention offers a challenge to the 'unity in diversity' approach of European integration. There is a tension between aligning EU human rights standards with the uniformly conceptualised Convention and the very essence of European integration.

Chapter 9

Revisiting the Lisbon Treaty's Constitutional Design of EU External Relations

Jan Wouters and Thomas Ramopoulos*

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Abstract The Lisbon Treaty is the outcome of a long gestation process that started with extraordinary ambitions but was stunned by political constraints. Instilling coherence in EU external action has been one of the major and most visible goals of this reform. In order to do so, the drafters of the Treaty attempted to integrate the different parts of EU external action. Their effort was only partly successful, allowing for an improved coherence, effectiveness and continuity in EU external action if the EU institutions and the Member States manage to garner the political will. However, the current text of the Treaties carries a largely untapped potential for non-negligible improvements in the exercise of Union action abroad. It is this potential that the intellectual exercise at hand attempts to reveal when revisiting the constitutional design of the Lisbon Treaty. At the same time, the political constraints both in the process that led to Lisbon and in the implementation of the new text of the Treaties since December 2009 are analyzed.

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9.1 Introduction

It is an almost trite observation that the external action of the European Union (EU or Union) can be significantly improved in terms of coherence, effectiveness and continuity. The question then arises whether this can best be achieved through yet another revamping of its constitutional design. And if so, is this politically practical? Our quick answer—and that of a number of academics and politicians for that matter—is that it isn't. The experience of the failed Treaty establishing a Constitution for Europe (the Constitution) has shown that such efforts are politically divisive whereas their success, despite best intentions, is far from guaranteed. They may prove destabilizing and counterproductive. That said, we do not mean that there should be no future Treaty changes nor that the Treaties are perfect by any stretch of the imagination. Rather, it is our conviction that the existing constitutional framework of EU external relations carries a largely untapped potential for non-negligible improvements in the exercise of Union action abroad. It is this potential that the intellectual exercise at hand attempts to reveal when revisiting the constitutional design of the Lisbon Treaty.

The reform of the EU external relations architecture has been one of the major innovations brought about by the Lisbon Treaty. It is the final product of a 7-year long gestation period, amidst a European and international context which was characterized, amongst others, by the international 'war on terror', the failure of the Constitution, the increase in the number of EU Member States from 15 to 27 with the subsequent enlargement fatigue, and the—at least for the EU—unfavorable shifting of the international balance of power. These events co-conditioned the content and focus of the Treaty reforms. Thus, the flurry of counterterrorism initiatives raised questions about adequate human rights safeguards internationally and within the EU; the divisive issue of the invasion of Iraq in 2003 brought to light the limits of the Common Foreign and Security Policy (CFSP) and provoked heated discussions over multilateralism versus unilateralism in international relations. At the same time the international financial crisis and the euro area sovereign crisis had not dawned yet, while the Arab Spring only started unfolding in the waning days of 2010. Although the latter developments could not have been foreseen and therefore could not have informed the reform debate, they have put the new EU external relations design to the test. Is this architecture empowered with the legal tools and its actors imbued with the political maturity and will to deliver on the purported goals of EU external action? What are its limits? How flexible and how robust is it in addressing new international challenges and needs? The present chapter attempts to offer a tentative reply to these questions in a three-step analysis.

First, we examine the political framework at the time of the drafting of the Treaties in the first decade of the twenty-first century (Sect. 9.2). Our main focus is on how this was reflected in EU documents connected to or influential on the process of the Treaty reform in the field of external action. This analysis serves to understand the political

constraints of the period that co-determined the text of the Lisbon Treaty. Just as importantly, it illustrates the aspirations and goals of the various players in the reform process. This should enable us to analyze whether and to what extent the new design has been able to deliver more coherent, effective and stable EU external action.¹

Secondly, we identify and discuss the major changes in the constitutional design of EU external relations (Sect. 9.3). The Treaty drafters tried to address the lack of coherence, effectiveness and continuity in this politically sensitive field. In this effort they unified the objectives and the institutional architecture of EU external action. However, they did not manage to overcome the legal and procedural duality between the CFSP and the Common Security and Defence Policy (CSDP), which forms an integral part of the former [Article 42(1) TEU], and the other external policies and internal policies with an external dimension. The outcome is far from perfect but indisputably constitutes an improvement from the *status quo ante*. In this section of the chapter we review how far the drafters went with these changes, how they envisaged improving the external action of the Union and where they were possibly misguided or more conservative than the situation called for.

Lastly, we examine the performance in practice of the EU external action architecture after Lisbon (Sect. 9.4). We revisit the current constitutional design with a view to suggesting a reading of the Treaties that makes use of opportunities and options offered therein in order to overcome existing problems of EU external relations (Sect. 9.5).

9.2 The Road to Lisbon: Aspirations and Constraints

The discussion over the external action architecture of the EU has its roots in the introduction of a political component to the structures of the European Communities in 1970. Over the years it has gained in prominence due to the further deepening of European integration both as an economic and political project. This has raised sovereignty concerns among many Member States, especially with regard to economic and foreign policies, which are considered fundamental attributes of the modern State. A divide exists between Member States that are in favor of an intergovernmental EU external action in these fields, which is complementary to national policies, and those Member States that gravitate toward a more integrated external action of the Union across all EU policies or even a unified foreign policy. This discrepancy of views has been at the center of developments in the design of EU external action.

This disagreement had been resolved in the text of the Treaties prior to Lisbon through a legal and procedural divide between the CFSP, the second pillar, and the rest of the external competences and internal competences with an external

¹ It has been rightly observed that States, even the most powerful ones, more often than not fail to deliver a foreign policy that is coherent, effective and characterized by continuity: Craig (2010), p. 423.

dimension, located in the first pillar. The application of the principle of coherence was supposed to prevent a disjointed and ineffective external action by the Union despite this duality.² It was first spelt out in primary EU law with the Single European Act (SEA) in 1986.³ Analyzing the relevant provisions of the SEA, Gauttier observes that

[t]he two faces of the coherence principle are therefore clearly laid down by the SEA. From a theoretical viewpoint, two aspects of the principle of coherence may be distinguished. The search for coherence aims on one hand at providing a declaratory diplomacy with content, often economic, by combining the CFSP with the various other actions of the Union in the field of external relations, and on the other hand attaining harmony between the CFSP and the sphere of national action. Vertical coherence between the EU and the Member States, and horizontal coherence between the different pillars of the EU are thus distinguished.⁴

Ever since the SEA, the EU has been trying to instill greater 'horizontal' and 'vertical' coherence in its external action.⁵ Thus, the last chapter of the Union's integration process that started in 2000 with a speech by the then German Minister of Foreign Affairs, Joschka Fischer,⁶ the Declaration on the Future of the Union annexed to the Treaty of Nice⁷ and the 2001 Laeken Declaration on the Future of the European Union⁸ could not ignore this quest for coherence, effectiveness and continuity in EU external action. However, the Laeken Declaration is of broader interest in the effort to understand the political aspirations of the Union in its action abroad. In the Declaration we read a number of relevant questions and a determination for the EU to play a leading role in the governance of world affairs promoting a normative agenda:

What is Europe's role in this changed world? Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilizing role worldwide and to point the way ahead for many countries and peoples? [...] Europe needs to shoulder its responsibilities in the governance of globalization. The role it has to play is that of a power resolutely doing battle against all violence, all terror and all fanaticism, but which also does not turn a blind eye to the world's heartrending injustices. In short, a power wanting to change the course of world affairs in such a way as to benefit not just the rich countries but also the poorest. A power seeking to set globalization within a moral framework, in other words to anchor it in solidarity and sustainable development.

² Gauttier (2004), p. 24. However, it should be noted that the principle of coherence is instrumental in achieving concerted external action by the EU and its Member States in non-CFSP policies also. Still, problems in this regard are far less pronounced than when there is a CFSP component in external action.

³ Single European Act (OJ 1987 L 169/1), preamble fifth recital, Articles 30(2)(d) and 30(5).

⁴ Gauttier (2004), p. 25.

⁵ See inter alia Neuwahl (1994), Tietje (1997), Schmalz (1998), Duke (1999), Wessel (2000), and Hillion (2008).

⁶ Rede von Joschka Fischer über die Finalität der europäischen Integration, Berlin, 12 May 2000, <http://www.cvce.eu> (accessed 20 August 2013).

⁷ Declaration on the Future of the Union, OJ 2001 C 80/85.

⁸ European Council, Laeken Declaration on the Future of the European Union, SN 300/1/01 REV 1, 14–15 December 2001.

[...] How should the coherence of European foreign policy be enhanced? How is synergy between the High Representative and the competent Commissioner to be reinforced? Should the external representation of the Union in international fora be extended further?⁹

Still, coherence in EU external action and the promotion of a normative agenda abroad with human rights at its center were significantly undermined by developments on the international plane. The 9/11 attacks that led to the war on terror and a unilateral and rather interventionist foreign policy by the U.S. questioned, first, the ability of EU Member States to agree on and pursue a CFSP, and, secondly, the political capacity and determination of the EU to insist on safeguarding human rights. The war in Iraq provoked deeply divided reactions among Member States which prevented the EU from reaching a unified position. At the same time the imposition of sanctions on individuals by the EU in compliance with the United Nations Security Council Resolution 1267 regime,¹⁰ apparently without due regard to their human rights and fundamental freedoms, cast a shadow on the commitment of the Union to human rights in CFSP.¹¹

Within this context the 'Convention on the Future of Europe' (Convention) was launched in February 2002 and in a relatively short period of time, it produced a Draft Constitution. Although the Constitution never came into force, most of its provisions on and mainly its approach to EU external relations were carried over to the Lisbon Treaty. Therefore, it is useful to keep in mind some points. Cremona accurately opined that

[t]he underlying feature of the draft Treaty is perhaps its attempt at integration: the integration of the EC and European Union Treaties, the integration of the pillar structure, the integration of policy under one rubric [...] and the integration of that action into the overall perspective of the Union's objectives.¹²

However, it became clear in the Convention that integration of EU external action could not have meant 'the overall 'federalization' of European foreign policy with an exclusive European competence for foreign policy' since this was 'a political non-option'.¹³ Even the duality between CFSP and non-CFSP policies could not be overcome despite the initial grouping of EU external action provisions

⁹ Ibid.

¹⁰ Security Council Resolution 1267 (1999) of 15 October 1999 on the situation in Afghanistan, UN Doc. S/RES/1267 (1999).

¹¹ A number of cases have been brought before the European Court of Justice touching on this issue since then. See inter alia CFI, Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649; ECJ, Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351; ECJ, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council, United Kingdom v Yassin Abdullah Kadi*, Judgment of the Court [2013] nyr.

¹² Cremona (2003).

¹³ Thym (2004), p. 7.

in one Title.¹⁴ This was already evident in the report of the Convention's Working Group VII on External Action of 16 December 2002. The members of the Group strived in their recommendations to instill coherence in EU external action 'while keeping different arrangements for different policy areas.'¹⁵ This was due to the fact that 'some areas [of EU external action] were more subject to divergent national views than others.'¹⁶ This choice was made despite apparent popular support in most EU Member States for further meaningful integration of the EU external relations architecture.¹⁷ CFSP remained a competence distinct from others with its specific procedures and instruments for which the European Court of Justice lacked jurisdiction. Nonetheless, the new framework allowed 'political actors to embark upon the development of a more effective common foreign policy to serve European interests and promote common values.'¹⁸ Following in the footsteps of the Constitution, the 2007 Intergovernmental Conference (IGC) mandate set the enhancement of coherence of EU external action as one of the three central goals of the Treaty reform that eventually led to the Lisbon Treaty.¹⁹

Thus, the aspiration of the most recent constitutional reform of EU external action has been to enhance the role and impact of the EU in global affairs. The obvious way for this goal to be achieved was for the EU to be able to use effectively all the tools and instruments at its disposal. As indicated above, the need to do so was highlighted by a number of international developments since the turn of the century. However, EU Member States did *not* agree on a further integration of CFSP with non-CFSP external action. Rather, they opted for choices that could bridge the gap between the first and second pillars insisting on coherence. The main conclusion to be drawn from this analysis is that the major political constraint to any reform of the EU external action architecture as well as to its performance in practice remains the sovereignty concerns of EU Member States, especially in the field of CFSP.²⁰ The Final report of the Convention's Working Group VII acknowledged in this respect:

¹⁴ See Kokott and R  th (2003), p. 1326. As discussed below, the provisions on CFSP were eventually separated from the rest of the provisions on the EU external action in the Lisbon architecture.

¹⁵ The European Convention, Final report of Working Group VII on External Action, Brussels, CONV 459/02, 16 December 2002, 2.

¹⁶ *Ibid.*, 13.

¹⁷ Thym (2004), p. 6.

¹⁸ *Ibid.*

¹⁹ Council of the European Union, IGC 2007 Mandate, Brussels, 11218/07, 26 June 2007, Annex, 2. See also European Council, Presidency Conclusions—Annex on 'EU Declaration on Globalisation,' 14 December 2007.

²⁰ This has also been the case with economic and monetary policy in the euro area, as the failure to use the provisions of Article 138 TFEU indicates. However, it may be that the ongoing sovereign debt crisis in the euro area will prompt Member States to act in accordance with the said article.

that acting collectively on the global stage depended to a large extent on political will and solidarity among Member States. This was particularly true for foreign policy, which was considered by many a core issue of national sovereignty.²¹

Therefore, there are distinct limits to what legal reforms can accomplish with regard to EU external action. The performance of political actors is instrumental in putting them into practice. The discussion in the following sections shows the potential and the limits of the new EU external action architecture as well as to what extent Member States and political EU institutions prove willing and able to make the most out of it in the post-Lisbon era.

9.3 The Lisbon Treaty: A Suspended Step Toward Integration²²

In light of the aforementioned aspirations and constraints, the Lisbon Treaty attempted to integrate the different parts and simplify the design of EU external action. The introduced changes touched on the architecture of the Treaties, the principles and objectives, and the institutional machinery of EU external action.

One major change to the architecture of the Treaties has been the repeal of the pillar structure. The Union 'replaced and succeeded' the Community [Article 1 (3) TEU] and obtained explicitly legal personality (Article 47 TEU).²³ This did not really change much in practice since the Union already had, albeit implicitly, international legal personality under the previous regime.²⁴ Still, it served to simplify questions of international representation, which had been a particularly perplexing feature of the Union's architecture in the eyes of its partners abroad (who were puzzled by the sometimes inconsistent references to 'EC,' 'EU,' 'European Commission' etc.). However, the Lisbon Treaty took a step back from the Constitution. It placed the provisions on the principles and objectives of Union external action and those on CFSP in the TEU, whereas the rest of external action is dealt with in Part Five of the TFEU. These provisions used to be grouped together in the Constitution. Apparently, such a structure proved unacceptable to certain Member States that wanted to underline the separate nature of CFSP in comparison to other policies.²⁵

²¹ Final report of Working Group VII on External Action, *supra* n. 15, 12.

²² After 'The Suspended Step of the Stork,' a 1991 Greek film directed by Theodoros Angelopoulos.

²³ Priollaund and Siritzky (2008) and Kokott (2012).

²⁴ See The European Convention, Final report of Working Group III on Legal Personality, CONV 305/02, 1 October 2002. See also Kuijper et al. (2013), p. 1.

²⁵ House of Commons, Foreign Affairs Committee (2008) Foreign Affairs Policy Aspects of the Lisbon Treaty, Third Report of Session 2007–2008, London, 16 January 2008; House of Commons, Defence Committee, The Future of NATO and European Defence (Ninth Report of Session 2007–2008), London, March 2008.

This separateness is further evidenced by the specific nature of CFSP competence. Article 2(4) TFEU does not clarify the nature of this competence as its 'specificity [...] where both the EU and the Member States have a competence, made it politically difficult to include this area in one of the three general categories of competences.'²⁶ It is a common observation that the main reasons CFSP was not listed amongst shared competences have to do with the fact that it has no pre-emptive effect and that no legislative acts can be adopted in this field [Article 24(1) second subpara TEU].²⁷ This ambiguity has led to a considerable debate, mainly of academic interest, whether CFSP is 'a form of shared competence'²⁸ or a 'type of *sui generis* competence that shares characteristics of both shared and complementary competences.'²⁹ However this may be, what comes out of this debate is that CFSP is not like any other Union competence.

The Lisbon Treaty did not clarify questions regarding the possible primacy and direct effect of CFSP acts either. Lenaerts and Corthaut had argued already in 2006 that these principles could readily be applied to the then EU.³⁰ Admitting the danger of fragmentation of the EU legal order in this field due to the almost complete lack of jurisdiction of the European Court of Justice in CFSP, De Baere is also favorable to recognizing primacy and direct effect to CFSP. However, he does not consider the application of these two principles in the EU legal order as strictly linked.³¹ Dashwood, by contrast, derived from the lack of jurisdiction of the Court and the 'specific character' of EU competence in this field that CFSP acts do not enjoy primacy and direct effect.³² Cremona shares Dashwood's opinion, highlighting that the Lisbon Treaty dropped the explicit provision of the Constitution (Article I-6), which recognized primacy to the entire Union legal order. In addition, she relies on Declaration 17 concerning primacy, annexed to the Lisbon Treaty, which refers to 'well settled case law of the Court of Justice of the European Union' recognizing the primacy of primary and secondary EU law over national legislation of the Member States. Since the Declaration did not include CFSP expressly whereas

²⁶ Piris (2010), p. 77.

²⁷ On the academic debate regarding the nature of the EU competence in CFSP see De Baere (2008), pp. 110–112.

²⁸ Rosas and Armati (2010), pp. 19–20.

²⁹ Cremona (2008), p. 65. The areas of research, technological development and space [Article 4(3) TFEU] and development cooperation and humanitarian aid [Article 4(4) TFEU] also frustrate any attempt to place them definitely in one of the existing categories of competence in the Treaties. They are somewhere between shared and supporting competences. Piris calls them 'complementary competences' (Piris 2010, p. 77), whereas De Baere prefers the term 'parallel competences' (De Baere 2008, p. 112).

³⁰ Lenaerts and Corthaut (2006), pp. 289–291.

³¹ De Baere (2008), pp. 201–213.

³² Dashwood (2004–2005), pp. 37–38. Van Elsuwege is also reluctant to recognize the application of primacy and direct effect in CFSP due to the lack of jurisdiction of the ECJ. See Van Elsuwege (2010), pp. 989–991.

there is no case law addressing this question with regard to CFSP, Cremona concludes that CFSP has no primacy and direct effect.³³

As a bridge between CFSP and other external competences, the Lisbon Treaty unified the principles and objectives of Union external action. Articles 3(5) and 21 TEU contain and apply them to EU external action in CFSP, non-CFSP external competences and internal competences with external aspects [Article 21(3) TEU].³⁴ This change from the previous text constitutes a welcome effort to instill coherence in EU external action.³⁵ However, in light of the less than clear definition of the scope of CFSP in Article 24(1) TEU, according to which it 'shall cover all areas of foreign policy and all questions relating to the Union's security,' this change has made the determination of the legal basis for an external action of the Union a far more complex exercise than before Lisbon. This determination is still significant given the fact that the Treaties continue to set CFSP apart from other competences: different instruments and voting arrangements apply while the impact and role of EU institutions and actors in CFSP are also different.

What is more, the new Article 40 TEU, which replaced the former Article 47 TEU, introduced legal equality between CFSP and other Union competences.³⁶ This provision does not give guidance anymore to the legislator or the Court with regard to the appropriate legal basis of a Union instrument in the field of external action. This has raised the question whether the *ECOWAS* case law is still relevant.³⁷ In that judgment the Court found that a Union action capable of having legal effects, adopted under the previous second pillar although it could have been adopted under the first pillar, infringed the former Article 47 TEU.³⁸ With the new Article 40 TEU the Court will have to accord equal protection to CFSP and non-CFSP legal bases. In order to do so, it will have to perform a 'center of gravity' test whereby the main purpose of the instrument in question will have to be ascertained on account of both its aim and content. This exercise will not become easier with an integrated list of objectives in external action. Still, some objectives enumerated in the list clearly refer to CFSP (international peace and security) whereas others to other competences, such as development co-operation, trade, environmental protection and humanitarian aid. The remaining objectives seem to apply to more than one area of external action. In addition, the seemingly all-embracing provision in Article 24(1) TEU—the origins of which trace back to

³³ Cremona (2008), pp. 63–67.

³⁴ See also Article 205 TFEU, which refers back to Articles 21 and 22 TEU, and Article 222 TFEU.

³⁵ On the legal status of these external objectives and relevant case law see Larik (2011), p. 27, arguing that these objectives 'can be ranked among norms of constitutional value.' For analyses of the new provisions see Priolla and Siritzky (2008), pp. 34–36 and 108–110; Pechstein (2012); Regelsberger and Kugelmann (2012a).

³⁶ Regelsberger and Kugelmann (2012b).

³⁷ See ECJ, Case C-91/05 *Commission v Council* [2008] ECR I-3651.

³⁸ *Ibid.*, para 58.

the Maastricht Treaty—will have to be circumscribed.³⁹ A last question that will most probably have to be reviewed by the Court after Lisbon is whether an instrument having both a CFSP and another objective, without one being incidental to the other, can have a dual legal basis. In *ECOWAS* the Court replied in the negative without explaining its reasoning other than vaguely relying on Article 47 TEU. Since the new Article 40 TEU places CFSP and non-CFSP competences at an equal level, it is unclear whether the Court's case law will change.⁴⁰

On top of a unified list of external action objectives, the drafters of the Lisbon Treaty opted for a unified institutional architecture in order to overcome the aforementioned duality. They tasked the European Council to provide strategic guidance to the EU in all aspects of its external action [Article 22(1) TEU]. They created the new post of the High Representative of the Union for Foreign Affairs and Security Policy, who is simultaneously a Vice-President of the Commission (HR/VP).⁴¹ In this dual function—triple if one considers the fact that the HR also presides over the Foreign Affairs Council [Article 18(3) TEU]—the HR/VP 'shall ensure the consistency of the Union's external action' [Article 18(4) TEU].⁴² The role of the HR in CFSP is instrumental in that he 'conduct[s] the Union's common foreign and security policy' and 'contribute[s] by his proposals to the development of that policy, which he [...] carr[ies] out as mandated by the Council. The same shall apply to the common security and defence policy' [Article 18(2) TEU].⁴³ Lastly, the HR can together with the Commission submit joint proposals to the Council covering both CFSP and non-CFSP external action [Article 22(2) TEU].⁴⁴

In fulfilling this very broad and politically challenging mandate, the HR/VP is assisted by the European External Action Service (EEAS) [Article 27(3) TEU]. The EEAS was set up in July 2010 as a 'functionally autonomous body of the Union

³⁹ See among others Cremona (2008), p. 46.

⁴⁰ See Cremona (2008), pp. 42–46; Dashwood (2008), pp. 99–103; Van Elsuwege (2010), pp. 1001–1012; Beekhout (2011), pp. 167–171, 180–186; Craig (2010), pp. 415–417.

⁴¹ The abbreviation HR/VP is used throughout the text when referring to the totality of the functions of this post. Otherwise we use HR or VP for the functions pertaining to the High Representative or Vice-President of the Commission respectively.

⁴² See also Articles 21(3) second subpara and 26(2) second subpara TEU.

⁴³ See also Article 27(1) TEU.

⁴⁴ See among others Joint Communication 'A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean,' COM (2011) 200, 8 March 2011; Joint Communication 'A New response to a changing Neighbourhood,' COM (2011) 303, 25 May 2011; Joint Communication 'Global Europe: A New Approach to financing EU external action,' COM (2011) 865, 7 December 2011; Joint Communication 'Human rights and Democracy at the Heart of EU external action—Towards a more Effective Approach,' COM (2011) 886, 12 December 2011; Joint Proposal for a Council Decision on the accession of the European Union to the Treaty of Amity and Cooperation in Southeast Asia, JOIN (2012) 1, 16 February 2012; Joint Proposal for a Council Regulation concerning restrictive measures against Iran and repealing Regulation (EU) No. 961/2010, JOIN (2012) 2, 17 February 2012.

under the authority of the High Representative.⁴⁵ The former Commission Delegations which have now been transformed to Union Delegations covering all fields of EU external action also belong to the EEAS.⁴⁶ The EEAS is expected to assist all actors in EU external relations and cooperate with them in order to ensure consistency across the board in EU actions abroad.⁴⁷

With regard to the representation of the Union abroad, this is still dependent on the area of competence. Thus, the Commission ensures the Union's external representation '[w]ith the exception of the common foreign and security policy, and other cases provided for in the Treaties' [Article 17(1) TEU].⁴⁸ The 'other cases' are the Union Delegations and the external representation of the euro area, which is governed by Article 138(2) TFEU. The conduct of CFSP is entrusted to the HR [Article 18(2) TEU]. However, in light of the 'double hat' of the HR/VP, it was expected that this division of labor would not have repercussions on the coherence of EU external action.⁴⁹ It should also be noted that another new actor plays a role in this area: the (permanent) President of the European Council ensures the external representation of the Union with respect to CFSP 'at his level and in that capacity' and 'without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy' [Article 15(6) TEU]. Union Delegations also represent the Union in its entirety [Article 221(1) TFEU].⁵⁰ In order to do so in accordance with the allocation of representation powers under the Treaties, they receive instructions from the HR regarding CFSP and the Commission on non-CFSP external action.⁵¹ Lastly, the absence of an explicit role for the rotating Presidency in EU external relations (whether CFSP or not) is conspicuous in the Treaties. This was a conscious choice made by the drafters of the Lisbon Treaty in order to minimize the number of actors in external representation.⁵²

However, the Treaties do not elaborate on the politically sensitive issue of representation in the area of shared competences. This has left space for inter-institutional strife as well as for differing interpretations on the issue between Union institutions and the Member States. The problems that this has created in practice are discussed in the following section. However, it should be noted here that external representation irrespective of the category of the Union competence has to comply with the principles of sincere cooperation [Article 4(3) TEU], conferral

⁴⁵ Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service (2010/427/EU), *OJ* 2010 L 201/30, preamble recital 1 and Article 1(2).

⁴⁶ *Ibid.*, Article 1(4).

⁴⁷ *Ibid.*, Articles 2 and 3. See more in Chap. 10 by Gatti, in this volume.

⁴⁸ See also ECJ, Case C-131/03 P *Reynolds Tobacco and Others v Commission* [2006] ECR I-7795, para 94.

⁴⁹ Rosas and Armata (2010), pp. 200–201.

⁵⁰ Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *supra* n. 45, Article 5.

⁵¹ *Ibid.*, Article 5(3).

⁵² See Ramopoulos and Odermatt (2013), pp. 22, 31.

[Article 5(2) TEU], consistency [Article 21(3) TEU], and unity.⁵³ Article 13 (2) TEU also obliges the EU institutions to 'practice mutual sincere cooperation.' Lastly, Article 24(3) TEU, a clause which traces back to the Maastricht Treaty, applies the principle to the Member States with regard to CFSP.⁵⁴ In this last instance the Court of Justice has no jurisdiction and the compliance of the Member States with this principle is to be ensured by the High Representative and the Council. Thus, the Treaties and the long-standing case law of the Court do not leave the EU institutions and Member States without any guidance regarding the external representation of the Union.

Naturally, one of the most important areas of external representation is the field of negotiation of international agreements. Article 218 TFEU has for the most part unified the EU's treaty-making procedure.⁵⁵ However, contrary to the situation prior to the Lisbon Treaty, it does not clarify who should be the negotiator on behalf of the Union.⁵⁶ Still, in light of the Treaty provisions on the external representation of the Union, it is interpretatively consistent to conclude that the negotiator will be the HR for CFSP and the Commission for all other Union competences.⁵⁷ In cases of mixed agreements though, it is unclear what the appropriate formula is. The spirit of Lisbon requires a unified representation. However, it does not specify whether this means that the Commission is to represent the Union and its Member States in shared competences, or whether this can be done by a negotiating team comprising the Commission and representatives—often the Council Presidency—of the Member States. As discussed further below, this led to a debacle among EU institutions regarding the representation of the Union in negotiations for an international agreement on mercury. Moreover, according to Articles 218(8) TFEU and 31 (1) TEU, decisions of the Council on the treaty-making procedure of an agreement on CFSP will be taken unanimously. Lastly, the Parliament has no role in the conclusion of agreements that relate exclusively to CFSP [Article 218(6) TFEU].

⁵³ See ECJ, Case C-246/07 *Commission v Sweden* [2010] ECR I-3317, paras 71–73 where the Court of Justice reiterated its well-established case law on the general applicability of the principle of sincere cooperation and the requirement of unity in EU external action.

⁵⁴ Interestingly, this clause has been expanded in the course of time. The Maastricht Treaty's Article J.1(4) TEU provided: 'The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.' The Amsterdam Treaty added in between these two sentences: 'The Member States shall work together to enhance and develop their mutual political solidarity.' [New Article J.1(2), renumbered into Article 11 TEU]. The Lisbon Treaty preserved all of this in Article 24(3) TEU but added to the first sentence that the Member States 'shall comply with the Union's action in this area.' See also Chap. 5 by Casolari, in this volume.

⁵⁵ See Mögele (2012). Also Kuijper et al. (2013), pp. 69–104.

⁵⁶ With the exception of where the Treaty provides who the negotiator must be. This is the case of Article 207(3) TFEU regarding agreements on common commercial policy, which foresees that the Commission will be the negotiator in such instances.

⁵⁷ Eeckhout (2011), p. 196.

Wrapping up, the constitutional structure of EU external action continues to be somewhat complex and is certainly not completely integrated. This may hamper efforts to achieve horizontal and vertical coherence in the action of the Union abroad. As analyzed above, there remains a duality between CFSP and non-CFSP external action. This is related primarily, but not solely, to the different nature of competence in CFSP, the differing roles and significance of Union institutions and other actors, such as the HR/VP and the President of the European Council, and the different instruments and decision-making processes.⁵⁸ Clearly, these particularities of the CFSP survived the last Treaty reform, or were made even more explicit in some cases, due to political concerns by some Member States and their wish to safeguard their sovereignty. The Treaties endeavor to bridge these gaps in a number of ways. The list of principles and objectives of EU external action was unified and the European Council has become responsible to give strategic orientation to the whole spectrum of EU external action. In addition, the positions of the HR/VP and the EEAS have been introduced in order to establish links between all players in EU external affairs. In the following section the present chapter examines whether and to what extent these changes have instilled coherence, effectiveness and continuity to EU external action, or fears that they would 'increase the potential for inter-institutional conflicts' have proven justified.⁵⁹ It also discusses what still can be done within the existing legal and political framework in order to achieve the aspirations of the Lisbon Treaty.

9.4 Implementing the New Constitutional Architecture: Reality and Opportunities

The analysis of the constitutional design of EU external action shows that it is an imperfect compromise reached by the drafters of the Lisbon Treaty. Conflicting interests, priorities and preferences among players in EU external relations had to be accommodated. The attempt at integration failed to overcome sovereignty concerns. Rather, the Treaty had to settle with a continued duality between CFSP and non-CFSP external action. At the same time the Union was equipped with the institutional structures—mainly the new multi-hatted HR/VP—and mechanisms in an attempt to prevent this duality from affecting the conduct of EU external affairs. In other words, the integration of EU external action was deferred to be settled in the everyday practice of the Union and its Member States. Unsurprisingly, this has come with a number of 'turf battles' among Member States and EU institutions and among the latter *inter se*. Here we focus on issues of strategic and political guidance by the HR/VP in the effort to improve internal cooperation and coordination. We

⁵⁸ See also Dashwood et al. (2010), pp. 905–907.

⁵⁹ Van Elsuwege (2010), p. 988.

also examine questions with regard to the external representation of the Union and, in particular, negotiations of international agreements.

As it has become clear above, the presence and function of the HR/VP and the EEAS both at the level of policy development and policy implementation is instrumental in order to induce coherence in EU external action. However, it is a common observation that the responsibilities attached to the post of the HR/VP appear too challenging for a single individual to fulfill.⁶⁰ It has appeared even more so during the mandate of the first HR/VP, Lady Catherine Ashton, since she also had to embark on the task of creating the new European diplomatic service, the EEAS. It is for this reason that the idea of designating political deputies to the HR/VP has been floating for a while.⁶¹ It proved impossible to address this question in the negotiations prior to the Lisbon Treaty. In practice, the HR/VP has been asking either Foreign Ministers of Member States or fellow Commissioners to represent her on different occasions depending on the nature of her role as HR or VP. While the current Treaties allow for some creative thinking towards a more permanent solution in this issue with the establishment of one or more Deputies to the HR/VP, this will have to respect a number of constitutional checks and balances, including the equality of the Commissioners. Such solution will also have to give due regard to the very sensitive inter-institutional balances in EU external action if it is to secure the necessary political consensus for its adoption and implementation in practice.

The work of the HR/VP and the EEAS has been made more difficult for the further reason that the Member States have had much less appetite to invest human and political capital in CFSP in the post-Lisbon era since they have been preoccupied with battling the euro area crisis.⁶² This is crucial since CFSP has remained an 'intergovernmental [policy] and subject to unanimity decision making,' limiting what the HR and the EEAS can do in the 'absence of political will or an agreement amongst Member States.'⁶³ The Commission did not make the life of the HR/VP easier either, perceiving her not 'as a Member of the Commission [...] but rather as

⁶⁰ Missiroli (2010); Hillion (2008), pp. 10–36. See also House of Lords, European Union Committee, Report: The EU's External Action Service, March 2013, para 19.

⁶¹ See Wouters et al. (2013a), pp. 32–33; House of Lords, European Union Committee, Report: The EU's External Action Service, *supra* n. 60, paras 20–23; European Parliament, 2013 Review of the organisation and functioning of the EEAS, European Parliament recommendation to the High Representative of the Union for Foreign Affairs and Security Policy and Vice President of the European Commission, to the Council and to the Commission of 13 June 2013 on the 2013 review of the organisation and the functioning of the EEAS [2012/2253(INI)], A7-0147/2013, 13 June 2013, para 2; Speech delivered by High Representative Catherine Ashton at Forum Nueva Economía, 13 June 2013, A 316/13, at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137458.pdf (accessed 20 August 2013).

⁶² Missiroli (2010), pp. 427–452. See also Rettman (2012).

⁶³ European Union, Statement by EU High Representative Catherine Ashton on EEAS Review, *supra* n. 61.

an agent of the Member States.'⁶⁴ The validity of these observations is tested throughout this section.

Leaving the adverse political climate aside, the HR/VP has had difficulties in making adequate use of the tools which the Treaties have put at her disposal. She has not been providing continued political leadership to EU external action supported by a comprehensive strategy.⁶⁵ One way to do so would arguably be to revisit the existing European Security Strategy (ESS), which was drafted in 2003 and was partly updated in 2008.⁶⁶ This document predated the entry into force of the Lisbon Treaty as well as the latest political developments in the Arab World, which have changed the political landscape in the South of the EU, a change that could not have been foreseen in 2003 or even in 2008. The need to revisit the ESS has been underlined by some players in EU external affairs, such as the European Parliament and the Foreign Ministers of a number of Member States.⁶⁷ At the same time, seeing the resistance from different quarters within the foreign and security policy establishment for a review of the ESS, Italy, Poland, Spain and Sweden commissioned a report on a European Global Strategy, which constitutes *de facto* an updated version of a security strategy for the EU.⁶⁸ This document could function as a working document to test ideas on the feasibility, expediency and substance of an updated ESS. It attempts to tackle in a concise manner most of the contemporary challenges the EU is facing at the international level. Cyber security, climate change and the world economy have a prominent place in the report. Also, the report refers to the US, Turkey, China and Russia as the focal partners for the EU to work with in order to link its regional and global agenda.

The HR/VP has opted for a different approach, delineating three policy priorities instead of coming up with a grand strategy. Her goals have been to set up the EEAS, invest in the European Neighbourhood Policy (ENP), and work with strategic

⁶⁴ Christiansen (2012), pp. 228–247. See also House of Lords, European Union Committee, Report: The EU's External Action Service, *supra* n. 60, paras 118–121. See already for this possibility, Wouters (2004).

⁶⁵ See Wouters et al. (2013a), p. 28; Bendiek and Kramer (2010). See also House of Lords, European Union Committee, Report: The EU's External Action Service, *supra* n. 60, para 18.

⁶⁶ European Security Strategy: A Secure Europe in a Better World, 12 December 2003; Report on the Implementation of the European Security Strategy: Providing Security in a Changing World, S407/08, 11 December 2008. See also Lehne (2011), p. 11, arguing in favor of 'a new strategic concept' that will offer the EEAS 'a coherent conceptual framework and a sense of strategic direction.'

⁶⁷ European Parliament, Report on the Annual Report from the Council to the European Parliament on the Common Foreign and Security Policy [12562/2011—2012/2050(INI)], 29 August 2012, para 8; The Future of Europe Group, Final Report of the Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain, 17 September 2012, at www.auswaertiges-amt.de/cae/servlet/contentblob/626322/publicationFile/171798/120918-Abschlussbericht-Zukunftsgruppe.pdf (accessed 20 August 2013). See also Coelmont (2012) and Biscop (2012).

⁶⁸ European Global Strategy, Towards a European Global Strategy: Securing European Influence in a Changing World, 28 May 2013. See also Coelmont (2013).

partners.⁶⁹ However justified this may be, it has not always been followed through with more elaborate, specific and inter-connected goals and actions that would give strategic direction to EU external affairs. Indeed, despite its valuable input in EU external action, the EEAS is still partly in search of its exact role and position in the EU external action architecture, an effort not made easier by the 'rather open-ended' definition of its mandate and tasks in the EEAS Decision.⁷⁰ This unavoidably affects its capacity to deliver. As to the ENP—despite the overall satisfaction within the EU regarding coordination and capacity to adjust to changes brought about suddenly by the Arab uprisings—there are voices suggesting that there is still a lack of long-term, structured and elaborate policy at least with respect to the Eastern neighbourhood and the Middle East.⁷¹ Lastly, strategic partnerships have not been developed in accordance with clearly defined criteria, goals, and ultimately framework.⁷²

The lack of a comprehensive strategy has translated into problems of lack of coherence in the development of policies in EU external action. In order to overcome this, the HR/VP has insisted in the last few years on the concept of the 'comprehensive approach' to EU external action as a guiding principle in her work and that of the EEAS. The 'comprehensive approach' has not yet been clearly defined in a policy document but it broadly entails a

merger of the three jobs in the Lisbon treaty [allowing the EU to] combine diplomacy with development aid, rule of law support, military and civilian operations to tackle not only the symptoms but also the underlying causes of a crisis or situation and ensures [its] capacity to remain there for the long term.⁷³

This idea has received overall support.⁷⁴ Still, a crucial question lingers. It is unclear how and to what extent this concept is qualitatively different from similar concepts already propounded in the ESS, which noted that

[t]he challenge now is to bring together the different instruments and capabilities: European assistance programmes and the European Development Fund, military and civilian

⁶⁹ See EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission, Europe and the World, SPEECH/10/378, 8 July 2010.

⁷⁰ See Wouters et al. (2013a), pp. 25–28; Hemra et al. (2011), p. 1.

⁷¹ See Shapovalova (2013); Echagüe and Mikail (2013). See also Chap. 11 by Comelli, in this volume.

⁷² See Wouters et al. (2013a), p. 28; European Parliament, Report on the Annual Report from the Council to the European Parliament on the Common Foreign and Security Policy, *supra* n. 67, paras 29–30. See also Hemra et al. (2011), p. 20; Renard (2011).

⁷³ European Union, Statement by EU High Representative Catherine Ashton on EEAS Review, *supra* n. 61.

⁷⁴ European Parliament, Report on the Annual Report from the Council to the European Parliament on the Common Foreign and Security Policy, *supra* n. 67, paras 4–7, 22, and 26; The Future of Europe Group, Final Report of the Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, the Netherlands, Poland, Portugal and Spain, *supra* n. 67.

capabilities from Member States and other instruments. All of these can have an impact on our security and on that of third countries. Security is the first condition for development.⁷⁵

In order to reply to this question, the comprehensive approach needs to be fleshed out in a detailed policy document. Although the Horn of Africa Strategy and the Sahel Strategy are broadly seen as successful examples of this approach,⁷⁶ they hardly offer a clear template generally applicable to EU external action. In any case, the important conclusion from this discussion is that the HR/VP has the tools provided for by the Treaties to streamline *prima facie* EU external action through a comprehensive strategy. Clearly, as is the case with national foreign policies too, political constraints and conflicting interests influence this process. However, the aforementioned successful examples indicate that these forces can be overcome or accommodated in an EU external action strategy.

In addition, certain players in EU external action have raised concerns about the identification of political priorities by the HR/VP. In a non-paper on the EEAS the Foreign Ministers of 12 Member States asked from the HR to find '[w]ays to further optimize the identification of political priorities' in the Foreign Affairs Council (FAC).⁷⁷ Most recently, a study on the functioning and organization of the EEAS found that the permanent presidency of the FAC ensures continuity in the work of this configuration of the Council but has yet to deliver on the request for more initiative and leadership as well as for more timely inputs in the work of the FAC.⁷⁸ Nonetheless, one should not lose sight of the fact that Member States have often found it difficult to let the HR lead EU external action.⁷⁹

This further illustrates that there is still much room to improve coordination and cooperation among the EEAS, the Council and the Commission through the multifaceted role of the HR/VP. Besides, the European Parliament accurately linked questions of coordination of the Council and the Commission with the EEAS, initiation of policies, and political leadership by the HR/VP.⁸⁰ This issue was raised previously and it had been acknowledged that there still remained challenges in fulfilling all the potential of the new architecture.⁸¹ In particular, there seems to be a consensus that the HR/VP needs to make adequate use of her

⁷⁵ European Security Strategy: A Secure Europe in a Better World, *supra* n. 66, 13.

⁷⁶ See Wouters et al. (2013a), pp. 28–29.

⁷⁷ Non-Paper on the European External Action Service, Joint letter from the Foreign Ministers of Belgium, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland and Sweden, 8 December 2011, <http://www.ies.be/files/documents/JMCdepository/EEAS,%20Non-paper%20on%20Cooperation.pdf> (accessed 20 August 2013).

⁷⁸ Wouters et al. (2013a), pp. 37–39. See also Balfour and Raik (2013).

⁷⁹ See Balfour and Ojanen (2013), pp. 25–29.

⁸⁰ European Parliament, *supra* n. 61, para. 4.

⁸¹ Non-Paper on the European External Action Service, *supra* n. 77; European External Action Service, Report by the High Representative to the European Parliament, the Council and the Commission, 22 December 2011, points 13–15.

role as Vice-President of the Commission in order to coordinate external action policies initiated by the Commission.⁸² This is also due to the defensive attitude adopted by parts of the Commission in their effort to safeguard the prerogatives and priorities of the institution in fields of EU external action.⁸³ A possible way to improve this *à droit constant* is to revitalize the Group of External Relations Commissioners under the chairmanship of the HR/VP and extend its membership to all Commissioners with a significant external dimension in their portfolio.⁸⁴ Internal coordination and cooperation among EU institutions in the field of external action is another area where the Treaties allow for much improvement from the current status. The multi-hatted HR/VP also has an instrumental role in this regard whereas the constructive attitude by the Commission and the Council is also a *sine qua non*.

If the area of internal coordination and cooperation has not been an indisputable success story of the new EU external action architecture, that of external representation has seen the most strife among EU institutions and Member States often at the expense of Union action abroad.⁸⁵ Although the Treaty framework codifying the external representation of the Union simplified the picture, it has been insufficient to help improve the status and effectiveness of the EU in international organizations and *fora*.

Most problems have occurred in the field of shared competences with regard to representation in multilateral *fora* and the particular case of negotiations of legally binding international instruments. This does not come as a surprise since in the field of exclusive competences the Commission has always represented the Union externally. In the field of shared competences, by contrast, the Treaties do not make any determination as to who represents the Union and the Member States externally, and on whose behalf in this field. In addition, the principle of pre-emption applies to this category of competences limiting the scope of Member States' competence to the extent that the EU has acted. Also, most of the external competences and internal competences with an external dimension are shared competences. In light of this, Member States push to maintain some role in external representation and opt for mixed agreements, primarily for two reasons. First, some Member States are afraid 'that if a disputable matter is once presented as on behalf of the EU, they would be excluded from exercising those shared competences in the

⁸² See Wouters et al. (2013a), p. 32; European Parliament, 2013 review of the organisation and functioning of the EEAS, *supra* n. 61, para 4; House of Lords, European Union Committee, Report: The EU's External Action Service, *supra* n. 60, para 24.

⁸³ See Wouters et al. (2013a), p. 32. Also Blockmans (2012).

⁸⁴ European Parliament, 2013 review of the organisation and functioning of the EEAS, *supra* n. 61, para 4; House of Lords, European Union Committee, Report: The EU's External Action Service, *supra* n. 60, para 4; Speech delivered by High Representative Catherine Ashton at Forum Nuova Economia, *supra* n. 61.

⁸⁵ See Corthaut and Van Eeckhoutte (2012), p. 155 where the authors suggest that '[t]he entry into force of the Lisbon Treaty triggered something close to a civil war between the institutions concerned in the field of EU external representation.'

future.⁸⁶ Secondly, Member States want to continue being visible internationally and to be able to have a decisive say in international negotiations. As already discussed, the European Court of Justice has tried to instill coherence in EU external action in this field by referring to the principles of sincere cooperation and unity in international representation.⁸⁷ Still, this case law has not precluded disagreements between the Commission and the Council, especially in the post-Lisbon era.

The external representation of the Union in multilateral *fora* has proven to be a contentious issue. The situation there can be yet more complicated since the EU can be only a full member in some of these organizations and instruments.⁸⁸ However, this discussion lies outside the ambit of our current analysis.

Perhaps this problem has most prominently manifested itself in the United Nations and, secondly, in the Organization for Security and Co-operation in Europe (OSCE). There, the United Kingdom blocked a significant number of EU statements until October 2011 in an ostensible attempt to safeguard its national competences in the field of shared competences.⁸⁹ This debacle had an impact on the external action of the Union, as acknowledged by the HR in a report to the Parliament in 2011.⁹⁰ Eventually, it was overcome due to the adoption in October 2011 of 'general arrangements' on EU statements in multilateral organisations.⁹¹ These arrangements represent a practical solution to the problem but once more just kick the can further down the road. The agreed *modus operandi* has been to indicate in the beginning of each statement on whose behalf this is made. Thus, for shared competences the preferred language will be 'on behalf of the EU and its Member States.' What is more the arrangements foresee that 'Member States agree on a case-by-case basis whether and how to co-ordinate and be represented externally,' and they can request the 'Member State holding the rotating Presidency of the Council' to represent them.⁹² The Commission immediately put on record its misgivings with regard to this last provision in a statement it made and asked to

⁸⁶ The Polish Institute of International Affairs, The EU external representation in the area of shared competences, January 2012, 7. See also Foreign & Commonwealth Office, Review of the Balance of Competences between the United Kingdom and the European Union: Foreign Policy, 22 July 2013, 40, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227437/2901086_Foreign_Policy_acc.pdf (accessed 27 August 2013).

⁸⁷ ECJ, Case C-246/07 *Commission v Sweden*, *supra* n. 53. See also Eeckhout (2011), pp. 241–255; Hillion (2010). Cf. also in this regard the always relevant analysis of Ehlermann (1983), pp. 4–9.

⁸⁸ For literature examining the status and representation arrangements of the EU in different international organisations in accordance with the founding instrument of each organisation, see Emerson et al. (2011) and Hoffmeister (2007).

⁸⁹ Vogel (2011) and Borger (2011).

⁹⁰ European External Action Service, Report by the High Representative to the European Parliament, the Council and the Commission, *supra* n. 81, point 17.

⁹¹ Council of the European Union. 'EU Statements in Multilateral Organisations—General Arrangements,' doc. 15901/11, 24 October 2011. For a commentary see Flaesch-Mougin (2013).

⁹² *Ibid.*

be entered in the minutes of the Council session endorsing the general arrangements. There the Commission underlined once more its view that 'regardless of the categories and areas of competence conferred upon the European Union,' the EU is not to be represented externally by a Member State.⁹³

It seems justified to submit that the aforementioned arrangements are not in line with the spirit of the Lisbon Treaty and the principle of unity of external representation and risk creating confusion for third countries regarding the allocation of competences within the EU.⁹⁴ A more permanent solution will have to be found eventually which needs to be closer to the aspirations of the Lisbon Treaty. However, it should not be too rigid as to prevent the EU and its Member States to use their combined 'political firepower' through separate statements in multilateral *fora*, only if and to the extent that this is deemed necessary to achieve a specific goal.⁹⁵

The negotiation of international agreements is another case where debacles arose in the post-Lisbon era with regard to representation. The legal and political arguments are not dissimilar from the ones analyzed above and the main disagreements have occurred with regard to shared competences. Thus, in the case of the negotiations on a legally binding instrument on mercury under the auspices of the United Nations, the Commission and the Council engaged in a *bras de fer* on the interpretation of the requirement for unity of representation in the field of international negotiations touching on shared competences.⁹⁶ The Commission insisted that it should be the negotiator on all Union competences, including shared ones, having to cooperate closely with Member States. On the contrary the Council based itself on Article 218(3) TFEU, opting for a negotiating team comprising of the Commission and the Presidency as a means to attain unity of representation. In other words, the Council treated shared competences upon which the Union has not acted as being of the same type as purely national competences. This is difficult to defend legally since EU principles and the EU external action architecture apply to shared competences but not to solely national ones. This proved unacceptable to the Commission, which withdrew its recommendation for a decision on the matter causing an unprecedented institutional crisis. Eventually a compromise was struck according to which the Commission will be the Union negotiator in areas where the Union has competence and has acted upon it. It will have to do so 'in consultation with a special committee of representatives of Member States, and in accordance with [specific] negotiating directives.' Lastly, there should be close cooperation

⁹³ Statement by the Commission to be entered into the minutes of the Council session endorsing the General Arrangements, Council of the European Union. 'EU Statements in Multilateral Organisations—General Arrangements,' *supra* n. 91.

⁹⁴ See further Ramopoulos and Odermann (2013), pp. 27–28.

⁹⁵ Wouters et al. (2013a), p. 80.

⁹⁶ For details of the debacle see Corthaut and Van Eeckhoutte (2012), pp. 145–170; De Baere (2011). Similar disagreements were observed with regard to the negotiation of the Arms Trade Treaty, see Foreign & Commonwealth Office 2013, 38–39.

between the Commission and the Member States throughout the negotiation while the Council can always revisit the negotiating directives.⁹⁷

Finally, it is worth discussing another opportunity offered by the text of the post-Lisbon Treaties to make external representation more coherent and unified. This is to be found in Article 138 TFEU regarding the external representation of the euro area. Realizing the different levels of integration within the EU in this area, the drafters of the Treaty provide in Article 138(1) that the Council 'shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent International Financial Institutions and Conferences' (IFICs). Article 138(2) further enables the unified representation of the euro area in IFICs. Euro area Member States are still far from having fully implemented the possibilities offered by this Article both due to internal political considerations and legal constraints imposed by the constituent instrument of some IFICs, such as the International Monetary Fund.⁹⁸ Thus, Member States once more prove more reluctant to instill coherence in EU external action than allowed for by the text of the Treaties.

The analysis above confirms our assertion that the Lisbon Treaty does not solve the most significant issues that impact on the coherence of EU external action. Rather, it offers EU external action players the framework and legal tools to achieve coherence. However, it also created the space for long brewing grievances and disagreements to surface. The Commission has tried to protect its 'realm.' Member States and the Council have fought back to safeguard sovereignty concerns. In-between, the new Head of EU diplomacy, the HR/VP, together with the EEAS have been trying to find their place in the system. By now, a *modus operandi* has been reached in most cases. Still, this does not always reflect the spirit, nor in some cases even the letter, of the Lisbon Treaty. The Treaties mandate much more coherence in EU external action through increased strategic and political leadership by the HR/VP, improved coordination and cooperation among EU institutions and Member States, unified external representation, and more engagement and commitment by the Member States.

9.5 Concluding Remarks

The Lisbon Treaty is the outcome of a long gestation process that started with extraordinary ambitions but was stunned by political constraints. Instilling coherence in EU external action has been one of the major and most visible goals of this reform. In order to do so, the drafters of the Treaty attempted to integrate the

⁹⁷ Council Decision on the participation of the Union in negotiations on a legally binding instrument on mercury further to Decision 25/5 of the Governing Council of the United Nations Environment Programme (UNEP), doc. 16632/10, 6 December 2010.

⁹⁸ For further analysis see Wouters et al. (2013b).

different aspects of EU external action. Their effort was only partly successful, allowing for an improved coherence, effectiveness and continuity in EU external action if the EU institutions and Member States manage to garner the political will.

It proved impossible to overcome in the Treaties the legal and procedural duality between CFSP and other external competences and internal competences with an external dimension. In addition, the Lisbon Treaty does not offer definitive answers to important legal questions in this field. Thus, it is unclear whether the unique nature of CFSP competence means that CFSP acts enjoy no primacy and direct effect over national law. Academics are divided on this whereas the Court of Justice is excluded from pronouncing itself on it. At the same time in light of the unified list of objectives in EU external action and the new Article 40 TEU that accords CFSP and other legal bases equal protection by putting them on an equal level, it is unclear what the scope of CFSP is. These changes also raise questions regarding the possibility to have dual legal bases for EU acts, one of them being CFSP. Lastly, the new institutional architecture has generated a renewed battle over coordination and cooperation as well as the external representation of the Union especially in the field of shared competences in multilateral organizations and *fora*. This disagreement escalated further with regard to negotiations of international agreements.

However, the Lisbon Treaty has also equipped the Union and its Member States with the tools to find solutions to most of these problems. The unified list of principles and objectives of external action serves as a constant reminder of the Treaty's endeavors to instill coherence in EU external action. This coherence can best be achieved through the HR/VP and the EEAS, which are expected to bring together every actor and policy in EU external relations. The HR/VP should provide strategic and political leadership (which does not exclude having recourse to political deputies). Furthermore, most of the legal problems in EU external action can be tackled through the application of existing principles of EU law, in particular those of sincere cooperation and of unity in the international representation. With regard to representation in multilateral *fora* and in negotiations for international agreements in areas of shared competence, the reading of the Treaties should lead to a unified representation. This does not impact on the internal allocation of competences as feared by some Member States. In sum, a creative use of the current constitutional design of EU external action can prove helpful in addressing the current challenges to the Union's international representation. Naturally, though, most of these solutions also rest on the political will of the actors involved.

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13. The external action of the European Union under the Treaty of Lisbon

Urfan Khaliq

1. INTRODUCTION

The European Union's external action has long been perceived simultaneously as a source of strength and of weakness. In foreign policy terms the potential of the collective action of these particular 27 Member States is a powerful one. More often than not, however, the potential contrasts starkly with the reality. The Union is routinely lamented for the paucity of its foreign policy action; one need only look at the reaction to the Union's 'interventions' in the 'Arab Spring' uprisings of early 2011 to get a flavour of the venom from many quarters which is vented at the inadequacy of Union foreign policy. It is argued in this chapter that the gap between the 'expectations' of the Union and its 'capabilities' is no longer as great as it once was, but that gap is still a sizeable one.¹ This 'gap' is examined in light of the objectives set out in the Laeken Declaration² and the changes subsequently made by the Lisbon Treaty³ to the Union's structures and institutions. The discussion, in particular, examines the role of the High Representative of the European Union for Foreign Affairs and Security Policy (High Representative) and the President of the European Council, and the establishment of the new European External Action Service (EEAS).

¹ I am here using the terminology of Hill, C. (1993), 'The Capability-Expectations Gap, or Conceptualizing Europe's International Role', *Journal of Common Market Studies*, 31 (3), 305-328.

² Presidency Conclusions, European Council Meeting, Laeken 14 and 15 December 2001, (2001) 12 *Bulletin of the European Union*, Annex 1.

³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C306/1, 17 December 2007.

2. THE UNION, FOREIGN POLICY, LAEKEN AND THE CONSTITUTIONAL TREATY

As is well known, the Common Foreign and Security Policy (CFSP) of the Union had been preceded by European Political Cooperation (EPC).⁴ EPC for all its shortcomings, showed that the (then) Community's nine (later 12) Member States occasionally could issue detailed statements setting out their position on matters or events in third States which were of mutual concern. These statements were precisely that, non-binding declarations setting out a common position, but such views were of no direct legal effect and usually had little reference to legal obligations.⁵ The end of the Cold War, the consequential rise of the USA as a hegemonic power that was willing to act unilaterally if need be and the disintegration of the former Yugoslavia simultaneously posed challenges as well as providing opportunities for the Union's international presence. On the one hand, the Balkans were, and still are, an issue in the Union's 'neighbourhood' and even allowing for the NATO-led interventions, the Union was one of the primary actors seeking to contain the repercussions of the conflicts which had erupted. On the other hand, the demise of the Soviet Union meant that 'Europeans' could realistically again seek to assert their identity on the international scene.⁶ The Union's Member States felt that it was appropriate to offer an alternative vision and model to that propagated by the United States of America. The TEU set out the Union's objectives of a foreign policy which was to have a 'normative dimension' to it.⁷ With regard to setting out an alternative vision to that of the USA, the Union has

⁴ The EPC was established further to the *Davignon Report* (Luxembourg, 27 October 1970) (1970), *Bulletin of the European Communities*, 11, 9–14 and in light of the (then) pending first enlargement. See, in particular, Part Two of the *Davignon Report*. The EPC was incorporated into the Community structure by Article 30 of the Single European Act, 1986, OJ L169/1, 29 June 1987. See further Article 30 (2) of the SEA which highlights the different nature of this cooperation.

⁵ Such statements cannot be considered to amount to unilateral statements for the purposes of customary international law.

⁶ See Article 2 TEU.

⁷ See Manners, I. (2002), 'Normative Power Europe: A Contradiction in Terms?', *Journal of Common Market Studies*, 40 (2), 235–285; Sonia Lucarelli and Ian Manners (eds) (2006), *Values and Principles in European Union Foreign Policy*, London: Routledge; Cavatorta, F. and M. Pace (2010), 'The Normative Turn in European Union (EU)–Middle East and North Africa (MENA) Relations: An Introduction', *European Foreign Affairs Review*, 15 (5) 581–587; and Nunes, I. (2011), 'Civilian, Normative and Ethical Power Europe: Role, Claims and EU Discourse', *European Foreign Affairs Review*, 16 (1), 1–20.

sought to constrain its influence and to maintain a balance of power through attracting others to its way of thinking as opposed to coercing them.⁸

The establishment of the CFSP 'pillar' in the TEU and the use of the CFSP 'method', as opposed to the Community one, highlighted perfectly that the Member States were intent on maintaining control over foreign policy matters but, at the same time, also sought the comfort of collective action, both where it was possible and where interests coincided. The CFSP in introducing a clearer legal framework to the Union's foreign policy also ensured that Community competence was respected, in particular, but not solely, where trade restrictions against third States were involved.⁹

Foreign policy formulation is a central aspect of a nation state's prerogatives and an inherently complex and difficult policy area with competing priorities and objectives. In the Union structure, differing types of Community competence in various areas which could not be encroached upon, as well as the clear desire of the Member States, ensured that the Union's common, as opposed to single, foreign policy was always subservient to the wishes of the Council. While there were some positive achievements, the various perspectives of the Member States meant that, notwithstanding the inherent limitation of trying to influence the behaviour of third States, any action was rarely as effective as it could have been.

The Laeken Declaration adopted almost exactly ten years after the TEU had been signed by the Heads of State and the CFSP formalized, set out the context for the European Council's perception of the external challenges then facing the Union. It notes:

Beyond its borders ... the European Union is confronted with a fast-changing, globalized world ... The eleventh of September has brought a rude awakening ... Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples? ... Europe needs to shoulder its responsibilities in the governance of globalisation. ... In short, a power wanting to change the course of world affairs in such a way as to benefit not just the rich countries but also the poorest.¹⁰

⁸ See Nye, Joseph (2004), *Soft Power: The Means to Success in World Politics*, New York: Public Affairs.

⁹ See Articles 60 and 310 TEC and Article 47 TEU as they were. The divisions between CFSP and the Community 'pillars' were never likely to be water tight and this has been proved on a number of occasions before the ECJ. For example see, Case C-91/05, *Commission v Council* [2008] E.C.R. I-3651 (the *ECOWAS* case).

¹⁰ Presidency Conclusions, European Council Meeting, Laeken 14 and 15 December 2001, (2001), *Bulletin of the European Union*, 12, Annex 1, Part I.

The lofty rhetoric was hardly surprising, but setting out such a role for the Union was going to require change to the Union's foreign relations actors and procedures. The Member States could not credibly, on the one hand, make such statements, but, on the other, not be willing to make some of the wholesale changes needed to give effect to the roles and functions they had identified for the Union.

As is well known, the Convention on the Future of the European Union set out various recommendations which were more or less reflected in the failed Constitutional Treaty.¹¹ Although the precise reasons for the rejection of the Constitutional Treaty in the Dutch and French referenda are difficult to discern, foreign policy cooperation certainly does not seem to have featured highly, if at all, among them.¹² The Constitutional Treaty sought to grant the Union express legal personality,¹³ 'merge' the pillars,¹⁴ enhance consistency between all the different areas of Union (and formerly Community) external competencies,¹⁵ create a Union Minister for Foreign Affairs¹⁶ and establish a European External Action Service.¹⁷ The Lisbon Treaty continues with these developments although there has been a degree of mutation. The discussion in the next section seeks to set out the Lisbon reforms with regard to foreign policy more generally before the final substantive sections analyse the posts and bodies which have been created.

¹¹ Treaty Establishing a Constitution for Europe, OJ C 310/1, 16 December 2004.

¹² For analysis of the referenda outcomes see the Symposium in (2006), *Political Science and Politics*, 39 (2), 237–272.

¹³ Article I-7, Constitutional Treaty.

¹⁴ Although the CFSP mostly retained its distinct procedures and remained outside of the ambit of the Court's powers of review, see Article III-376(1) Constitutional Treaty.

¹⁵ Part III, Title V, Constitutional Treaty.

¹⁶ Article I-28, Constitutional Treaty.

¹⁷ Article III-296(3). The final provisions in the Constitutional Treaty are less far-reaching than some of the proposals which were put forward in the Convention process. See, for example, the documentation from Working Group VII, External Action, available at: http://european-convention.eu.int/doc_register.asp?MAX=1&LANG=EN&Content=WGVII (accessed 12 February 2011).

3. THE LISBON FOREIGN POLICY ARCHITECTURE¹⁸

Although under the Lisbon Treaty settlement there is no one consolidated treaty which sets out all the external relations powers and objectives of the Union, the DNA of the Constitutional Treaty is clear to see. Despite all the rhetoric at Laeken, it was clear at the time that the Lisbon Treaty was adopted that the European Council had been chastised by the Dutch and French electorates and had also scaled back its ambition as to the Union's role in global affairs. In the December 2007 Brussels European Council, the Presidency Conclusions reflected this more limited ambition. They in part noted:

... even the enlarged Union cannot act alone. We must engage our international partners in enhanced strategic cooperation and work together within stronger multilateral organisations. The Lisbon Treaty, in setting a reformed and lasting institutional framework improves our capacity to fulfil our responsibilities, respecting the core principles enshrined in the Berlin declaration. *It will bring increased consistency to our external action.*¹⁹

Laeken was about much more than just consistency in external action. While the Presidency Conclusions noted above reflect toned down expectations, with the requisite political will the Lisbon Treaty amendments do provide legal and institutional tools which could significantly improve the coherence of external action and in turn the Union's ability to assert itself globally. The Union now has express legal personality.²⁰ The previous lack of explicit reference to Union, as opposed to Community, personality had led to significant academic discussion but had not caused any real problems

¹⁸ For a more detailed overview see Wouters, Jan, Dominic Coppens and Bart De Meester (2008), 'The European Union's External Relations after the Lisbon Treaty', in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty – EU Constitutionalism Without a Constitutional Treaty?*, Vienna: Springer, pp. 143–203; Koutrakos, P. (2008), 'Primary Law and Policy in EU External Relations: Moving Away from the Big Picture', *European Law Review*, 31 (5), 666–686 and Craig, Paul (2011) *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford: Oxford University Press, pp. 379 et seq.

¹⁹ European Council, Brussels, 14 December 2007. EU Document No. 16616/1/07 REV 1, Presidency Conclusions, Annex: EU Declaration on Globalisation, para. 2. Emphasis added. The Brussels European Council met one day after the Lisbon Treaty was signed on 13 December 2007.

²⁰ Article 47 TEU.

in practice.²¹ With regard to the absence of 'pillars', it is also much as it was in the Constitutional Treaty, which in practical terms is not saying that much.²² The CFSP is still, as one would expect, about intergovernmental cooperation and thus retains its own procedures and has not been absorbed by the former Community 'pillar'.²³ The CFSP is to be 'defined and implemented by the European Council and the Council acting unanimously, unless the Treaties provide otherwise'.²⁴ It was previously possible under Article 23 TEU for States to abstain but for the decision still to bind the Union, and, subject to some tinkering, this is still more or less the case now.²⁵ The adoption of legislative acts is also prohibited in CFSP. CFSP is to be conducted by defining general guidelines or adopting decisions defining any 'action' or 'positions' to be undertaken by the Union.²⁶ These decisions which are to be adopted by the Council, are not only limited to the CFSP. Article 22 (1) TEU notes that the decisions of the European Council on the strategic interests and objectives of the Union 'shall relate to the common foreign and security policy and to other areas of the external action of the Union'.²⁷ Where the exact boundary lies between those areas which are part of the CFSP, on the one hand, and, on the other, Union external relations in all its other guises, will occasionally be difficult. The involvement of the European Council can ensure greater consistency in Union external relations as a whole but will also entail that the Member States have a greater say in the identification of interests and the implementation of objectives.

The European Court of Justice still does not have jurisdiction over CFSP measures, although the Court can theoretically police the boundaries

²¹ The European Community's legal personality has mutated or evolved to become Union personality. The European Atomic Energy Community (EURATOM), retains its own separate personality. See Article 184, EURATOM, OJ C 84/1, 30 March 2010.

²² See Cremona, M. (2003), 'The Draft Constitutional Treaty: External Relations and External Action', *Common Market Law Review*, 40 (6), 1347–1366 and Piri, Jean-Claude (2006), *The Constitution for Europe: A Legal Analysis*, Cambridge: Cambridge University Press, pp. 62 et seq.

²³ It has been stated that this is because it was 'important conceptually' to the UK. See Wouters, Coppens and De Meester, 'The European Union's External Relations after the Lisbon Treaty', *supra*, fn. 18, pp. 143–203 at p. 146.

²⁴ Article 24 TEU pre-Lisbon.

²⁵ See Article 31 (1) TEU. Article 31 contains the exceptions to the unanimity rule for CFSP. The others relate to the European Security and Defence Policy (ESDP) and the setting up of ESDP structures. See Articles 41, 45 and 46 TEU.

²⁶ Article 25 TEU.

²⁷ Emphasis added.

between TFEU competence and CFSP under Article 40 TEU.²⁸ Article 40 TEU as it is now differs from Article 47 TEU as it was prior to the Lisbon amendments, in that it states that neither the CFSP or TFEU are to affect the operation of the other. In Article 47 TEU it was clear that nothing in the TEU was to 'affect' the Community treaties establishing the European Communities. The ECJ in *ECOWAS* had made it clear that where the objectives of an action were inextricably linked to both the CFSP and EC and neither objective was superior to the other, then Community powers alone must be utilized.²⁹ A dual legal base which crossed pillars in such circumstances was not acceptable and the exercise of Community powers took precedence.³⁰ Article 40 TEU now makes it clear that neither CFSP nor the TFEU must affect the other. If this is read in conjunction with Articles 1 of both the TFEU and TEU, where it is noted that the 'two Treaties shall have the same legal force', then it is clear that the previous Community priority rule no longer exists. For the Union as a sole legal person this makes perfect sense and it should also follow that a TFEU and TEU joint legal base could now be acceptable to the Court.

The TEU in Article 2 (5) now sets out the Union's objectives vis-à-vis relations with the wider world and notes that:

... the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Although the provision itself is new, the objectives are not and almost all were present in one form or another in the TEU and TEC prior to the Lisbon amendments.³¹ It is Title V of the TEU where the crux of the Union's external relations powers are now concentrated. Article 21 TEU which elaborates upon the Union's objectives as set out in Article 2, in its final paragraph reads:

²⁸ Article 24 TEU.

²⁹ Case C-91/05, *Commission v Council* [2008] E.C.R.-3651 paras 67–68, 71–72, 75–77 and 108–109.

³⁰ *Ibid.*, para. 77.

³¹ The objectives set out in Article 2 (5) TEU are further elaborated upon in Article 21, TEU. Again the objectives referred to were all present prior to the Lisbon amendments.

3. The Union shall respect the principles and *pursue* the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies. *The Union shall ensure consistency between the different areas of its external action and between these and its other policies.* The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.³²

The issues of consistency and also coherence, which is broader and the term used in other language versions of the Treaty, are crucial. The incoherence of Union foreign policy has long been an issue.³³ Although Article 3 (2) TEU prior to the Lisbon amendments stated that the 'Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies', there was little joined up thinking between different policy areas. The different Directorates-General of the Commission specialized in their areas of competence and pursued their policy objectives with little regard for other fields of Community activity. The classic example is the inconsistency between the approaches to trade, on the one hand, and, on the other, to development cooperation with third States.³⁴ Article 7 TFEU stresses that the 'Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'.³⁵ Even when this provision is read in conjunction with Article 21 (2) TEU, or any other provision in the Treaties, it is clear that as before there is no hierarchy between policy areas. With regard to consistency, it is the role of the High Representative of the Union to assist the Council and the Commission to that effect. It should be noted that consistency applies not only between the different areas of external relations but also between external relations and 'other policies'. This principle if fully respected would go quite some way to addressing one of the key

³² Emphasis added.

³³ See Cremona, M. (2008), 'Coherence Through Law: What Difference Will the Treaty of Lisbon Make?', *Hamburg Journal of Social Sciences*, 3 (1), 11–36 and Hillion, Christophe (2008), 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union', in Marise Cremona (ed.), *Developments in EU External Relations Law*, Oxford: Oxford University Press, pp. 10–36.

³⁴ For detailed discussion see Khaliq, Urfan (2008), *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal*, Cambridge: Cambridge University Press, pp. 108 et seq.

³⁵ Emphasis added.

criticisms of the Union vis-à-vis external action, that is of its 'double-standards' and the role of political expediency in how it treats third States differently, depending on the political, security, economic and other interests of the Member States.³⁶ On the basis of historical experience, the prospects for consistency between third States, and in behaviour internally and externally, are not promising. Consistency of action is now, however, a part of the equation in any action carried out by the Union. As the President of the European Council, the High Representative, and the External Action Service are some of the key external relations developments in the Lisbon Treaty the discussion now turns to them in detail.

4. THE PRESIDENT OF THE EUROPEAN COUNCIL

The President of the European Council is perhaps not the most obvious of the offices or bodies established by the Lisbon Treaty to be discussed in an analysis of the Union's external action. However, the President has an important role to play in such matters. This is because disputes over who would exercise executive power were the most divisive issue in the entire negotiating process.³⁷ The central contention was where executive power would be exercised, and the creation of the posts of the President of the European Council and the High Representative, and the relationship between them, illustrate some of those tensions. The eventual appointment of the former Belgian Prime Minister Herman Van Rompuy as the President of the European Council and Baroness Catherine Ashton as the High Representative with effect from 1 December 2009 reflect clearly the different objectives and perspectives of the various protagonists.³⁸

Article 15 TEU establishes that the European Council shall elect a President and his or her functions are to: chair it and drive forward its

³⁶ See Williams, Andrew (2004), *EU Human Rights Policies: A Study in Irony*, Oxford: Oxford University Press, *passim* and Khaliq, *Ethical Dimensions*, *supra*, fn. 34, *passim*.

³⁷ For detailed discussion see Craig, *The Lisbon Treaty*, *supra*, fn. 18, pp. 78 et seq.

³⁸ European Council Decision 2009/879/EU of 1 December 2009 Electing the President of the European Council, OJ L 315/48 2 December 2009 and European Council Decision 2009/880/EU, Taken with the Agreement of the President of the Commission of 1 December 2009 Appointing the High Representative of the Union for Foreign Affairs and Security, OJ L 315/49, 2 December 2009. For discussion of the different views of the Member States and Commission see Piris, Jean-Claude, (2010) *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press, pp. 206 et seq.

work; ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, on the basis of the work of the General Affairs Council; and facilitate cohesion and consensus within the European Council. In addition to the Heads of State and the President of the Commission, the European Council is to consist of the President of the Council, and the High Representative shall also take part in its work. Furthermore, the President of the European Council shall, 'ensure the external representation of the Union on issues concerning its common foreign and security policy' but this is to be 'without prejudice to the powers of the High Representative'.

Article 16 TEU further muddies the demarcation of external action powers as it stipulates that the General Affairs Council shall ensure consistency in the work of the different Council configurations and that the Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent. This assumes that there is a clear demarcation between foreign and other areas policy areas, there is not. For those matters deemed to be foreign affairs proper, the Council will be chaired by the High Representative but all other Presidency of Council configurations are held by Member State representatives in the Council, which still rotates on a six-monthly basis.

These arrangements are noteworthy in three key respects. First, the President of the European Council has substantial influence over the work of the Foreign Affairs Council (chaired by the High Representative) as the latter must work within the scope of the guidelines established by the European Council. The High Representative does not from the wording of Article 15 appear to have voting rights in the European Council which is chaired by the President. The role of the High Representative is thus one of persuasion. Second, the President of the European Council has a role in the external representation of the Union and with regard to the CFSP. Although this is to be 'without prejudice to the powers of the High Representative' that does not mean a great deal in practice. The TEU is clear that the President of the European Council can represent the Union on the global stage and provide an alternative voice to that of the High Representative. The practice of the President of the Council has been to issue his own communiqués on events in third States alongside those issued by the President of the Commission and the High Representative, and further to attend certain summits with third countries. The President is, broadly speaking, in a stronger position than the High Representative to influence the Member States in European Council meetings as to the direction CFSP should take. This is especially the case when it is also considered that the High Representative does not have new instruments to

avail herself of in the CFSP in pursuing identified tasks. Finally, the Member State holding the Presidency of the Council (and the preceding and subsequent holder) can still influence external relations as they arise within the context of, for example, the General Affairs Council. What these arrangements actually accentuate is that the Member States, through the creation of the post of the President of the European Council, have clearly sought to ensure that they retain ultimate control over executive power vis-à-vis external action. This conclusion becomes even more inescapable in the discussion that follows.

5. THE HIGH REPRESENTATIVE

Catherine Ashton upon taking office became the first 'High Representative of the European Union for Foreign Affairs and Security Policy'. The title of Minister has been lost to the post in the transition from Constitutional Treaty to Lisbon Reform Treaty, and there is little doubt that although symbolic the use of the term 'minister' was too politically sensitive for some.³⁹ As with the other Lisbon external changes discussed above, while there have been changes from the Constitutional Treaty, they are not significant in substantive terms. The role of what has been referred to as 'the bridge builder' between the Union's external actions has more or less survived intact.⁴⁰ This discussion will initially examine the functions of the High Representative before examining aspects of the practice so far.

The role and duties of the High Representative are without any shadow of a doubt demanding. Javier Solana, who under the pre-Lisbon settlement was the Union's High Representative for the CFSP and who occupied one of the three offices which Baroness Ashton has now assumed within her responsibilities, is known to have routinely worked for over 100 hours a week during his tenure.⁴¹ Baroness Ashton is also a Vice-President of the

³⁹ Article I-28, Constitutional Treaty. See Piris, *The Lisbon Treaty*, *supra*, fn. 38, p. 243. Wouters, Coppens and De Meester, 'The European Union's External Relations After the Lisbon Treaty', *supra*, fn. 18, p. 150 state that the nomenclature 'minister' was dropped at the insistence of the United Kingdom who opposed the title but not the functions of the post.

⁴⁰ Wouters, Coppens and De Meester, 'The European Union's External Relations After the Lisbon Treaty', *supra*, fn. 18, p. 150.

⁴¹ See Brady, Hugo and Natividad Sola, 'Building a European External Action Service: a Difficult Birth?', in Elvire Fabry and Gaëtane Ricard-Nihoul (eds), *Think Global - Act European*, Paris, pp. 158-163, available at: <http://www.ceps.eu/book/think-global-%E2%80%93-act-european> (accessed 1 March 2011). Solana, who was High Representative for the Common, Foreign and Security Policy from

Commission and Commissioner responsible for external relations, one of the most important and demanding of the Commission portfolios.⁴² In the past this particular post has been held with distinction by, among others, Chris Patten. Patten and Solana had different but complementary roles, although there was also some overlap. Baroness Ashton as the High Representative also has another role which was occupied under the previous system by a third individual, that of the President of the External Relations Council.⁴³ As Piris notes, this is actually a 'triple-hatted' office as opposed to the 'double-hatted' one routinely described.⁴⁴

There is clearly logic in concentrating the three portfolios identified in the hands of one individual in order to try and ensure consistency between some of the different externally oriented parts of the Union, as well as to ensure continuity in personnel both institutionally within the Union and in the Union's relations with third States. While as 'External Relations Commissioner' that role is within Baroness Ashton's portfolio, it should not be forgotten that four other Commissioners have primarily an external relations dimension to their portfolio: Trade; Development; Enlargement and Neighbourhood Policy; and International Cooperation, Humanitarian Aid and Crisis Response.⁴⁵ Coordinating the work of these Commissioners and their Directorates-General and ensuring all relevant policies are coherent is not at all straightforward.⁴⁶ The High Representative has no legal

October 1999 to December 2009, was simultaneously the Secretary-General of the Council. See ex-Articles 18 and 26 TEU. Baroness Ashton by contrast has been criticized for her lack of work and absence from, in particular, Commission meetings, see Waterfield, B. (2011), 'Absent Baroness Ashton Leaves Britain Without a Voice', *The Daily Telegraph*, 5 January 2011.

⁴² Articles 17 (4) and 18 (4) TEU. Since the European External Action Service has been set up there is no Directorate-General of External Relations as such. See the discussion *infra*.

⁴³ See Article 18 (3) TEU.

⁴⁴ Piris, *The Lisbon Treaty*, *supra*, fn. 38, p. 245.

⁴⁵ It is further the case that the Commissioners for Climate Action, Energy, Home Affairs and Maritime Affairs and Fisheries will have substantial external relations aspects to their work. The Treaty is opaque as to whether these other areas come within the functions of the High Representative or not. It is worth noting that when Baroness Ashton is unable to attend a European Parliamentary meeting one of the three Commissioners mentioned above – Development, Enlargement and Neighbourhood Policy, or International Cooperation, Humanitarian Aid and Crisis Response – will deputize but this does not apply to CFSP matters where she will be replaced by a foreign minister with a Council mandate.

⁴⁶ For discussion of aspects of the policy incoherence in foreign policy see, Khaliq, *Ethical Dimensions*, *supra*, fn. 34, pp. 103–186.

power to impose coherence and to force a change of approach, it is again a diplomatic undertaking.

The arduous nature of the various roles assigned to the High Representative is more than apparent. Working through the provisions of the TEU (and where relevant the TFEU) it is possible to identify 13 distinct treaty-based tasks assigned to the current High Representative.⁴⁷ They include but are not limited to: conducting the CFSP;⁴⁸ ensuring the consistency of the Union's entire external action and not just the CFSP;⁴⁹ ensuring with the Council the unity, consistency and effectiveness of action by the Union in CFSP;⁵⁰ being the 'face' and 'voice' of the Union in other international organizations, conferences and where the Union has a defined position presenting the Union's position in the Security Council of the United Nations;⁵¹ negotiating on behalf of the Union international agreements which relate at least principally to CFSP;⁵² and exercising authority over the European External Action Service.⁵³

Carrying out these tasks effectively and efficiently requires, among other qualities, skill, charm, personal charisma and diplomatic nous, not to mention extraordinary amounts of energy as well as the ability to appoint able deputies. Under the Lisbon arrangements the different 'hats' being worn simultaneously mean that new considerations have entered the equation and will affect the dynamics of decision-making. There are, as noted above, potential conflicts between the role of the High Representative and the President of the European Council. Further, there are significant tensions in different areas between, for example, Council and Commission, Commission and the Member States and between policy areas.⁵⁴ The multiple-hatting of the High Representative may seek to transcend these latter tensions, but equally it can be seen to be about the Member States retaining, if not increasing, control over all aspects of external relations.⁵⁵

⁴⁷ For a full list see Piris, *The Lisbon Treaty*, *supra*, fn. 38, pp. 246–247.

⁴⁸ Article 18 (2) TEU.

⁴⁹ Article 18 (4) TEU.

⁵⁰ Article 26 (2) TEU.

⁵¹ Articles 27 (2) and 34 (2) TEU.

⁵² Article 281 (3) TFEU.

⁵³ Article 27 (3) TEU.

⁵⁴ For discussion of the different relationships the High Representative has with the Council, Commission, European Parliament, European Council and Member States, see Kaddous, Christine, 'Role and Position of the High Representative of the Union for Foreign Affairs and Security Policy Under the Lisbon Treaty', in Griller and Ziller, *The Lisbon Treaty*, *supra*, fn. 18, pp. 205–222.

⁵⁵ This potentially includes areas of exclusive competence as the Commission will have to consider whether the approach it wishes to adopt in trade talks, for

The High Representative conducts the Union's CFSP and CSDP which 'he shall carry out as mandated by the Council'.⁵⁶ Although different procedural hats are to be worn, for example in Commission meetings Baroness Ashton is present in her capacity as a Vice-President of the Commission, her input in that forum cannot be divorced from her being the High Representative. The last sentence of Article 18 (4) TEU makes this clear. Any fleeting thoughts that the High Representative as Commission Vice-President would introduce the 'Community method' to the CFSP were put to bed by the Member States in Declarations 13 and 14 attached to the Treaty.⁵⁷ The first paragraph of Declaration 13, for example, notes:

[t]he Conference underlines that the provisions in the Treaty on European Union covering the Common Foreign and Security Policy ... do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations.

Considering the potential significance and difficulty of the role, Baroness Ashton was an interesting choice for the High Representative. As someone with no obvious international diplomatic experience or a high international profile, she was clearly appointed with a view to other considerations. With a more limited mandate, Solana had earlier provided the Union with an international presence and an identifiable figure. He had previously enjoyed an international profile in Europe and more widely as a Spanish Foreign Minister and the Secretary-General of NATO. With his skill, drive and energy he incrementally carved out an important niche for himself in the Union.⁵⁸ Baroness Ashton by contrast was hardly well known within her own political party in the United Kingdom, let alone by the general public.

example, is consistent with other aspects of external relations as primarily defined by the Council and Member States.

⁵⁶ Article 18 (4) TEU. Emphasis added. See ex-Article 26 TEU. The English language version of the Treaty refers only to the masculine.

⁵⁷ Declaration Concerning the Common Foreign and Security Policy (Declaration No. 13) and Declaration Concerning the Common Foreign and Security Policy (Declaration No. 14) OJ C305/255, 17 December 2007.

⁵⁸ There is little doubt that Solana increased his authority incrementally. See Sir Brian Crowe, former Director-General for External and Politico-Military Affairs, EU Council of Ministers, at paras 177–183 of his 1993 interview in British Diplomatic Oral History, transcript available in Churchill College, Cambridge and online at: <http://www.chu.cam.ac.uk/archives/collections/BDOHP/Crowe.pdf>, cited by Denza, Eileen (2012), 'The Role of the High Representative of the Union for Foreign Affairs and Security Policy', in Hermann-Josef Blanke and Stelio Mangiameli (eds) *The European Union after Lisbon*, Vienna: Springer, pp. 481–493, p. 482.

The selection of Baroness Ashton was treated with derision in many quarters (alongside the choice of Herman Van Rompuy as the President of the European Council) and her performance has been constantly subject to vitriolic attacks from all sides.⁵⁹ It should not be ignored that while the Treaty does set out some of the functions of the High Representative there is no detail on key issues such as the establishment of the EEAS; the Treaty left a blank page which is both an advantage, but, in the formative period, a substantial hindrance. The EEAS had to be established further to negotiation with the myriad of vested interests in the Union and that was always going to be contentious and determined by the political will of the various actors.⁶⁰

What also seems to be overlooked as far as Baroness Ashton is concerned is that the creation of the post of High Representative was never supposed to lead to the Union speaking with one voice. Here expectations far exceed reality. It is untenable to expect the Member States at this point of integration to give up their prerogative to speak and act unilaterally on foreign policy matters. The Member States simply will not do so and as the Union expands further, this becomes even less likely.⁶¹ The alleged request from Henry Kissinger for a single telephone number to call when 'Europe's' point of view is needed has been a poisoned chalice. It is simply unachievable with a polity composed of nation states. It is questionable whether there is a 'single number' to call for any democratic liberal State let alone a continent. A key function of the High Representative is to ensure that there are less competing voices on foreign policy matters, not a single voice; which in any case does not correspond to a 'common' policy. Both the Treaty provisions and the appointment of Baroness Ashton reinforce the view that the post-Lisbon High Representative of the European Union for Foreign Affairs and Security, like the pre-Lisbon High Representative for the Common, Foreign and Security Policy, is in post not to compete with

⁵⁹ For an account of some of the criticisms levelled at Baroness Ashton see the discussion in Denza, 'The Role of the High Representative', *supra*, fn. 58. Herman Van Rompuy has, on the whole, been subject to less scathing public criticism since his appointment.

⁶⁰ See the discussion *infra* in Section 6.

⁶¹ The approach adopted by the French, to the dismay of some other Member States, over events in Libya in Spring 2011 is a good example. On 10 March 2011 the French unilaterally recognized the rebels in Benghazi as the legitimate government of Libya. See Rettman, A. (2011), 'France Alienates Fellow EU Countries on Libya', *EUobserver*, 10 March 2011, available at: <http://euobserver.com/9/31961/?rk=1> (accessed 10 March 2011). Acts such as the recognition of other governments or States are an inherent part of the sovereign powers of an existing State.

the Member States but to act as another of *their* representatives.⁶² The primary function of the High Representative is to try to ensure consistency in the Union's external actions as a whole. To that end it was crucial that the European External Action Service was successfully set up and it is to this new body that the discussion now turns.

6. THE EUROPEAN EXTERNAL ACTION SERVICE⁶³

The establishment of the European External Action Service (EEAS) is widely regarded as one of the more significant innovations introduced in the sphere of the Union's external action by the Lisbon Treaty.⁶⁴ First specified in Article III-296 of the Constitutional Treaty, the establishment of the EEAS has involved a painful and contentious gestation. The reference in the Constitutional Treaty led to early efforts and political manoeuvring to try and shape the service in the mould desired by the different political actors. Javier Solana and José Manuel Barroso as the High Representative and President of the Commission respectively, in a 2005 joint report to the Council set out that the EEAS should be *sui generis* and not an institution but a 'service', with links to but separate from the Commission and Council.⁶⁵ This basic vision of the EEAS has remained constant among the Member States and Council, notwithstanding the

⁶² Cf. Gardner, Anthony and Stuart Eizenstat (2010), 'New Treaty, New Influence? Europe's Chance to Punch its Weight', *Foreign Affairs*, 89 (2), 104–119, at 110.

⁶³ More generally see: Crowe, Brian (2008), *The European External Action Service: Roadmap for Success*, London: RIIA; Duke, S. (2009), 'Providing for European-level Diplomacy After Lisbon: The Case of the European External Action Service', *The Hague Journal of Diplomacy*, 4, 211–233; Vanhoonaeker, S. and N. Reslow (2010), 'The European External Action Service: Living Forward by Understanding Backwards', *European Foreign Affairs Review*, 15 (1), 1–19; Duke, S. (2008), 'The European Commission: Inside and Out. Administering EU Foreign Policy After Lisbon: The Case of the EEAS', EIPA Working Paper 2008/W/01; Hillion, C. and M. Lefebvre (2010), 'The European External Action Service: Towards a Common Diplomacy', *Foundation Robert Schuman/European Issue*, 184, 25 October 2010; and van Vooren, B. (2011), 'A Legal-Institutional Perspective on the European External Action Service', *Common Market Law Review*, 48, 475–502.

⁶⁴ See Council Conclusions, 26 April 2010, EU Doc., 8967/19 p. 8.

⁶⁵ Progress Report to the European Council, On European External Action Service, EU Doc., 9956/05 9 June 2005, para. 6. Also see Declaration on Article 27 of the Treaty on European Union, (Declaration No. 15) OJ C305/255, 17 December 2007 where the Member States stipulated that preparatory work on the EEAS should commence as soon as the Treaty of Lisbon had been signed.

efforts of the European Parliament to ensure it was set up within the administrative and budgetary remit of the Commission.

The legal basis for the EEAS is Article 27 (3) TEU. The lack of detail in that provision makes it obvious that establishing the Service would involve a struggle between different Union actors and that the Member States while drafting the Treaty had left the exact details to be resolved for a later point in time. The vagueness of Article 27 (3) TEU is advantageous in that it allows pragmatic arrangements to be established or to evolve, either informally or through the adoption of secondary legislation. There is nothing in Article 27 TEU, for example, that suggests that the High Representative cannot draw on other services which exist within the Union in carrying out her functions. Nor does Article 27 TEU limit the Service to only working for the High Representative, and it would seem logical that the President of the Council and Commission can also, when appropriate, draw upon the expertise of the Service.⁶⁶

During the process that led to the adoption of the Council Decision which established the EEAS, it was clear that there were differences on a number of grounds between the Council and Member States, on the one hand, and, on the other, the Parliament.⁶⁷ For the European Parliament, the establishment of the EEAS was a logical consequence of the extension of the *acquis communautaire* to Union external relations and it was willing to fight its corner to that end.⁶⁸ The original proposal for a Council Decision on the EEAS was submitted by Baroness Ashton on 25 March 2010.⁶⁹ The proposal was rejected by the European Parliament and a substantial number of proposed amendments were suggested.⁷⁰ In essence

⁶⁶ This is now expressly stated in Article 2, Council Decision 2010/427/EU of 26 July 2010, Establishing the Organisation and Functioning of the European External Action Service, OJ L 201/31, 3 August 2010.

⁶⁷ The original approach of the Presidency can be seen in Presidency, Presidency Report to the European Council on the European External Action Service, EU Doc., 14930/09, 23 October 2009.

⁶⁸ See paras C and 2 of European Parliament Resolution of 22 October 2009 on the Institutional Aspects of Setting Up the European External Action Service, EP P7_TA(2009)0057, (2009/2133(INI)).

⁶⁹ Proposal from The High Representative for Foreign Affairs and Security Policy, Draft Council Decision Establishing the Organisation and Functioning of the European External Action Service, EU Doc. 8029/10, 25 March 2010.

⁷⁰ See the 'non-paper EEAS' issued by MEPs Elmar Brok and Guy Verhofstadt, available at: <http://www.euractiv.com/en/future-eu/parliament-throws-its-weight-eeas-negotiation-news-375926>, (accessed 2 March 2011). For the perspective of Guy Verhofstadt, the LDE group leader who led the European Parliament in its 'turf-war' over the EEAS, see 'Fighting Talk', *Parliament Magazine*, 14 June 2010, p. 28.

the Parliament rejected the proposal on the basis that: there was not enough political accountability; an unacceptable position had been adopted with regard to various aspects of development cooperation; a lack of adequate provision was made for instances where the High Representative could not attend a meeting; and there was both inadequate financial and budgetary responsibility for the EEAS and inadequate application of staff regulations to the EEAS.⁷¹ The European Parliament by threatening to use its 'nuclear option' on the EEAS, through its role in the staff regulations and its budgetary powers, secured some concessions, as a month or so later the Presidency issued a 'compromise' which sought to bridge the differences between the Council and the European Parliament.⁷² After machinations by all sides, on 21 June 2010 the European Parliament, the High Representative, the Council and Commission issued a statement on the EEAS in which they announced that they had reached political agreement on the EEAS as well as on two declarations by the High Representative on political accountability and on the basic structure of the central administration.⁷³ The decision establishing the EEAS was adopted by the Council on 26 June 2010.⁷⁴

The European Parliament secured a number of concessions from the Council, some more substantively important than others. For example, the

⁷¹ See NLE/2010/0816, 8 July 2010. With regard to the budget now see Regulation (EU, EURATOM) No 1081/2010 of the European Parliament and of the Council of 24 November 2010 Amending Council Regulation (EC, EUARTOM) No. 1605/2002 on the Financial Regulation Applicable to the General Budget of the European Communities, as Regards the European External Action Service, OJ L 311/9, 26 November 2010.

⁷² Presidency, Proposal for a Council Decision Establishing the Organisation and Functioning of the European External Action Service – Presidency Compromise, EU Doc., 8724/1/10/REV 1, 23 April 2010. Also see General Affairs Council, 26 April 2010, EU Doc., 8967/10, p. 8, Conclusions – European External Action Service. For the perspective of the European Parliament's rapporteur (Elmar Brok) of the Committee on Constitutional Affairs, see, On the Institutional Aspects of Setting up the European External Action Service, A7-004/2009, 20 October 2009.

⁷³ Statement of the European Parliament, the High Representative of the Union for Foreign Affairs and Security Policy, the Council and the Commission on the European External Action Service, EU Doc., A 109/10, 21 June 2010. See Revised Draft (21 June 2010) Consolidated Version With Latest Amendments Post Quadriologue of 21 June 2010: Proposal for a Council Decision Establishing the European External Action Service, available at: http://www.eepa.be/wcm/dmdocuments/EEAS_compromise_20100621.pdf (accessed 3 March 2011) for the amendments made to the original proposal of March 2010.

⁷⁴ Council Decision 2010/427/EU of 26 July 2010, Establishing the Organisation and Functioning of the European External Action Service, OJ L 201/31, 3 August 2010.

Parliament secured that at least 60 per cent of all EEAS staff will be made up of permanent EU officials and that recruitment must be on the basis of merit.⁷⁵ While recruitment on the basis of merit is important, the make-up of staff is perhaps less so. In trying to ensure a more 'Communitarian mentality' in the EEAS the Parliament is seeking to ensure that staff seconded from Member States do not dominate the EEAS and ingrain a 'Member State first' mentality. In many senses this is part of the vision to extend the *acquis communautaire* to Union external relations. Other substantive concessions secured by the Parliament are significantly more meaningful. In this respect, the agreements secured concerning control over the Union's development policy or budgetary control are important. Baroness Ashton's original proposal gave far more power to the EEAS over, for example, development and neighbourhood policy than the final decision where some of that control is still retained by the Commission.⁷⁶ The former Commission Directorate-General for External Relations (DG RELEX) has now been absorbed into the EEAS. It had always been the case that in DG RELEX development was just one of the ingredients in the foreign policy mix, and one of minor importance at that, whereas in the Directorate-General for Development, poverty eradication and related policies were much more central to the mandate.⁷⁷ At the very least, the rump of the Directorate-General for Development which has survived outside the EEAS should ensure a greater focus on development issues and poverty eradication than would otherwise be the case.⁷⁸

The EEAS is perceived as strengthening the presence of the European Union on the global stage, giving it a greater profile and enabling it to project its interests and values more efficiently.⁷⁹ To that end the EEAS must work in cooperation with the diplomatic services of the Member

⁷⁵ See Article 6, Council Decision 2010/427/EU.

⁷⁶ See Article 9 (2), 9 (4) and the Annex to Council Decision 2010/427/EU.

⁷⁷ For a now historical analysis of this, see Khaliq, *Ethical Dimensions, supra*, fn. 34, pp. 116 et seq. A number of development NGOs sought legal advice on the original proposal and its impact on the Union's development cooperation policy. A copy of the legal advice is on file with the author. For an analysis of the legal advice see Duke, Simon and Steve Blockmans (2010), 'The Lisbon Treaty Stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) Establishing the Organisation and Functioning of the European External Action Service', *CLEER Legal Brief*, 4 May 2010.

⁷⁸ The Development Directorate-General has been absorbed by EuropeAid Development and Cooperation which incorporates the former Development and EuropeAid Directorates.

⁷⁹ See Proposal from The High Representative for Foreign Affairs and Security Policy, Draft Council Decision Establishing the Organisation and Functioning of the European External Action Service, EU Doc. 8029/10, 25 March 2010.

States, the General Secretariat of the Council and the services of the Commission, 'in order to ensure consistency between the different areas of the Union's external action and between those areas and its other policies'.⁸⁰ The EEAS, which is functionally autonomous,⁸¹ is composed of various Union delegations to international organizations and third States (although these will also contain Commission staff where necessary) who are responsible for the execution of the instructions they receive⁸² and a central administration based in Brussels.⁸³ As of 1 January 2011, a total of 1643 civil servants from the Commission and the Council were transferred to the EEAS and there were a further 2034 staff working in delegations around the world.⁸⁴ At the time of writing, the EEAS budget for 2011 has not been finalized but it will be over €400 million.⁸⁵ It is estimated that once fully operational in around 2015 the EEAS will have a staff of around 5000 and a substantially larger budget than at present.

The EEAS is to serve the Commission and the President of the Council as well as the High Representative. This is critical in trying to ensure consistency in external policies and, in particular, so that the impact and effect of the Union's external policies is increased. The establishment of the EEAS is an attempt, within limits, to tackle the artificiality of the Union's traditional approach to foreign policy. States are unitary foreign policy actors, acting with all potential instruments across a spectrum, whereas in

⁸⁰ Article 3 (1), Council Decision 2010/427/EU.

⁸¹ Article 1 (2), Council Decision 2010/427/EU.

⁸² Article 5, Council Decision 2010/427/EU. There are approximately 136 Union delegations worldwide.

⁸³ Article 1 (2) and 1 (4), Council Decision 2010/427/EU.

⁸⁴ 'A New Step in the Setting-up of the EEAS: Transfer of Staff on 1 January 2011', EU Doc. IP/10/1769, 21 December 2010, and O'Sullivan, David, Chief Operating Officer, EEAS, 'Setting Up the EEAS', speech delivered at the IIEA, Dublin 14 January 2011, podcast available at: http://www.iiea.com/event/download_podcast?urlKey=david-osullivan-chief-operating-officer-of-the-european-external-action-service (accessed 18 January 2011).

⁸⁵ Banks, M., 'EU Budget Row Put Funding for EEAS Under Threat' *The Parliament.com*, 28 November 2010, available at: <http://www.theparliament.com/latest-news/article/newsarticle/eu-budget-row-puts-funding-for-eeas-under-threat/> (accessed 1 March 2011), gives a figure of €476m. William Hague in September 2010 gave the figure for an operational budget (based on 2009 costings) of around €398.5m. See UKFP 01: Letter to the Chair of the Committee from the Rt Hon William Hague MP, Secretary of State for Foreign and Commonwealth Affairs and First Secretary of State. Foreign Affairs Committee Oral Evidence Session – 8 September 2010: 'Developments in UK Foreign Policy', para. 17. David O'Sullivan, Chief Operating Officer, EEAS, *supra*, fn. 84, gives 2011 figures of €182million for the Brussels EEAS headquarters and €278 million for delegations, giving a total of €460 million.

the Union action has been split up according to competence between the primary actors, that is, Commission, Council or Member States, and dependent upon the ability to utilize certain instruments in some circumstances but not in others. With a greater degree of coherence and consistency across all parts of the spectrum, the idea is that the impact and value of Union external action is greater. In the areas of traditional high politics, such as defence, the Union is still an immature entity. In other areas, such as trade, the Union's assertiveness in global politics is well established.⁸⁶ By establishing the EEAS the aim is to try and to ratchet up that assertiveness across the spectrum but without changing the nature of the Union's competencies in areas which are still the traditional preserve of nation states. Institutions (or more accurately a service) such as the EEAS are important as what they can provide is a framework in which the relevant actors can seek to ensure improvements.⁸⁷

The establishment of the EEAS was an opening skirmish. Ensuring that identified objectives are achieved will be an on-going struggle. By having Commissioners with sectoral external relations portfolios as Baroness Ashton's deputies, the complementarity, perhaps competition, between the external relations oriented Commissioners is obvious. The issue is not only ensuring complementarity and consistency in external action but also avoiding duplication in Union efforts. Duplication is not only inefficient, it enhances competition between divisions of the Commission as different Directorates-General may be pulling in varying directions. Avoiding duplication of efforts requires the EEAS to have available to it all necessary foreign policy instruments, which is not the case. As the EEAS is separate from the Commission, although DG EXREL has been absorbed by the EEAS, some experience will have to be built up from scratch, while in other areas it will have to consolidate that which already exists amongst its personnel. In those areas which are not within its competence, aspects of development and trade are key examples, the EEAS will have to establish a strong working relationship with those Directorates-General of the Commission to ensure that all relevant considerations are taken into account when decisions are being made by either the EEAS or the relevant Commission Directorate-General.⁸⁸ What should not be overlooked, is the fact that the EEAS will develop their policies and approach over time, and the

⁸⁶ See Krotz, U. (2009), 'Momentum and Impediments: Why Europe Won't Emerge as a Full Political Actor on the World Stage Soon', *Journal of Common Market Studies*, 47 (3), 555–578.

⁸⁷ Duke, 'Providing for European-level Diplomacy After Lisbon', *supra*, fn. 63, p. 214.

⁸⁸ To this effect see Article 9 (4), Council Decision 2010/427/EU.

impact of their actions will only be assessable a number of years after establishment. At the time of writing trying to assess its effectiveness is premature.

7. CONCLUSIONS

In foreign policy terms, the Union has long been accused of being a payer as opposed to a global player. Whether the Lisbon Treaty amendments will in practice change this or not still remains to be seen. The Union's success as an actor in trade matters is a reflection of what is possible. Do the Lisbon Treaty changes provide the instruments to replicate this success in all aspects of foreign policy? The answer to this on balance is no. The Union Member States desire to replicate their success in trade in all aspects of foreign policy but know this involves making sacrifices that they are currently unwilling to make. The expectation is there, both within Europe and globally, that Europe should be an 'actor' during a global crisis, be it the Middle East Peace Process, the Arab Spring or climate change, but foreign policy in all its guises involves issues which are still too sensitive for the Member States to implement through the 'Community method', and it is unrealistic to expect them to agree to do so. Having said that, the gap between expectation and potential reality is no longer as great as it once was.

The issue for the Member States is to ensure that the Union's external action is as effective as it can be while remaining common. Control is important and it is in the nature of States to be cautious. The lamenting of the Union's inactions or the paucity of any action is often unfair. States in defining their foreign policy actions have to balance competing and conflicting considerations and weigh up the cost of certain actions or inaction. For a polity which consists of 27 Member States, foreign policy action is significantly more complex still. No other group of States seeks to coordinate their foreign policies in the way that the Union Member States do. The Union's problem is that it engages in moral rhetoric with a view to inspiring the relevant protagonists, which invariably means it sets itself up for failure when its performance is measured against its own utterances.

Looking back to the EPC, the CFSP under the 1992 TEU and the CFSP after Lisbon, it is obvious that the level of sophistication and the nature of cooperation has moved on. It is an evolutionary process, and Lisbon was never going to be a foreign policy revolution. Institutions, actors and offices need time to bed, they accumulate experience and incrementally their methods achieve efficiencies. Javier Solana as the High Representative for

the CFSP displayed perfectly how, over time, an office can grow in importance. Baroness Ashton's and President Van Rompuy's offices are going through a similar evolutionary process and will continue to do so. Similarly with the EEAS, only over time will we be able to ascertain accurately whether consistency across Union actions has been achieved. Even if it has not, it may well not be due to the shortcomings of the EEAS. Lisbon provides the Union and its Member States with the opportunity to enhance the quality and effectiveness of its external action. Whether they do so remains to be seen, but in either case the incremental advancement of EU external action continues.

Nevertheless, it must not be forgotten that while there is a close link between status and influence, the former does not guarantee the latter. Important though the Union's status in the various UN bodies may be for its international identity, it must be kept in mind that the strength of its influence within the UN is determined first and foremost by the strength of the EU position to be put forward.

CHAPTER THREE

ARMA FERRO, ERGO SUM? THE EUROPEAN UNION, NATO AND THE QUEST FOR 'EUROPEAN IDENTITY'

Joris Larik

1. INTRODUCTION

The emergence of a security and defense policy of the European Union, and the questions it raises for the relationship between the Union and the North Atlantic Treaty Organization, have always been closely linked to the question of the 'identity' of the EU on the international stage. Already in the Single European Act of 1986, the Member States concluded "that closer co-operation on questions of European security would contribute in an essential way to the development of a European *identity* in external policy matters".¹ Subsequently, the Treaty on European Union, signed in Maastricht in 1992, stipulated as one of the objectives of the newly established Union "to assert its *identity* on the international scene", which was to be achieved "*in particular* through the implementation of a common foreign and security policy including the progressive framing of a common defense policy, which might lead to a common defense".² In 2009, the preamble of the TEU as amended by the Lisbon Treaty continues to express the resolve of the Member States to implement a Common Foreign and Security Policy (CFSP), including a Common Security and Defense Policy (CSDP), "*thereby reinforcing the European identity*".³ Against this backdrop of evolving Treaty language, it seems that once the European Union as a polity starts to become active in the area of security, it reaches a new level of self-consciousness – a more palpable kind

¹ Art 30(6)(a) Single European Act [1987] OJ L 169/1 (SEA) (emphasis added).

² Art. 2(1) TEU (pre-Lisbon; emphases added). In the course of this chapter, references to the EU Treaties will be made in the following way: The Treaties, as amended by the Lisbon Treaty, in force as of 1 December 2009, will be designated as Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU). For reasons of simplicity, references to the pre-Lisbon Treaties will be made in the form of the Treaties as amended by the Nice Treaty, and designated as the Treaty on European Union (TEU (pre-Lisbon)) and the Treaty establishing the European Community (TEC).

³ Eleventh recital of the preamble, TEU (emphases added).

of international existence. To (ab)use René Descartes' famous axiom, the underlying sentiment could be termed: The Union bears arms, therefore I am – arma fero, ergo sum.

This kind of soul-searching that preoccupied the Union as well as those who study it was warranted by the fact the European Union was a new initiative to take European integration beyond the allegedly 'low politics' of economic integration,⁴ and put it on a more ambitious, political track. According to Bretherton and Vogler, "the lack of access to military capabilities was central to discourses on EU identity either for those wishing to disparage or, indeed, to celebrate its pacifistic nature".⁵ Consequently, once the Union equipped itself with such capabilities, old narratives such as Europe being a 'civilian power' were put in question.⁶ A vivid academic discussion was prompted subsequently about the nature of the EU as a global player, ranging from heralding the coming of an 'ethical power'⁷ to cautioning against the prospect of 'militarizing' a project that used to be inherently civilian and pacifistic.⁸

These upheavals of course did not take place in a political, institutional or legal vacuum. By expanding its activities into these new areas, the Union came into contact with institutions that already occupied these fields. After all, the North Atlantic Treaty Organization (NATO), and in its shadow the Western European Union (WEU), had been charged with providing security to Western Europe for decades before the Maastricht Treaty was signed. Also in the transatlantic dimension of security and defense policy, the quest for a European identity was evident. This is well captured in the term devised for the ill-fated project for a European pillar

⁴ To use the term famously coined by Stanley Hoffmann, *The European Sisyphus: Essays on Europe, 1964–1994*, Boulder: Westview Press 1995.

⁵ Charlotte Bretherton and John Vogler, *The European Union as a Global Actor*, Abingdon: Routledge 2006, p. 190.

⁶ Seminally François Duchêne, 'Europe's role in world peace', in: Richard Mayne (ed.), *Europe Tomorrow: Sixteen Europeans Look Ahead*, London: Fontana 1972, pp. 32–47; see on the initial difficulties of integration theories to cope with this development, Hanna Ojanen, 'The EU and Nato: Two Competing Models for a Common Defence Policy', (2006) 44 *Journal of Common Market Studies*, pp. 57–76.

⁷ See for an introduction to the concept e.g. Lisbeth Aggestam, 'Introduction: Ethical Power Europe?', (2008) 84 *International Affairs*, pp. 1–11.

⁸ See for a rather sceptical perspective e.g. Ian Manners, 'Normative Power Europe Reconsidered: Beyond the Crossroads', (2006) 13 *Journal of European Public Policy*, pp. 182–199. In addition, there were also voices doubting that the EU would manage to live up to these ambitions in the first place, see Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order*, New York: Knopf 2003.

embedded within NATO, viz. the 'European Security and Defence Identity' (ESDI).⁹

The EU-NATO relationship is thus particularly well suited for scrutinizing the Union's 'international identity' through the interaction with another international organization. Both do indeed share many things: both organizations have their headquarters in Brussels, and both sealed their latest grand conceptual overhaul in Lisbon, with the Lisbon Treaty¹⁰ and the 2010 Strategic Concept¹¹ respectively. Twenty-two European countries are members of both organizations. All EU members except Cyprus are part of NATO's Partnership for Peace (PfP) programme. Both have been key institutions in the post-war European architecture for more than half a century. Yet, comparing their historic trajectories and the legal norms that define them reveals that there is much that sets them apart.

Generally, the relations between the EU and NATO have already captivated the sustained interest of international relations scholars for many years.¹² The resulting literature forms part of a wider discussion of transatlantic relations, the organization of European security, the continuing relevance and function of NATO in the post-Cold War world, as well as

⁹ NATO, Final Communiqué of the Ministerial Meeting of the North Atlantic Council, Press Communiqué M-NAC-1(96)63, 3 June 1996, <<http://www.nato.int/docu/pr/1996/p96-063e.htm>> (emphasis added).

¹⁰ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306/L.

¹¹ NATO, 'Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization, adopted by Heads of State and Government at the NATO Summit in Lisbon, 19–20 November 2010' (NSC 2010).

¹² As testimony, see the various collections such as Jolyon Howorth and John Keeler (eds.), *Defending Europe: The EU, NATO and the Quest for European Autonomy*, Basingstoke: Palgrave Macmillan 2003; Hall Gardner (ed.), *NATO and the European Union: New World, New Europe, New Threats*, Aldershot: Ashgate 2004; Johannes Varwick (ed.), *Die Beziehungen zwischen NATO und EU: Partnerschaft, Konkurrenz, Rivalität?*, Opladen: Budrich 2005; or individual monographs and articles such as Paul Cornish and Geoffrey Edwards, 'Beyond the EU/NATO dichotomy: the beginnings of a European strategic culture', (2001) 77 *International Affairs*, pp. 587–603; Ojanen, *supra* n. 6; James Sperling, 'The European Union and NATO: Subordinate partner, cooperative pillar, competing pole?', in: Spyros Blavoukos and Dimitris Bourantonis (eds.), *The EU Presence in International Organizations*, London: Routledge 2011, pp. 33–60; Simon Smith, 'EU-NATO cooperation: a case of institutional fatigue?', (2011) 20 *European Security*, pp. 243–264; Nina Græger and Kristin Haugevik, 'The EU's Performance with and within NATO: Assessing Objectives, Outcomes and Organisational Practices', (2011) 33 *Journal of European Integration*, pp. 743–757. See also a previous piece by the present author, Joris Larik, 'Kennedy's "two pillars" revisited: Does the ESDP make the EU and the US two equal partners in NATO?', (2009) 14 *European Foreign Affairs Review*, pp. 289–304.

the role of the EU as an international actor in its own right.¹³ However, while the literature on the legal aspects of security and defense policy of the EU has thrived as well,¹⁴ we find few contributions addressing the relationship between the Union and the Alliance as a matter of law.¹⁵

As this chapter will argue, despite mutual affirmations of their importance, the European Union has not only come to incorporate security and defense policy into its ambit of competences, but has put itself on a track to become a fully-fledged security policy actor, arguably surpassing NATO. At the same time, the relevance of NATO has declined, and it is left with the choice either to branch out or accept a residual yet not insignificant role in transatlantic relations. These contrary organizational histories left a strong legal imprint, which allows for a number of observations of the Union's international identity, albeit *not through* NATO, but rather through the hallmarks of its own legal order and its relations with NATO. Essentially, it shows that the EU has risen to become both an ambitious international actor with virtually all-encompassing competence in the area of external relations as well as a constitutionalized community. While security and defense policy remain sensitive 'high politics', in which the Member States retain a strong say as well as autonomous policies of their own, this has not prevented this rise; neither has the continued existence of NATO or the superpower status of the United States. To elaborate on these observations, the paper is structured in two main sections. The first will address the field of defense and security policy, focusing on the major shifts in the international system and how both the EU and

¹³ The concepts of 'actorness' and 'identity' are indeed intertwined, with the latter linking "the Union's presence, and understandings about its capabilities, in constructing expectations concerning EU practices"; see Bretherton and Vogler, *supra* n. 5, p. 6.

¹⁴ See, seminally, Ramses Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective*, The Hague: Kluwer Law International 1999; more recently Martin Trybus and Nigel White (eds.), *European Security Law*, Oxford: Oxford University Press 2007; Anne Cammilleri-Subrenat, *Le droit de la politique européenne de sécurité et de défense dans le cadre du traité de Lisbonne*, Paris: Lavoisier 2010; Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights*, Antwerp: Intersentia 2011. Also the principal textbooks on EU external relations law dedicate chapters to the CFSP/CSDP, see Piet Eeckhout, *EU External Relations Law*, Oxford: Oxford University Press 2011, Chapters 5 and 11; Panos Koutrakos, *EU International Relations Law*, Oxford: Hart Publishing 2006, Chapters 11 and 13.

¹⁵ See as notable exceptions the extensive treatise by Martin Reichard, *The EU-NATO Relationship: A Legal and Political Perspective*, Aldershot: Ashgate 2006; and Simon Duke, 'The EU, NATO and the Treaty of Lisbon: Still Divided Within a Common City', in: Paul James Cardwell (ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*, Berlin: Springer 2012, pp. 335–355.

NATO have reacted to them. Against this backdrop, the second section will turn to the legal interaction between the two organizations. A conclusion will sum up the findings.

2. THE EVOLUTION OF NATO AND THE EU OVER TIME

When appraising the relationship between the EU and NATO, it is worthwhile to take a look back at where both have come from and how they developed in the course of time in a changing international context. Both have their origins in the aftermath of the Second World War and the looming Cold War. The relations between the two can be divided roughly into three periods: one of neat complementarity, followed by one of upheaval and uncertainty, and finally an emerging one marked by the quest of the EU for comprehensive international actorness.¹⁶

As a preliminary point, it should be underlined that unlike other areas of EU external relations, defense and security policy was not born out of the need to externalize following the development of common internal rules. Rather, with the Maastricht Treaty, internal and external security entered the scene at the same time, and both initially in a strong intergovernmental fashion. Later on, the so-called 'third pillar' (at first known as 'Justice and Home Affairs') was 'communitarized' and now figures among competences governed by the TFEU.¹⁷ Nevertheless, also in the post-Lisbon TEU, it is stressed that the Union is to respect the "essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security" and that the latter "remains the sole responsibility of each Member State".¹⁸ Also with regard to foreign and security policy, the Member States continue to stress

¹⁶ These three periods correspond roughly to the three periods identified by Günter Burghardt for the bilateral EU-US relationship, Günter Burghardt, 'The EU's transatlantic relationship', in: Alan Dashwood and Marc Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press 2008, pp. 376–397. For a more fine-tuned division of periods from 1999 to 2009, see Daniel Keohane, 'EU and NATO', in: Giovanni Grevi, Damien Helly and Daniel Keohane (eds.), *European Security and Defence Policy: The First 10 Years (1999–2009)*, Paris: EUISS 2009, pp. 127–138.

¹⁷ This area in turn is gaining an external dimension of its own; see e.g. Florian Trauner and Helena Carrapiço, 'The External Dimension of EU Justice and Home Affairs after the Lisbon Treaty: Analysing the Dynamics of Expansion and Diversification', (2012) 17 *European Foreign Affairs Review*, pp. 1–18.

¹⁸ Art. 4(2) TEU; also Art. 276 TFEU on the restricted jurisdiction of the Court of Justice in this area.

their prerogatives, which they made clear in two declarations attached to the Treaties.¹⁹ Thus, anything touching upon security, be it of an internal or external character, remains a sensitive issue over which the Member States are adamant to retain control.

2.1 Neat Complementarity: Transatlantic Defense – A European Common Market

The first and longest period ranges roughly from the founding of NATO to the fall of the Berlin Wall half a century later. NATO was founded in 1949 by virtue of the Washington Treaty²⁰ as an alliance set up to defend Western Europe from a Soviet attack.²¹ With regard to other international commitments of its members, the treaty claims precedence,²² a feature that Reichard terms "NATO primacy".²³ NATO has continued to exist on the basis of this Treaty, with its membership growing over time significantly from twelve founding members to twenty-eight at the time of writing.

If we turn to the evolution of the European Union, in this period we find no fewer than four precursor organizations that would later be absorbed into what is now the EU. These include the three European Communities, i.e. the European Coal and Steel Community, founded in 1952 following the Schuman Declaration, and subsequently the European Atomic Energy Community as well as the European Economic Community in 1957, all by the original six members. In addition, by expanding the Brussels Treaty of 1948, the Western European Union was established in 1954 as a defensive pact among the six Communities members and the United Kingdom.

Taken all together,²⁴ this multitude of international organizations form part of what has been termed the 'transatlantic bargain' in the post-war

world. This entailed, in a nutshell, "that the United States would contribute to the defense of Europe and to Europe's economic recovery from the war if the Europeans would organize themselves to help defend against the Soviet threat and use economic aid efficiently".²⁵

While economic recovery and integration progressed in Western Europe and the idea of a common market as the centerpiece of the economic community advanced, defense integration faltered. This was epitomized by the failure of the establishment of a European Defence Community (EDC) in the 1950s. This led to a so-called 'revised' transatlantic bargain, in which defense issues were the exclusive domain of NATO, which in turn relied heavily on American nuclear deterrence.²⁶ The WEU, as a substitute to the EDC, took a back seat subordinate to NATO.²⁷ Consequently, a neat division of labor emerged between NATO as the organization charged with military defense matters of Europe on the one, and the European Communities on the other hand being preoccupied with economic integration.²⁸

In this first period, "in the shadow of the Cold War and under the protection of NATO"²⁹ the identity of the European Communities grew as a primarily economic club, shying away from the 'high politics' of defense and international security. This identity was reinforced a contrario through this division of tasks with NATO. For the Soviet Union, the European Communities literally did not exist, as the former refused to recognize them until as late as 1989.³⁰

¹⁹ See also Declarations No. 13 and 14 concerning the Common Foreign and Security Policy attached to the Treaties.

²⁰ The North Atlantic Treaty, Washington D.C., 4 April 1949 (NAT).

²¹ See in detail on the historic origins of the treaty Timothy Ireland, *Creating the Entangling Alliance: The Origins of the North Atlantic Treaty Organization*, Westport: Greenwood Press 1981; and Ellen Hallams, *The United States and NATO since 9/11: The Transatlantic Alliance Renewed*, Abingdon: Routledge 2010, Chapter 1 on "The Origins of the Transatlantic Community".

²² Art. 8 NAT. The treaty in turn respects the primacy of the Charter of the United Nations, Art. 7 NAT.

²³ Reichard, *supra* n. 15, p. 148. This is not to be confused with the idea of primacy of EU law over national law, a point which will be elaborated on section 3.2.

²⁴ For the sake of completeness, one would also have to bear in mind the Organization for European Economic Cooperation (OEEC, now Organization for Economic Cooperation and Development (OECD)), charged with coordinating the distribution of economic

assistance from the United States in the framework of the Marshall Plan. See further on this organization the contribution by Tamara Takács and Joren Verschaevé to this volume (Chapter 8).

²⁵ Stanley Sloan, *NATO, the European Union, and the Atlantic Community: The Transatlantic Bargain Challenged*, second edition, Lanham: Rowman & Littlefield 2005, p. 1.

²⁶ *Id.*, Chapter 3.

²⁷ Gustav Schmidt, 'Getting the Balance Right: NATO and the Evolution of EC/EU Integration, Security and Defence Policy' in *idem* (ed.), *A History of NATO: The First Fifty Years*, Volume 2, Basingstoke: Palgrave Macmillan 2001, pp. 3–28, p. 11.

²⁸ One could also add the Council of Europe and its European Court of Human Rights as the third complement of this arrangement, being in charge of human rights protection in Europe. See further on this particular organization the contribution by Thomas Streinz to this volume (Chapter 5).

²⁹ Bretherton and Vogler, *supra* n. 5, p. 212.

³⁰ This refusal only ended with the conclusion in 1989 of the Agreement between the European Economic Community and the European Atomic Energy Community and the Union of Soviet Socialist Republics on trade and commercial and economic cooperation [1990] OJ L 68/3.

2.2 In Search of New Identities in the New World Order

With the end of the Cold War, the first phase of the EU-NATO relationship comes to an end and a period of upheaval begins, in which both organizations had to redefine their roles in the proverbial 'new world order'.³¹ As NATO moved away from a focus on territorial defense and the European Communities moved away from their focus on economic integration, both came to enter the field of international security writ large. The questions that this raised to both, however, were very different at the outset. As far as NATO was concerned, given that its original *raison d'être* had vanished with the demise of the Soviet Union and the Warsaw Pact, it indeed faced an existential crisis, as voices were raised that it had become obsolete and it, too, ought to vanish.³² To avert getting 'out of business', it embarked on a process of transformation, thereby acquiring a role beyond that of territorial defense.

NATO adopted two further strategic concepts in 1991 and 1999, which reflected this change of role.³³ It exercised its new, 'out of area', non-collective defense tasks first in the Balkans through intervention into the Bosnian civil war, as well as later in Kosovo. In these cases, the European Union and its predecessors were absent. Calls for a European-led intervention in the Balkans wars – the 'hour of Europe'³⁴ – were left unheeded. Following the terrorist attacks of 9/11,³⁵ it also took on a role in the so-called 'War on Terror', notably by taking over the International Security

³¹ George H.W. Bush, President of the United States, 'Address Before a Joint Session of Congress, Washington D.C., 11 September 1990', available at: <<http://millercenter.org/scripps/archive/speeches/detail/3425>>.

³² See Reinhard Meier-Walser, 'Die Entwicklung der NATO 1990–2004', in: Johannes Varwick (ed.), *Die Beziehungen zwischen NATO und EU: Partnerschaft, Konkurrenz, Rivalität?*, Opladen: Budrich 2005, pp. 25–44, pp. 25–27.

³³ NATO, 'The Alliance's New Strategic Concept, agreed by the Heads of State and Government participating in the Meeting of the North Atlantic Council, 7 November 1991 – 8 November 1991', available at: <http://www.nato.int/cps/en/natolive/official_texts_23847.htm>; and NATO, 'The Alliance's Strategic Concept, approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington D.C., 24 April 1999', available at: <http://www.nato.int/cps/en/natolive/official_texts_27433.htm>.

³⁴ To recall the (in)famous expression by Luxembourgish foreign minister Jacques Poos in 1991, quoted in Jolyon Howorth and John Keeler, 'The EU, NATO and the Quest for European Autonomy', in: Jolyon Howorth and John Keeler (eds.), *Defending Europe: The EU, NATO and the Quest for European Autonomy*, Basingstoke: Palgrave Macmillan 2003, pp. 3–21, p. 7.

³⁵ This was also the first time that Art. 5 of the North Atlantic Treaty on collective defence was invoked, resulting in surveillance of US airspace in the framework of operation *Eagle Assist*.

Assistance Force (ISAF) in Afghanistan and by conducting related counterterrorism operations.³⁶

Especially on the formerly Eastern bloc countries, it retained an undiminished force of attraction. Many former Warsaw pact countries, as well as the Baltic States, which had been occupied and incorporated into the Soviet Union itself, became NATO members in two waves of enlargement, in 1999 and 2004 respectively.³⁷ Later on, also the countries of the Western Balkans, including those of the former Yugoslavia, joined the queue for membership. These countries, at the same time, aspire to EU membership, which has led to a similar enlargement of the Union.

During this same turbulent period, also the European Communities embarked on reinventing themselves. In contrast to NATO, however, the question was not to abolish them unless a new *raison d'être* was found. Instead, over the course of two decades, the goals and competences of the European institutions were progressively expanded, far beyond economic integration and international trade. An early hint at this development was given already in the 1980s with the Stuttgart Declaration on European Union³⁸ and the later Single European Act (SEA). This codified and consolidated a practice known as European Political Cooperation (EPC), through which the EC Member States coordinated their foreign policies. This expansion of the tasks of what would become the EU went straight to the core of the question of its identity. This is made explicit already in the SEA itself, in which the Member States pledged to cooperate more closely not only on matters of foreign policy, but also specifically on security matters. As was stressed already in the introduction, this 'would contribute in an essential way to the development of a European identity in external policy matters'.³⁹ However, the Act is prudent in underlining also that these new commitments are not to 'impede closer co-operation in the field of security between certain of the High Contracting Parties within the framework of the Western European Union or the Atlantic Alliance'.⁴⁰

³⁶ See further Hallams, *supra* n. 21, Chapter 7 on 'NATO's Transformation'.

³⁷ See on the latter in particular NATO, Prague Summit Declaration, issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Prague on 21 November 2002, Press Release (2002)127, 21 November 2002; see further Frank Schimmelfennig, *The EU, NATO and Integration of Europe: Rules and Rhetoric*, Cambridge: Cambridge University Press 2003, pp. 37–51.

³⁸ European Council, Solemn Declaration on European Union, Stuttgart 19 June 1983, reproduced from the Bulletin of the European Communities, No. 6/1983, pp. 24–29.

³⁹ Art 30(6)(a) SEA.

⁴⁰ Art 30(6)(c) SEA.

Thus, the Member States of the Communities still paid heed to 'NATO primacy'.

This question of identity was reiterated in the watershed Maastricht Treaty of 1992, which formally founded the European Union. By adding two intergovernmental pillars to what had thus far been the *supranational* Communities, it equipped the Union with its own Common Foreign and Security Policy (CFSP), including what was then known as the European Security and Defence Policy (ESDP, later CSDP). It took a number of years, however, before the ESDP came of age. After the unsuccessful initiative of a "European Security and Defence Identity" within NATO and supervised by the WEU, a breakthrough within the EU was reached through the Anglo-French understanding at Saint-Malo in 1998.⁴¹ A year later, it was decided to incorporate the WEU into the EU altogether.⁴²

In practice, after the humble beginnings of operation *Concordia* in Macedonia in 2003, in rapid succession more than two dozen civilian and military missions have been carried out in the framework of the ESDP around the world.⁴³ In these operations, almost all EU Member States, including NATO and non-NATO members, have regularly participated. The exceptions are Denmark, which due to its CSDP opt-out does not participate in military operations,⁴⁴ as well as Malta and Cyprus. Moreover, non-EU countries have contributed to such operations, in some cases even NATO members. A telling example for this is the Norwegian participation in the CSDP anti-piracy operation *Atalanta*. While not a member of the EU (and not aspiring to become one), this NATO member has contributed ships to the CSDP anti-piracy operation, but thus far not to the concurrent NATO operations.⁴⁵

⁴¹ British-French Summit, St-Malo, 3–4 December 1998, 'Joint Declaration on European Defence', reproduced in: Institute for Security Studies, Western European Union, *From Nice to St-Malo, European Defence: Core Documents*, compiled by Maartje Rutten, Chaillot Paper No. 47 (May 2001), pp. 8–9.

⁴² European Council, 'Presidency Conclusions – Cologne European Council', 3 and 4 June 1999, Annex III; see further Cammilleri-Subrenat, *supra* n. 14, pp. 206–210; and earlier Ramses Wessel, 'The EU as Black Widow: Devouring the WEU to Give Birth to a European Security and Defence Policy' in Vincent Kronenberger (ed.), *The EU and the International Legal Order: Discord or Harmony?* (The Hague: T.M.C. Asser Press 2001), pp. 405–434.

⁴³ See in detail the various chapters on ESDP/CSDP operations in Giovanni Grevi, Damien Helly and Daniel Keohane (eds.), *supra* n. 16.

⁴⁴ Denmark can and does contribute to civilian CSDP missions. On its opt-out see further section 3.1.

⁴⁵ EU NAVFOR Somalia, 'Norwegian Frigate Joins EU NAVFOR', press release, 3 August 2009, available at: <<http://eunavfor.eu/norwegian-frigate-joins-eu-navfor/>>. See generally

In addition, it should not go unnoticed that in terms of bilateral cooperation, the EU and the United States have concluded a Framework Agreement on the participation of the US in EU crisis management operations in 2011.⁴⁶ Under the terms of this agreement, the United States may contribute civilian personnel, units, and assets (which the agreement calls the 'US contingent') to EU crisis management operations.⁴⁷ It is a CFSP agreement concluded by the EU without its Member States.⁴⁸ It contains no reference to NATO whatsoever.

As both organizations started to expand their ambit of competences and ambitions into the field of international security, the relationship between the two became increasingly more complex. For the United States, this represented both a risk and an opportunity. On the one hand, as successive American administrations had called throughout the Cold War and thereafter for more commitment from the European Allies and more equitable 'burden sharing',⁴⁹ the new ESDP could be used to enhance Europe's contributions to the alliance. On the other, an autonomous ESDP at the very least posed the risk of unnecessarily duplicating functions and thus wasting resources. In addition, decoupled from NATO, the ESDP might evolve in ways inconsistent with US interests, or even develop into a counterweight to American power.⁵⁰ Also for the more Atlanticist members of the EU, these prospects were worrisome. Hence, mechanisms had to be devised to balance the development of an autonomous ESDP with maintaining 'NATO primacy'.

This came about, following lengthy negotiations, in the form of the so-called 'Berlin Plus' arrangement between the two organizations, which

on Norway's active participation in the CSDP, Christophe Hillon, 'Integrating an Outsider: An EU Perspective on Relations with Norway' (2011) 16 *European Foreign Affairs Review*, pp. 505–506. Norway has, however, contributed aircraft to the NATO operation.

⁴⁶ Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations, [2011] OJ L 143/L.

⁴⁷ *Id.*, Art. 2(2).

⁴⁸ The legal basis of the agreement is Art. 37 TEU juncto Art. 218(5) and (6) TFEU.

⁴⁹ See in detail Gustav Lindström, *EU-US Burdensharing: Who Does What?*, Chaillot Paper No. 82 (September 2005).

⁵⁰ Together with the discrimination of non-EU allies, duplication and decoupling form Madeleine Albright's proverbial 'three D's', see Reichard, *supra* n. 15, pp. 153–162; Jolyon Howorth, *Security and Defence Policy in the European Union*, Basingstoke: Palgrave Macmillan 2007, pp. 135–146.

was finalized in 2003.⁵¹ It enables access of the European Union to NATO planning, using a NATO European command option for CSDP operations as well as the use of NATO assets and capabilities.⁵² It still forms the most formalized relationship between the two.

2.3 NATO and the EU post-Lisbon

A third phase can be seen emerging in the EU–NATO relationship with the entry into force of the Lisbon Treaty. This is not to say that either organization has consolidated its role and international identity. While this remains an on-going process, in recent years another jump has been made on the part of the EU to ‘assert itself’ even more strongly and fully on the international scene. As Reichard sums it up, while till the mid-1990s NATO was the ‘pre-eminent’ security actor in Europe, a decade later ‘the EU is moving centre stage’.⁵³ The EU Treaties now outline a comprehensive and more assertive foreign and security policy, and also codify mutual defense commitments among the EU Member States. At the same time, NATO is left drifting, preoccupied predominantly with Afghanistan and with an unclear future ahead.

This new phase was foreshadowed by one of the most serious rifts in transatlantic relations, viz. the Iraq crisis of 2002/03. The United States under the George W. Bush administration opted for unilateral action backed by a mixed ‘coalition of the willing’, which also pitted EU Member States supporting or opposing the intervention against each other.⁵⁴ Consequently, both NATO and the European Union remained firmly on the back seat in this particular crisis. Only after the war was over, both engaged in minor training operations there (operation *EUJUST LEX-Iraq* and operation *NATO Training Mission-Iraq* respectively).

The efforts made subsequently to mend these European and transatlantic dissensions helped to set in motion a process which would ultimately culminate in the Lisbon Treaty. As the first important indication of rapprochement, under the direction of EU High Representative Javier

⁵¹ Reichard, *supra* n. 15, pp. 273–288; Matthias Demblinski, ‘Die Beziehungen zwischen NATO und EU von ‘Berlin’ zu ‘Berlin Plus’: Konzepte und Konfliktlinien’, in: Johannes Varwick (ed.), *Die Beziehungen zwischen NATO und EU: Partnerschaft, Konkurrenz, Rivalität?*, Opladen: Budrich 2005, pp. 61–80.

⁵² Council of the European Union, ‘Background on EU–NATO permanent arrangements (Berlin +)’, available at: <<http://www.consilium.europa.eu/uedocs/cmsUpload/03-11-11%20Berlin%20Plus%20press%20note%20BL.pdf>>.

⁵³ Reichard, *supra* n. 15, p. 356.

⁵⁴ See Hallams, *supra* n. 40, pp. 85–104.

Solana, the European Council adopted the European Security Strategy (ESS) before the end of 2003. Even though criticized by some commentators as not really representing a ‘real’ national-style security strategy,⁵⁵ it nonetheless represents a first coherent outline of the European Union as an actor in the area of international security writ large. It explicitly stresses the importance of the transatlantic relationship as ‘irreplaceable’, with the EU and US having the potential of forming ‘a formidable force for good in the world’.⁵⁶ NATO, it asserts further, ‘is an important expression of this relationship’.⁵⁷ However, it also underlines that ‘no single country is able to tackle today’s complex problems on its own’.⁵⁸ In addition, important nuances in the ESS as compared to its American counterpart at the time⁵⁹ were the stronger emphases on multilateralism (‘effective multilateralism’, as the EU likes to call it) and the so-called ‘comprehensive approach’ to security challenges, i.e. an approach not only relying on military strength (‘shock and awe’) but also on long-term engagement employing military as well as civilian capabilities.

Here we see already a sign of the relative shifts between the two organizations. While the transatlantic alliance is acknowledged, in so many words the ESS makes clear that it is an important aspect of EU foreign policy, but only *one* among many. Furthermore and crucially, it is the Union itself which declares to become active across the entire spectrum, something NATO at no point aspired to.

While the ESS is a policy document, these wide-ranging global ambitions found their legal expression at the Convention on the Future of Europe, which took place in 2002–2003 and eventually produced the draft Treaty Establishing a Constitution for Europe.⁶⁰ This project was ill-fated and ultimately abandoned, at least in terms of the constitutional ‘label’.

⁵⁵ Asle Toje, ‘The European Security Strategy: A Critical Appraisal’, (2005) 10 *European Foreign Affairs Review*, pp. 117–133.

⁵⁶ European Council, *A Secure Europe in a Better World, European Security Strategy*, Brussels, 12 December 2003, at 13 (ESS). See also *Report on the Implementation of the European Security Strategy: Providing Security in a Changing World*, Brussels, 5407/08, 11 December 2008.

⁵⁷ ESS, p. 9. Note also the reference to the historic importance of the United States and NATO in European security, p. 1.

⁵⁸ ESS, p. 1.

⁵⁹ President of the United States of America, ‘The National Security Strategy of the United States of America’, Washington D.C., 16 March 2006; further Lark, *supra* n. 12, pp. 294–297. For the current national security strategy see President of the United States of America, ‘National Security Strategy’, Washington D.C., May 2010.

⁶⁰ Treaty establishing a Constitution for Europe [2004] OJ C 310/1 (CT).

Nevertheless, most of the ideas of a stronger and more assertive Union on the global stage – also in the area of security and defense – voiced at the Convention and codified into the Draft Constitutional Treaty⁶¹ would later find their way into the text of the Lisbon Treaty.⁶² These ambitions are to be realized through a revamped institutional framework. Innovations here include a reinforced and double-hatted High Representative (even though stripped off the title ‘foreign minister’), a European External Action Service (EEAS), the setting up of a European Defense Agency to promote cooperation in the area of armaments (already set up as an agency in 2004)⁶³ and permanent structured cooperation among the Member States.⁶⁴ Moreover, the EU, after first having incorporated the WEU as its defense arm, eventually absorbed this international organization entirely in 2011, with the latter officially disbanding itself.⁶⁵

With the entry into force of the Lisbon Treaty on 1 December 2009, all these elements have become part and parcel of EU primary law. To which extent, however, the Union will be able to live up to these ambitions, is indeed still an open question. Setting up the new diplomatic arm of the Union, the EEAS, has gone rather sluggishly, with many legal issues on its powers and competences remaining to be settled.⁶⁶ Equally, utilization of the new option of permanent structured cooperation is also still wanting.⁶⁷ In addition, while CSDP operations have proliferated from 2003

⁶¹ See e.g. Secretariat of the European Convention, *Speeches delivered at the inaugural meeting of the Convention on 28 February 2002*, Brussels, 5 March 2002, CONV 4/02, Annex 4: ‘Introductory Speech by President V. Giscard d’Estaing to the Convention on the Future of Europe’, p. 16; Arts. I-3(4) and III-292 CT and Arts. III-309 to III-313 CT on the CSDP.

⁶² Arts. 3(5) and 21 TEU; Arts. 42–46 TEU on the CSDP.

⁶³ Council of the European Union, Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency [2004] OJ L 245/17.

⁶⁴ For a concise overview see Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge: Cambridge University Press 2010, pp. 273–275; further Christine Kaddous, ‘External Action under the Lisbon Treaty’, in: Ingolf Pernice and Evgeni Tanchev (eds.), *Ceci n’est pas une Constitution – Constitutionalisation without a Constitution?* Baden-Baden: Nomos 2009, pp. 173–189.

⁶⁵ See Western European Union, ‘Statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty – Belgium, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom’, Brussels, 31 March 2010.

⁶⁶ For the legal uncertainties surrounding the EEAS as a sui generis organ, see Bart Van Vooren, ‘A legal-institutional perspective on the European Union External Action Service’, (2011) 48 *Common Market Law Review*, pp. 475–502; for an assessment of the first year of EEAS practice see Steven Blockmans, ‘The European External Action Service one year on: First signs of strengths and weaknesses’, *CLEER Working Paper* 2012/2.

⁶⁷ Note also Protocol 10 on Permanent Structured Cooperation attached to the Treaties. Arguing for an indirect use of this option, see Sven Biscop and Jo Coelmont, ‘CSDP and the

to 2008, culminating in the launch of the first aero-naval operation of the EU in the fight against Somali pirates (operation *EU NAVFOR Atalanta*) in late 2008, no other operations have been launched under the CSDP ever since. This has prompted Duke to speak of a “crisis of confidence in CSDP” today.⁶⁸

While the EU has been expanding its global ambitions and institutional machinery, and followed up with a burst of different operations around the world, the same cannot be said by any measure about NATO. The Alliance remains largely preoccupied with its operation in Afghanistan. Apart from this and the aforementioned training mission in Iraq, NATO still keeps peacekeepers in Kosovo and supports the EU in Bosnia via the ‘Berlin Plus’ mechanism. In parallel to the EU, it maintains an anti-piracy operation off the coast of Somalia (operation *Ocean Shield*). This in particular seems to be a case of duplication, necessitating the allocation of resources for EU–NATO–US coordination.⁶⁹

However, in 2011 during the Libyan civil war, it was in the framework of NATO that Western nations intervened (operation *Unified Protector*), and not the European Union.⁷⁰ The two organizations existed here next to one another, as frameworks from among which states could choose, and here NATO came to be preferred by those EU Member States that wanted to act swiftly, i.e. France and the United Kingdom in this case. This does not reflect the assertions from the new NATO Strategic Concept, which after all calls for an “active and effective European Union” as “a unique and essential partner for NATO”.⁷¹ Moreover, the side-lining of the European Union in this context was perceived as a huge setback not only for the CSDP but for EU foreign policy as a whole. An editorial in *Le Monde* of 31 March 2011, poetically declaring the CSDP dead and buried in the sands of Libya, opined that “[t]he disunity is total and particularly striking when it is a question of deciding on war”.⁷² The Union, for various reasons of internal divisions, including Germany’s reluctant stance in this

‘Ghent Framework’: The Indirect Approach to Permanent Structured Cooperation’, (2011) 16 *European Foreign Affairs Review*, pp. 149–167.

⁶⁸ Duke, *supra* n. 15, p. 343.

⁶⁹ See Hallams, *supra* n. 21, pp. 66–84. The European Union has also launched a CSDP police operation in Afghanistan (*EUPOL Afghanistan*).

⁷⁰ See Anand Menon, ‘European Defence Policy from Lisbon to Libya’, (2011) 53 *Survival*, pp. 75–90.

⁷¹ NSC 2010, *supra* n. 11, p. 2, par. 32.

⁷² As quoted and translated by Menon, *supra* n. 70, p. 76.

crisis, failed to pick up arms. Thus, for many observers, it ceased to exist altogether as an actor.⁷³

As a matter of general trajectory, commentators observe that the EU is on track to be leaving behind NATO. For Sven Biscop, whereas "NATO can contribute, it is not equipped to take the lead", the EU together with the United States "are the true, comprehensive foreign policy actors in Europe and North America".⁷⁴ More cautiously, Simon Duke concludes that "if the treaty-based aspirations are realised, the EU will have potential to address a far wider range of foreign policy and security challenges than NATO."⁷⁵ In sum, uncertainties surrounding the future performance of both organizations remain. On the one hand, despite all prophecies of the demise of NATO, it is still quite obviously 'in business', as illustrated most clearly in Afghanistan as well as on Europe's southern doorstep. On the other, in view of the global ambitions of the Lisbon Treaty, it remains open to which extent the Union will be able to live up to them, not least in times of internal turmoil of the Eurozone crisis.⁷⁶

Notwithstanding these uncertainties, in terms of identity the EU has clearly surpassed NATO. For better or worse, while NATO contents itself with continuing to secure the "common defense and security" of its members and occasional international crisis management,⁷⁷ the EU claims nothing less than to "promote an international system based on stronger multilateral cooperation and good global governance"⁷⁸ in each and every way. However, as the case of Libya shows, the actorness of the EU can quickly vanish into thin air if it falters in the area of security and defense.

⁷³ The EU did eventually agree on a military operation in Libya. However, this came at too late a stage, and was never activated. See Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya) [2011] OJ L 89/17.

⁷⁴ Sven Biscop, *From Lisbon to Lisbon: Squaring the Circle of EU and NATO Future Roles*, EGMONT Security Policy Brief No. 16, January 2011, p. 2.

⁷⁵ Duke *supra* n. 15, p. 354.

⁷⁶ Note that austerity and spending cuts already start to permeate the discourse on European defense policy, see e.g. Biscop and Coelmont, *supra* n. 67; also Giovanni Faleg and Alessandro Giovannini, *The EU between Pooling & Sharing and Smart Defence: Making a virtue of necessity?* CEPS Special Report May 2012.

⁷⁷ NSC 2010, *supra* n. 11, p. 4.

⁷⁸ Art. 21(2)(h) TEU.

3. THE EU AND NATO: SISTERS-IN-LAW?

As was outlined in the preceding section, the relationship between the EU and NATO has shifted in the course of history from a neat distinction of functions in post-war Europe, via a period of uncertainty, to a situation in which at least the ambitions of the Union as a global player are politically comprehensive, while NATO remains limited to its "core business"⁷⁹ of common defense as well as global crisis management. This evolution also finds its expression in the legal relationship between the two organizations.

As a preliminary matter, given that we find ourselves here in the sovereignty sensitive, 'high politics' area of security, too strong a legal dimension may not be expected in the first place. In view of the "inherently limited function of legal rules in the area of security and defense policy",⁸⁰ this is not the type of external policy where judicialized dispute settlement is common, as opposed to, for instance, trade or human rights.⁸¹ Keeping this in mind, it is a priori unsurprising that soft arrangements rather than hard treaty law govern the relationship between both.

Nonetheless, we do find law that defines this relationship in two principal aspects. On the one hand, the Union, in its Treaties as well as in the soft arrangements between the two organizations, indeed continues to acknowledge in principle 'NATO primacy'. On the other, in the EU context, a rather strong reliance on law also in the area of the CSDP can be detected, which in turn shapes the relationship between the two organizations and their member states. In addition, through the connection between the internal market and armaments policy, also an EU-internal dimension can be seen emerging.

3.1 A Transatlantic Nod from the EU

As a point of departure, it should be stressed that the Union is not, and cannot be, a member of NATO. Thus, the EU does not enjoy a formal status in the sense of being a member or even observer at NATO. The North

⁷⁹ Biscop, *supra* n. 74, p. 1.

⁸⁰ Panos Koutrakos, *The Role of Law in Common Security and Defence Policy: Functions, Limitations and Perceptions*, in: id. (ed.), *European Foreign Policy: Legal and Political Perspectives*, Cheltenham: Edward Elgar 2011, p. 256.

⁸¹ See the contributions by Tamara Perišin and Thomas Streinz to this volume (Chapters 4 and 5).

Atlantic Treaty does only allow states to become members.⁸² The Union itself is thus not subject to the obligations under the NAT, in contrast to those of its Member States which are NATO allies.

Nonetheless, as was referred to earlier, a claim to 'NATO primacy' exists in Article 8 of the NAT, which states that:

Each Party declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty.

Consequently, those Allies which would go on to participate in European integration were under an obligation to ensure that the Treaties governing the European institutions, or any other 'engagement' in this area, would not be at odds with the NAT. In times of neat complementarity, conflicts were rather unlikely. Once the EU entered into the field of security and defense policy, however, the question to which extent this 'primacy' can be maintained becomes salient.

The ESDI, as the European pillar within NATO, would have been a clear expression of such primacy, but it did not come about. The resulting ESDP, which was to be the autonomous defense capability of the EU, in turn did underline its compatibility with NATO.⁸³ The breakthrough in implementing the ESDP, the Franco-British Saint-Malo Summit, already catered to NATO obligations. While the two nations agreed that "the Union must have the capacity for autonomous action",⁸⁴ they asserted in the same breath that collective defense commitments under WEU and NATO must be maintained and that the obligations under NATO are to be respected. In this way, the Union and its Member States gave a 'transatlantic nod' in order to dispel American and other Allies' suspicions of the ESDP.

Also after the Lisbon reform the Treaties continue to accommodate the fact that many EU Member States are also members of NATO. Generally, EU primary law now vows to respect the "national identities, inherent in their fundamental structures, political and constitutional"⁸⁵ of the

⁸² More precisely, "any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area" can be invited to join NATO (Art. 10 NAT).

⁸³ For the situation pre-Lisbon, see Heike Krieger, 'Common European Defence: Competition or Compatibility with NATO', in: Martin Trybus and Nigel White (eds.), *European Security Law*, Oxford: Oxford University Press 2007, pp. 174–197, pp. 192–194; and Reichard, *supra* n. 15, pp. 148–149.

⁸⁴ Saint-Malo Declaration, *supra* n. 41, p. 8.

⁸⁵ Art. 4(2) TEU.

Member States. The accommodation in EU primary law of the Atlanticist attitudes and concerns of some members can be seen as a specific expression of such respect.⁸⁶ Article 42 TEU on the CSDP states that this policy

shall respect the obligations of certain Member States, which see their common defence realized in the North Atlantic Treaty Organization (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.⁸⁷

In this context, it should be noted that the position of neutral Member States is accommodated in the Treaties as well. The provision cited above also states that the CDSP will not "prejudice the specific character of the security and defence policy of certain Member States",⁸⁸ which means their neutrality. Overall, relations between Member States which are NATO allies and other EU members (Austria, Cyprus, Finland, Ireland, Malta and Sweden) have not caused particular friction in the EU-NATO relationship.⁸⁹ Arguably, this is due to the way the CSDP works, i.e. providing ample flexibility and a large degree of control to the Member States.⁹⁰ As we have seen, virtually all Member States participate in CSDP operations, neutrals as well as allies, once such operations could be agreed upon at EU level.

Two exceptions apply here. First, Denmark opted out of the CSDP altogether ever since the so-called 'Edinburgh Decision' of 1992. However, according to Protocol 22 attached to the Treaties, "Denmark will not prevent the other Member States from further developing their cooperation in this area".⁹¹ Danish approval is not necessary to establish unanimity

⁸⁶ The scope of 'constitutional identity' as a ground for invoking derogations from obligations under EU law, however, is rather limited. See in detail Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', (2011) 48 *Common Market Law Review*, pp. 1417–1454.

⁸⁷ Art. 42(2), second subparagraph TEU. The new mutual assistance clause reiterates this concern (Art. 42(7), second subparagraph TEU), as do Protocol 10 on Permanent Structured Cooperation and Protocol 11 on Art. 42 of the Treaty on European Union attached to the Treaties.

⁸⁸ Art. 42(2), second subparagraph TEU.

⁸⁹ This is not to say that neutrality is not an important domestic political topic in these countries. See further Nicole Alecu de Flers, *EU Foreign Policy and the Europeanization of Neutral States: Comparing Irish and Austrian foreign policy*, Abingdon: Routledge 2012.

⁹⁰ While the Member States "shall make civilian and military capabilities available to the Union for the implementation" of the CSDP (Art. 42(3) TEU), there is no mechanism to force them to do so. Generally, decisions in the area of CSDP are taken unanimously (Art. 42(4) TEU).

⁹¹ Protocol No. 22 annexed to the Lisbon Treaty on the Position of Denmark, Art. 5(1).

within the Council to take decisions in this area.⁹² Thus, for instance, Denmark does not contribute to operation *Atalanta* launched by the EU, but instead commits warships to NATO's operation *Ocean Shield* in the same area and with a similar mandate. The second problematic case is the so-called 'Cyprus question', which has complicated the efforts to operationalize the EU-NATO relationship.

These efforts, as we have seen, did not yield a formal international agreement between the two organizations. Instead, what exists between them is the 'Berlin Plus' arrangement. It is officially a 'Declaration', with the detailed content of this arrangement remaining classified. This puts in question its legal value, in particular its character as an international agreement.⁹³ It took three years to negotiate this arrangement, which is not least due to the 'Cyprus question', viz. tensions between Greece (member of both the EU and NATO) and Turkey (member of NATO and officially an EU candidate country) over Cyprus (EU member since 2004 but outside of NATO and the PFP).⁹⁴ Related to 'primacy', there remains the contentious idea of a 'right of first refusal' by NATO. Already in the Saint-Malo Declaration, it was stated that the Union should be able to take action "where the Alliance as a whole is not engaged".⁹⁵ This formulation was subsequently incorporated in the 'Berlin Plus' arrangement as well as EU documents.⁹⁶ Whether it means that the EU cannot engage in crises where NATO is not already present or rather where NATO does not choose to be present is a matter of controversy. Thus far, NATO has never claimed it in practice.⁹⁷

Subsequently, 'Berlin Plus' has only been drawn upon on two early occasions, operation *Concordia* in Macedonia and operation *Althea* in Bosnia. Given the time and efforts it took to finalize the arrangement, it has been observed that it "only remained relevant for less than 20 months".⁹⁸ Misgivings due to the 'Cyprus question', in particular Cyprus blocking Turkish participation in the CSDP and Turkey blocking Cypriot participation in

⁹² Id., Art. 5(2).

⁹³ Reichard, *supra* n. 15, pp. 288–300.

⁹⁴ Reichard, *supra* n. 15, pp. 283–288.

⁹⁵ Saint-Malo Declaration, *supra* n. 41, p. 8.

⁹⁶ 'EU-NATO Declaration on ESDP', Press Release (2002) 142, 16 December 2002, available at: <<http://www.nato.int/docu/pr/2002/p02-142e.htm>>; see also already European Council, Presidency Conclusions, Helsinki European Council of 10 and 11 December 1999, par. 27.

⁹⁷ See Reichard, *supra* n. 15, pp. 162–170.

⁹⁸ Erwan Lagadec, *Transatlantic Relations in the 21st Century: Europe, America and the Rise of the Rest*, Abingdon: Routledge 2012, p. 118.

NATO/PFP, continue to impede its being utilized, or any more meaningful form of EU-NATO cooperation for that matter.⁹⁹ Against this backdrop, cooperation between EU and NATO under this framework has been the object of criticisms as being ineffective and unsatisfactory.¹⁰⁰

In sum, acknowledging that 'NATO primacy' in principle and generally stressing the importance of the Transatlantic Alliance could be seen as an integral part of the Union's identity as an international actor. However, it seems to be of little practical relevance. As the Libyan example shows, while there remain situations in which NATO is chosen over the EU, this occurs rather *de facto* rather than as a matter of law.

3.2 European Identity beyond NATO

Beyond nodding to the importance of the transatlantic relationship, the EU Treaties, especially after the Lisbon reform, contain much more that is of relevance in determining the Union's identity as an international actor through security policy. Today, the shifting relationship between the two, in which the Union's ambitions by far surpass those of NATO, are plainly expressed in the Treaties. By including this in the overall system of Union primary law, this also introduces a stronger legal dimension – one which is absent from NATO. Apart from substantive obligations under the EU Treaties, the Union's institutional framework serves to lend more credence to these commitments. While retaining an intergovernmental character at large, defense policy is also linked to the supranational rules of the internal market via the still developing area of armaments cooperation.

As a point of departure here, the claim to primacy of Article 8 NAT meets as its EU counterpart the principle of 'primacy' of Union law.¹⁰¹ At first glance, these may seem as diametrically opposed claims. However, they operate in quite different ways, with the primacy of EU law running deeper and producing more tangible effects. The NAT is undoubtedly an agreement setting up an international organization. Compliance with the

⁹⁹ See Smith, *supra* n. 12, p. 247.

¹⁰⁰ For Simon Duke, EU-NATO relations "remain ill-defined and lack much meaningful substance". Duke, *supra* n. 15, p. 354; also Smith, *supra* n. 12; Howorth, *supra* n. 51, pp. 173–177; and Asle Toje, *The EU, NATO and European Defence – A Slow Train Coming*, EUISS Occasional Paper (December 2008).

¹⁰¹ This principle is not codified in the EU Treaties until the present day. However, it is referred to, as well as the 'well settled case law' of the EU Court of Justice thereon, in Declaration No. 17 Concerning Primacy attached to the Treaties. This case law started, as is well-known, with the judgment of the Court of Justice in Case 6/64 *Costa v ENEL* [1964] ECR (English special edition) 585.

NAT is governed by international law. The case of the EU is not so simple. In the course of time, it has acquired what many consider 'constitutional' features.¹⁰² One important such feature is that EU law claims precedence over any form of the national law of its Member States, rendering the latter inapplicable to the extent that it is inconsistent with the former.¹⁰³

Importantly, this includes in principle also international agreements concluded by the Member States, unless covered by the protection afforded by Article 351 TFEU (formerly Article 307 TEC). This Article, while respecting the rights and obligations under prior international agreements concluded by Union Member States with third parties,¹⁰⁴ obliges them at the same time to "take all appropriate steps to eliminate the incompatibilities established."¹⁰⁵ Consequently, EU Member States adhering to NATO are under a duty to eliminate incompatibilities which might arise between their obligations under the Treaties and the NAT.

The fact that we find ourselves in the 'high politics' of security policy here does not serve as an excuse not to comply with other obligations under Union law. The Court stressed this is the *Centro-Com* case. While confirming that "Member States have indeed retained their competence in the field of foreign and security policy",¹⁰⁶ the Court underlines that, nonetheless, "the powers retained by the Member States must be exercised in a manner consistent with [then] Community law".¹⁰⁷ This also entails that the basic foundations of the constitutional order of the Union, including fundamental rights protection, cannot be undermined by international commitments, including those in the pursuit of international

¹⁰² The Court of Justice famously labeled the Treaties 'the basic constitutional charter' of the then Community in Case 294/83 *Parti écologiste 'Les Verts' v Parliament*, [1986] ECR 01339, par. 23; arguing for the "constitutionalization" of EU foreign affairs, including the CSDP, see Daniel Thym, 'The Intergovernmental Constitution of the EU's Foreign, Security & Defence Executive', (2011) 7 *European Constitutional Law Review*, pp. 453–480, pp. 477–478; and generally Paul Craig, 'Constitutions, Constitutionalism, and the European Union', (2001) 7 *European Law Journal*, pp. 125–150.

¹⁰³ According to the Court of Justice, this includes also constitutional law of the Member States: see Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, par. 3. See in detail on this subject, for instance, Robert Schütze, *European Constitutional Law*, Cambridge: Cambridge University Press 2012, Chapter 10 on "Supremacy and Preemption".

¹⁰⁴ Art. 351(1) TFEU.

¹⁰⁵ Art. 351(2) TFEU. It thus protects the obligations towards third parties rather than the rights of EU Member States under these agreements: see ECJ, Case 10/61, *Commission v Italy*, [1962] ECR (English special edition) I.

¹⁰⁶ ECJ, Case C-124/95, *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England*, [1997] ECR I-81, par. 24.

¹⁰⁷ *Ibid.*, par. 25.

security. In contrast to NATO, in the case of the Union, we find a court willing to rule on such questions.¹⁰⁸

Beyond the question of primacy, the post-Lisbon Treaties impose a number of important substantive obligations on the Member States. The pre-Lisbon Treaties still rather vaguely called for the EU "to assert its identity on the international scene, in particular through" the CFSP and CSDP.¹⁰⁹ Under the current Treaties, expressing the global ambitions of the Union, the wish to become a security actor is more clearly visible. Among the general objectives of EU external action,¹¹⁰ the Union is to "safeguard its values, fundamental interests, security, independence and integrity"¹¹¹ and "preserve peace, prevent conflicts and strengthen international security".¹¹² With particular regard to the CSDP, the Petersberg tasks, originally devised by the WEU, have been expanded through the Lisbon reform. In addition to humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking,¹¹³ these tasks now include also joint disarmament operations, military advice and assistance tasks, conflict prevention and post-conflict stabilization, which all may also be used to contribute to the fight against terrorism.¹¹⁴

Two further substantive obligations stand out concerning the Union as a security actor. First, the Treaties now also contain a so-called solidarity clause. It obliges the Union and its Member States to "act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster".¹¹⁵ Secondly, the EU Treaties post-Lisbon also move towards the traditional core task of NATO, viz. common defense, with a new mutual assistance clause, which reads:

If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by

¹⁰⁸ In particular Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat v Council and Commission* [2008] ECR I-06351; further Nikolaos Lavranos, 'Protecting European Law from International Law', (2010) 15 *European Foreign Affairs Review*, pp. 265–282.

¹⁰⁹ Art. 2(1) TEU (pre-Lisbon). The objectives specific to the CFSP were elaborated on further in Art. 11 TEU (pre-Lisbon), and have to a significant extent inspired what is now Art. 21 TEU.

¹¹⁰ On the legal effects of such objectives see Joris Larik, 'Shaping the International Order as a Union Objective and the Dynamic Internationalisation of Constitutional Law', *CLEER Working Paper* 2011/05.

¹¹¹ Art. 21(2)(a) TEU.

¹¹² Art. 21(2)(c) TEU.

¹¹³ As included already in Art. 17(2) TEU (pre-Lisbon).

¹¹⁴ Art. 43(1) TEU.

¹¹⁵ Art. 222(1) TEU.

all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.¹¹⁶

This reproduces largely, albeit not exactly, Article V of the WEU Treaty.¹¹⁷ Two caveats, in addition to the compatibility requirement with NATO, apply here. It should be noted, first, that it is only the Member States which are called upon here to lend assistance to *each other*. The Union and its institutions, however, do not appear here, as they do by contrast in the solidarity clause. Secondly, even though this makes the Union a mutual defense arrangement among the Member States, this should not be confused with the creation of a 'common defense' or a 'military alliance' à la NATO or WEU.¹¹⁸ The Treaties only keep the door ajar for this option in the future.¹¹⁹ A 'common defense', including in particular nuclear deterrence that could be provided by the two Member States possessing such capabilities (France and the United Kingdom), is not present at EU level. This remains thus the sole domain of NATO. In this vein, the new Strategic Concept does not fail to recall that the "supreme guarantee of the security of the Allies is provided by the strategic nuclear forces of the Alliance, particularly those of the United States".¹²⁰ Thus far it could be said that common defense is not part of the Union's identity.

Such substantive objectives and obligations have to be understood within their institutional context. While the legal nature of the CFSP/CSDP was questionable in the early phase after the Maastricht Treaty and in view of the peculiar pillar-structure that it brought about,¹²¹ it has become more consolidated over the years. Now, with the Lisbon Treaty in force, the CFSP is part and parcel of the integrated Union structure.

¹¹⁶ Art. 42(7), first subparagraph TEU.

¹¹⁷ Art. V Modified Brussels Treaty: "If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked all the military and other aid and assistance in their power."

¹¹⁸ Piris, *supra* n. 64, p. 275, and Koutrakos, *supra* n. 80, pp. 237–240, who both note, however, the political significance of the provision.

¹¹⁹ Art. 42(2), first subparagraph TEU, which states ambiguously: "The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides."

¹²⁰ NSC 2010, *supra* n. 11, p. 14, par. 18.

¹²¹ For a shrewd assessment of the intricacies of this structure see Christoph Herrmann, 'Much Ado About Pluto? The "Unity of the European Union Legal Order" Revisited', in: Marise Cremona and Bruno de Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals*, Oxford: Hart Publishing 2008, pp. 19–51.

Nevertheless, despite the formal disappearance of the pillars, "specific rules and procedures" continue to apply in this policy area.¹²² CFSP, and the CSDP as an "integral part"¹²³ of it, hence retain a strong intergovernmental character, which is best illustrated by the a priori exclusion of jurisdiction of the Court of Justice from this field.¹²⁴ The breadth of CFSP, as covering "all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy",¹²⁵ is contrasted with the ill-defined nature of this competence. This is reflected by the fact that the competences catalogues of the TFEU put the CFSP as a case apart. The extent to which former Community law principles apply, remains thus open to question.¹²⁶

However, it was already mentioned that Member States remain bound by EU law obligations even when acting in the domain of foreign and security policy. In addition, the Court retains the power to rule on cases concerning the proper legal basis of Union measures with a view to ensuring that CFSP and non-CFSP competences do encroach upon each other.¹²⁷ Furthermore, under the Treaties, the Member States are under the so-called 'duty of sincere cooperation',¹²⁸ violations of which are justiciable.¹²⁹ In the area of the CFSP, this duty is reiterated in strong terms:

The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

¹²² Art. 24(1), second subparagraph TEU. See further Peter van Elsuwege, 'EU external action after the collapse of the pillar structure. In search of a new balance between delimitation and consistency', (2010) 47 *Common Market Law Review*, pp. 987–1019.

¹²³ Art. 42(1) TEU.

¹²⁴ Art. 24(1), second subparagraph TEU juncto Art. 275(1) TFEU.

¹²⁵ Art. 21(1), first subparagraph TEU.

¹²⁶ Some consensus seems to exist that the CFSP/CSDP is neither exclusive nor pre-emptive, see Aurel Sari, 'Between Legalization and Organizational Development: Explaining the Evolution of EU Competence in the Field of Foreign Policy', in: Paul James Cardwell (ed.), *EU External Relations Law and Policy in the Post-Lisbon Era*, The Hague: T.M.C. Asser Press, pp. 59–95; Marise Cremona, 'Defining competence in EU external relations: lessons from the Treaty reform process', in: Alan Dashwood and Marc Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press 2008, pp. 63–67; and Eeckhout, *supra* n. 14, p. 171.

¹²⁷ Art. 40 TEU; see for a discussion of the pertinent case law on this issue, Bart Van Vooren, 'The Small Arms Judgment in an Age of Constitutional Turmoil', (2009) 14 *European Foreign Affairs Review*, pp. 231–248.

¹²⁸ Art. 4(3) TEU.

¹²⁹ On the case law of the Court of Justice in this regard, see Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?', (2011) 36 *European Law Review*, pp. 522–539.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.¹³⁰

There is no cogent reason why the duty of cooperation as such should not also apply in the area of CFSP/CSDP.¹³¹ Since the general provision on the duty of sincere cooperation obliges the Member States to "refrain from any measure which could jeopardize the attainment of the Union's objectives",¹³² i.e. *all* of the Union's objectives, it might be argued that the Court would have jurisdiction to enforce this duty also in the area of CFSP/CSDP.¹³³ However, when arguing along the lines that still CFSP-specific objectives exist among the external action objectives of the EU,¹³⁴ the exclusion of the jurisdiction of the Court from the CFSP would also apply to them. Consequently, the exceptions to this exclusion specifically mentioned in the Treaties would thus be deemed exhaustive.¹³⁵

In any event, both Union institutions and the Member States are legally bound to the pursuit of these objectives and to cooperate with each other to achieve them. As "trustees of the Union interest",¹³⁶ the Member States are made to partake in international actions on behalf of the Union, asserting further a shared EU identity.

As a final point, a link can be seen emerging between the initial 'core business' of the Union, or rather its predecessors, the Communities, and its more recently emerging identity as a security actor. This is the link between the efforts for better coordination of armaments policy and the rules of the internal market. It became clear early on in the history of

¹³⁰ Art. 24(3) TEU, second and third subparagraph.

¹³¹ Christophe Hillion and Ramses Wessel, 'Restraining External Competences of EU Member States under CFSP', in: Marise Cremona and Bruno de Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals*, pp. 79–121.

¹³² Art. 4(3), third subparagraph TEU.

¹³³ Arguing in this direction, Hillion and Wessel, *supra* n. 131, pp. 108–112.

¹³⁴ Alan Dashwood, 'Article 47 TEU and the Relationship between First and Second Pillar Competences', in: Alan Dashwood and Marc Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press 2008, pp. 70–103.

¹³⁵ These are the already mentioned monitoring of the borderline between CFSP and non-CFSP competences (Art. 40 TEU), as well as jurisdiction over restrictive measures against natural or legal persons (Art. 275(2) TFEU).

¹³⁶ To borrow the term from Marise Cremona, 'Member States as Trustees of the Union Interest: participating in international agreements on behalf of the European Union', in: Anthony Arnulf et al. (eds.), *A Constitutional Order of States: Essays in European Law in Honour of Alan Dashwood*, Oxford: Hart Publishing 2011, pp. 435–457.

the CSDP that the Union would need "credible military forces"¹³⁷ in order to live up to the new tasks it had set itself. Especially after the need to rely on the United States and NATO in the Balkan conflicts of the 1990s, shortcomings in this regard became apparent. Consequently, the Union set itself ambitious 'headline goals'¹³⁸ and elaborated 'capability action plans' and 'capability improvement charts' to remedy them.¹³⁹

With a view to improving capabilities, institutionally, an increasingly important role was to be played by the European Defense Agency. Under the post-Lisbon TEU, it

shall identify operational requirements, shall promote measures to satisfy those requirements, shall contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, shall participate in defining a European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities.¹⁴⁰

In its endeavors to foster a European Defense Technological and Industrial Base operating in a European Defense Equipment Market, it encountered the difficult issue of security exceptions to the rules of the internal market.¹⁴¹ Traditionally, the Member States have based themselves on what is now Article 346 TFEU (ex-Article 296 TEC) in order to prevent an automatic opening of their armaments industries to the internal market. Under this provision, a Member State does not have to supply information "the disclosure of which it considers contrary to the essential interests of its security"¹⁴² and is free to take measures that it deems "necessary for the protection of the essential interests of its security which are connected

¹³⁷ Saint-Malo Declaration, *supra* n. 41, p. 8.

¹³⁸ First, the Helsinki Headline Goal of 1999, set for 2003, European Council, Presidency Conclusions, Helsinki European Council of 10 and 11 December 1999, Annex 2 to Annex IV; then, the Headline Goal 2010, approved by General Affairs and External Relations Council on 17 May 2004, endorsed by the European Council of 17 and 18 June 2004.

¹³⁹ See Council of the European Union, Development of Military Capabilities, Updated: January 2011, Military capabilities/8, available at: <http://www.consilium.europa.eu/media/1222506/110106%20updated%20factsheet%20capacities%20militaires%20-%20version%208_en.pdf>.

¹⁴⁰ Art. 42(3), second subparagraph TEU; see also European Defence Agency, An Initial Long-Term Vision for European Defence Capability and Capacity Needs, 3 October 2006.

¹⁴¹ See on these difficulties and the various earlier attempts to improve European cooperation in the field of armaments, Aris Georgopoulos, 'The European Armaments Policy: A *conditio sine qua non* for the European Security and Defence Policy?', in: Martin Trybus and Nigel White (eds.), *European Security Law*, Oxford: Oxford University Press 2007, pp. 198–222.

¹⁴² Art. 346(1)(a) TFEU.

with the production of or trade in arms, munitions and war material".¹⁴³ At the same time, the article states that "such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes".¹⁴⁴

However, the broad interpretation of this exception by the Member States has been contested more recently in the case law of the Court of Justice and by the Commission.¹⁴⁵ Subsequently, the Commission has put forward a number of legislative proposals (the so-called 'defense package'), which resulted in the adoption in 2009 of directives concerning both intra-EU transfers of defense products and procurement rules in this area.¹⁴⁶ These rather recent developments remind us that the Union has not shed its original identity as a project of economic integration with the internal market as its centerpiece. Furthermore, despite the overall intergovernmental character of the CSDP, the character of the Union as a "community based on the rule of law"¹⁴⁷ re-enters the picture through legislative attempts and judicial clarification in the area of defense equipment. These, again, are elements lacking in the context of NATO.

4. CONCLUSION

In this chapter, the relations between the EU and NATO have been assessed from the vantage point of what they can tell us about the identity of the Union on the international stage. Both organizations share more than half a century of history, most of which was centered on the European continent, but which has acquired during the past two decades an increasingly global outlook. As we have seen, the relationship between the two has shifted significantly over time. While initially they complemented each other functionally, the end of the Cold War brought about a period

of reorientation for both. While NATO managed to stay in business as a defense and international crisis management organization, the Union's ambitions have become decidedly higher and more comprehensive. It has certainly not lived up to all of them, but in any event has surpassed NATO on its way to become a global actor in its own right across all areas of foreign policy.

In terms of the identity of the Union through interaction with other international organizations, this has been a case apart for two related reasons: first, the fact that this concerns the sovereignty-sensitive area of security and defense, where secrecy and intergovernmentalism are the hallmarks, which often overshadow legal rules and deny judicial intervention; second, the fact that the EU has never been a member of NATO. We can thus hardly speak of the shaping of an EU identity *through* NATO, not to mention *through the law* that would bind the two.

Rather, it is what distinguishes the two organizations that allows us to reflect on the Union; and one of the principal differences between them is the stronger reliance on law in the framework of the Union. The integrative force of law, in turn, shapes the identity of the Union also in the area of CSDP. In this respect, the wording of the pre-Lisbon preamble of the TEU that the Union would assert its international identity "in particular" through CFSP and CSDP was misleading for two reasons. First, at all times the Union has respected the commitment of its Member States to NATO, not least by providing an EU primary law foundation for accommodating NATO membership. What the Treaties tell us with this is that Atlanticism is decidedly not at odds with the CSDP or the Union's identity. Secondly, contrary to the perceptions that international identity goes hand in hand with bearing arms, it was argued here that the fact that the Union started to bear arms did not in itself create its particular identity. Instead, that it did so and yet remained a community based on the rule of law with a deeply integrated economy, yet flexible enough to respect also the identities of its Member States, is what truly defines its identity. Therefore, the new formulation of the TEU preamble stating that further implementation of the CFSP/CSDP means "thereby *reinforcing* the European identity and its independence in order to promote peace, security and progress in Europe and in the world" is doubtlessly more appropriate.

¹⁴³ Art. 346(1)(b) TFEU.

¹⁴⁴ Art. 346(1)(b) TFEU.

¹⁴⁵ See, respectively, ECJ, Case C-337/05, *Commission v Italy*, [2008] ECR I-02173; and European Commission, Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement, 7 December 2006, COM(2006) 779 final; further Koutrakos, *supra* n. 14, pp. 245–258.

¹⁴⁶ Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community [2009] OJ L 146/1; Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security [2009] OJ L 216/76.

¹⁴⁷ ECJ, Case 294/83 *Parti écologiste Les Verts v Parliament*, [1986] ECR 01339, par. 23.

Chapter 10

Coherence vs. Conferred Powers?

The Case of the European External Action Service

Mauro Gatti

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Abstract The process of European integration has led to the creation of numerous external actions at the Union level, and these should now be brought together to reinforce the coherence of EU foreign affairs. The attainment of coherence finds an apparently insurmountable obstacle in the delimitation of the powers conferred on EU institutions, since a rigid separation of the powers of Union bodies hinders the generation of positive connections among EU policies. The Lisbon Treaty sought to increase coherence in foreign affairs in part by creating the European External Action Service. This chapter examines the EEAS's mandate and responsibilities in order to elucidate the interplay of coherence and conferred powers in external relations law. The first part of the analysis investigates the EEAS mandate, showing that the Treaties require the Service to coordinate external relations in order to ensure coherence. The second part examines the nature of this coordination, focusing on the technique legislators used to enable the EEAS to have a role in the implementation of development aid. Legislators identified the EEAS's responsibilities by balancing the principle of the coherence of external action against the delimitation of conferred powers, with a view to fostering synergy in foreign

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affairs. It is argued that a similar approach can also be adopted in other areas where the EEAS brings added value as a coordinator, and in particular in the area of crisis response. An enlargement of the EEAS's responsibilities is politically difficult, but it may be simplified by an amendment of the Treaties (where the mandate of the Service is spelled out), in such a way as to reinforce the Service's legitimacy and effectiveness as a foreign-policy coordinator.

Keywords Conferred powers • Crisis response • Development cooperation • European External Action Service • External action coherence • Institutional balance

10.1 Introduction

The attainment of coherence in foreign affairs is one of the most important objectives of the European Union (EU), but it finds an apparently insurmountable obstacle in institutional balance, since a rigid separation of powers among Union bodies hinders the ability to form positive connections among EU policies. By providing for the establishment of the European External Action Service (EEAS, or Service), the Lisbon Treaty sought to increase coherence in foreign affairs. This chapter analyses the EEAS's mandate and responsibilities in order to elucidate the interplay of coherence and conferred powers in external-relations law. The analysis suggests the need for some minor Treaty amendments as a way to strengthen the EEAS's ability to increase coherence in foreign affairs.

The European External Action Service is well known, but some of its crucial aspects are not. As readers will know, the EEAS is a service of the High Representative (HR), having quasi-institutional features,¹ but its overarching function remains unclear: even Union officers have no common understanding of what the EEAS is for, what its mandate is, or what its place is in EU external relations.² Moreover, the EEAS's responsibilities raise some doubts, especially as concerns its role in development cooperation: for one thing, it is only recently that it became possible to identify the EEAS's exact role³; and, for another, there is little clarity as to the legal rationale for the Service's role in managing development aid. While some authors focus on the compression of Commission's powers, which they find unwarranted,⁴ others stress the importance of the EEAS's coordination in achieving coherence of

external action.⁵ As a result of these uncertainties, it is also unclear whether the current Treaty rules allow for an augmentation of the EEAS's responsibilities.⁶

This chapter seeks to explain the peculiar division of labour between the EEAS and the Commission's departments in light of the Service's overarching objective, namely, to ensure coherence. This will make it possible to determine whether the current Treaty rules allow for an enlargement of the EEAS's field of action, either through administrative decisions or via an amendment of Decision 2010/427/EU (EEAS Decision),⁷ which established the Service. The analysis divides into two parts. The first investigates the EEAS's mandate: Sect. 10.2 seeks to demonstrate that the Treaties require the 'coherence' of EU external relations, whose implementation is hindered by the delimitation of the powers of EU institutions. Section 10.3 shows that the EEAS is tasked precisely with promoting the coherence of external action, and that it should consequently coordinate the activities of offices and bodies having different responsibilities, even across the divide between the Common Foreign and Security Policy (CFSP) and non-CFSP areas. The second part of the chapter analyses the nature of this coordination and the techniques that have been adopted to allow for the inclusion of both CFSP and non-CFSP activities among the responsibilities of the EEAS. Section 10.4 suggests that interinstitutional cooperation may contribute to the pursuit of the EEAS's goals, and in such a way as not to call into question the delimitation of the powers of EU bodies. However, this cooperation is sometimes insufficient to bring about coherent action. Therefore, as shown in Sect. 10.5, legislators reshuffled Commission-department responsibilities in the field of development aid by balancing coherence against conferred powers, in order to foster synergy in foreign affairs. Section 10.6 suggests that a similar approach may also be adopted in crisis response, since the EEAS has great coordinating potential in this area. The findings of the paper are summarised in Sect. 10.7, which also makes a modest proposal for Treaty amendment.

10.2 External Action Coherence as a Political Objective and a Legal Principle

The process of European integration has led to the creation of numerous external initiatives at the EU level. The challenge now is to bring these different instruments and capabilities together so as to reinforce European identity and its independence.⁸

¹ Van Vooren (2011).

² Wouters et al. (2013), p. 26.

³ Stroß (2012). In fact, such an analysis became possible only once the EEAS and Commission services came to an agreement as to their precise division of labour: see *infra*, Sect. 10.5.

⁴ See, *inter alia*, Van Reisen (2010) and Mekonnen (2010).

⁵ Duke and Blockmans (2010).

⁶ Cf. Blockmans et al. (2013), p. 14.

⁷ OJ 2010 L 201/30. It must be stressed from the outset that, even though the EEAS Decision may be revised soon, its content is unlikely to be radically altered, especially as concerns the division of labour between the EEAS and Commission services; therefore, the findings of this paper are likely to remain valid even after the forthcoming amendment to Decision 2010/427/EU. Cf. High Representative, "EEAS Review", http://eeas.europa.eu/library/publications/2013/3/2013_eeas_review_en.pdf. Accessed 18 September 2013.

⁸ See European Council, A Secure Europe in a Better World: European Security Strategy, 12 December 2003.

EU law soon recognized the importance of this issue, which was first addressed in primary law in the Single European Act, whose preamble stressed Europe's responsibility 'to aim at speaking ever increasingly with one voice and to act with consistency and solidarity'.⁹ The Constitutional Treaty, and then the Lisbon reform, multiplied the references to 'consistency'. Article 21(3) of the Treaty on European Union (TEU) partly echoes pre-Lisbon Article 3 TEU by stating that 'the Union shall ensure consistency between the different areas of its external action', and also 'between these and its other policies'. Other provisions of primary law call for 'consistency' in specific external action areas or within the EU institutions that manage them.¹⁰ The concept of consistency between EU policies also spilled over into other areas and is now listed among the 'provisions having general application' in the Treaty on the Functioning of the European Union (TFEU), whose Article 7 reads: 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'. Therefore, there is little doubt that the consistency of external action should be considered a general principle of EU law.¹¹

The rationale for this concern with consistency is well known. The risk of inconsistency in European foreign affairs is determined by the multiplicity of actions by Member States and the EU. The conferral of limited competences on the EU means that its external action coexists with the Member States' foreign policies. What is more, the EU has multiple competences, and they are subject to autonomous decision-making procedures. Since each institution plays a distinct role under the different procedures, the various policies must be kept separate. Indeed, it is necessary to preserve the delimitation of powers set through the conferral of competences on the Union, a delimitation in which lies the EU's institutional balance.¹² This institutional balance is protected mainly by Article 13(2) TEU, stating that 'each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'. The delimitation of external action policies is particularly important when it comes to the Common Foreign and Security Policy. While this policy is implemented largely through intergovernmental procedures,¹³ the other actions of the Union are managed through approaches resembling the archetypal 'Community method'. This difference justifies the provisions contained in Article 40 TEU, according to which the implementation of the CFSP cannot affect the application of the procedures and the extent of the institutional powers set forth in the Treaties for the exercise of non-CFSP competences, and vice versa.

⁹ Single European Act, OJ 1986 L 169/1, Preamble. See also Article 30(5).

¹⁰ Articles 18(4), 26(2) TEU and 196(1)(c), 212(1), 214(7), 329(2) TFEU. For a general survey of how Treaty drafters tried to address the lack of coherence in external action, see Chap. 9 by Wouters and Ramopoulos in this volume.

¹¹ Hillion (2012), p. 4.

¹² Christiansen (2012); Constantinesco (2006), p. 485; Jacqu   (2004).

¹³ Gosalbo Bono (2006), p. 347; Constantinesco and Petculescu (2005), p. 69; Edwards (1998).

Still, the exact content of the principle of consistency remains unclear. A literal interpretation of external action consistency may suggest that this principle calls for preventing antinomies among European foreign policies. Consistency is commonly described as the ability of several propositional contents to be asserted together without contradiction. Similarly, the consistency of a legal system may be defined as the absence of logical contradiction between two statements of law.¹⁴ In this sense, consistency is a property of legal systems enabling them to exist,¹⁵ a property protected by interpreting norms in such a way as to prevent antinomies,¹⁶ or else by solving antinomies through norms on the conflict of rules.¹⁷

However, such a restrictive interpretation of the principle of external action consistency does not seem appropriate. For one thing, there seems to be no reason why the drafters of the Treaties should have made a point of repeatedly requesting the noncontradiction of EU external action law, since such consistency is a property of all legal systems and is actually a precondition for their existence.¹⁸ And, for another thing, the noncontradiction of legal norms is insufficient: even policies that do not contradict one another on a legal level can be politically incompatible. Political (CFSP) issues are in particular closely bound up with 'technical' (non-CFSP) ones. As is stated in the Tindemans Report, 'the traditional distinctions maintained by diplomatic chancelleries in this field make increasingly less sense in the modern world', since economic, industrial, financial, and commercial questions 'are the subject of negotiations, the significance of which is highly political'.¹⁹ In fact, this issue is neither new nor a prerogative of the Union; as a French diplomat remarked back in 1907, 'en tout pays commerce et politique vont aujourd'hui de pair et r  agissent l'un sur l'autre'.²⁰

Therefore, it has been argued that references to consistency in primary law should rather be interpreted as a call for 'coherence',²¹ that is, for synergy among

¹⁴ See, inter alia, Guest (2012), p. 80; Schiavello (2001), p. 236.

¹⁵ See Mignolli (2009), pp. 10, 281–282.

¹⁶ As has been noted by the International Law Commission, 'it is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations'. See Conclusions of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Yearbook of the International Law Commission, 2006, vol. II, Part Two.

¹⁷ The consistency of international law, for instance, is ensured also via the norms on treaty conflict, see inter alia Conforti (2011) (significantly titled 'Consistency among Treaty Obligations').

¹⁸ Mignolli (2009), p. 282.

¹⁹ Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council, Bulletin of the European Communities, Supplement 1/76.

²⁰ Berthelot, quoted in Outrey (1953), p. 718.

²¹ Blockmans (2011), p. 7; Gauttier (2004), p. 26; Tietje (1997), p. 213. This is not to say that the Treaties do not request also the non-contradiction of EU law; as noted in den Hertog and Stro   (2013), pp. 379–381, also notions of *consistency* are advanced in Union primary law, namely through rules of delimitation.

norms, actors, and instruments in EU external relations.²² The principle of external action coherence would thus entail an obligation of EU institutions and Member States not only to ensure the noncontradiction of EU law but also to coordinate their external policies so as to give rise to coherent EU foreign affairs.²³ Such an interpretation of consistency as coherence is further justified by a teleological appraisal of the Treaties. Several primary-law provisions state that Union bodies and offices should ensure the effectiveness of EU policies in foreign affairs.²⁴ This obviously calls for coherent action, reinforcing the EU's identity and independence, which in turn are required by the preamble of the TEU.²⁵ It is evident, in other words, that if the EU intends to have political weight, it must become a coherent actor.²⁶

This reading of consistency is not contradicted by the letter of the Treaties. The distinction between consistency and coherence is absent from many European languages and is consequently not reflected in other Treaty versions. Even in English, the semantic difference between *consistency* and *coherence* is not evident: consistency is sometimes simply understood as coherence in a broader sense of this term, such as it is ordinarily understood in the English language.²⁷ Even so, it would be advisable to revise the Treaties so as to bring the semantic formulation of this principle in line with its legal content, thus eliminating the residual perplexities relating to its interpretation.

Once an extensive reading of coherence is accepted, another problem comes into focus, namely, how can coherence be implemented in practice? There is an obvious tension between the promotion of coherence and the delimitation of the powers of institutions.²⁸ If the powers of Union organs are rigidly delimited, it may prove impossible to generate positive connections among policies and to ensure their synergy. On the other hand, the principle of coherence cannot annihilate institutional balance, which is protected by Article 13(2) TEU. In particular, the promotion of coherence should not lead CFSP and non-CFSP procedures and powers to affect one another (Article 40 TEU). It is commonly claimed that this conundrum

²² Cremona (2008), p. 16. For an analysis of the practice of the EU's external action by a criterion of consistency as coherence in the 'synergetic' sense just introduced, see Bonavita (2012).

²³ Portela and Raube (2009), p. 4.

²⁴ See in particular Articles 13(1), 24(3), 26(2) and 28(5) TEU.

²⁵ Bosse-Platière (2009), p. 524.

²⁶ Neframi (2009), p. 49.

²⁷ Franklin (2011), p. 47.

²⁸ As is well known, coherence is hindered by a number of other factors, too, and in particular by the delimitation of Union and Member State competences, as shown, *inter alia*, in Cremona (2008), Bosse-Platière (2009), Neframi (2009), Mignolli (2009), Franklin (2011), and Hillion (2012). A holistic appraisal of the obstacles to the pursuit of coherence falls beyond the scope of this chapter.

cannot easily be solved in legal terms,²⁹ and that the enforcement of coherence mainly depends on the political will of Union States and institutions.³⁰

However, the interplay of coherence and conferred powers is not without legal consequences. As will be shown in the next section, the Lisbon reform provided for the creation of two organs, i.e., the High Representative and his or her Service, which are tasked with ensuring coherence transversally in foreign affairs by 'coordinating' EU policies. The remainder of the paper argues that the design of the EEAS reflects a concern with synergy, since its coordination responsibilities have not always been determined on the basis of a rigid delimitation of powers but have rather been determined by balancing the principle of coherence against conferred powers.

10.3 The High Representative and the EEAS: The Enforcers of Coherence

The High Representative (HR) and his or her Service are two of the most important innovations introduced by the Lisbon Treaty. The HR is a Union office best known for its multiple 'hats': the office conducts the CFSP,³¹ controls EU diplomacy,³² chairs the Foreign Affairs Council,³³ and acts as a Vice President of the Commission.³⁴ The HR may also act as a sort of 'Commission of the CFSP', since this person is responsible for initiative, implementation, and external representation in the CFSP area, including the Common Security and Defence Policy (CSDP), while the Commission has similar powers in the non-CFSP field.³⁵ This duality seems

²⁹ It may seem that this conundrum is solved, in a sense favourable to institutional balance, directly by the letter of Article 7 TFEU, according to which 'the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and *in accordance with the principle of conferral of powers*' (emphasis added). However, that interpretation of Article 7 TFEU is not appropriate, since this provision refers not to the powers of EU institutions but to the conferral of competences on the Union itself. This comes through clearly in the French version of the TFEU, according to which 'l'Union veille à la cohérence entre ses différentes politiques et actions, en tenant compte de l'ensemble de ses objectifs et en se conformant *au principe d'attribution des compétences*' (emphasis added). As was previously noted, this paper does not seek to investigate the relationship between coherence and the delimitation of Union competences. It suffices to stress here that, even if the former were subordinated to the latter, as the letter of Article 7 TFEU may seem to suggest, the same would not be true of the interplay between coherence and institutional powers. Indeed, this interplay is not regulated by Article 7 TFEU but, as was indicated above, it rather depends on a systematic reading of Article 13(2) TEU and Article 7 TFEU ('the Union shall ensure consistency between its policies and activities').

³⁰ Van Elsuwege (2010), p. 1015.

³¹ See in particular Articles 18(2) and 26(3) TEU.

³² Article 221(2) TFEU.

³³ Article 18(3) TEU.

³⁴ Article 18(4) TEU.

³⁵ Christiansen (2012) and Gatti and Manzini (2012).

hardly conducive to the creation of positive connections between CFSP and non-CFSP actions; therefore, the drafters of the Treaties expressly introduced an institutional linkage between the HR and the Commission. Article 18(4) TEU states that, within the institution, the HR has responsibilities pertaining to external relations and is also responsible for 'coordinating other aspects of the Union's external action'. It is obvious that legislators introduced the coordination of non-CFSP and CFSP actions in order to reinforce policy coherence: Article 18(4) TEU itself explicitly states that the HR, in his or her capacity as Commission Vice President, 'shall ensure the consistency of the Union's external action'.³⁶

Can the coordination brought by the HR/VP be a tool for promoting coherence while respecting institutional balance? The answer to this question obviously depends on the specific definition of the coordinating duties of the HR/VP. In order to understand how the HR's coordination responsibilities are put into practice, it is necessary to examine the administrative organ that exercises most of the HR's powers, namely, the European External Action Service. The post-Lisbon Treaties only mention the EEAS in Article 27(3) TEU, which reads as follows:

In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.

At least two aspects of this provision require attention. In the first place, the status of the EEAS is unclear. Article 27(3) TEU explicitly defines the EEAS as a 'service', that is to say, an entity functionally attached to, and dependent on, another body or office.³⁷ Council Decision 2010/427/EU, which established the EEAS, characterises it as a *sui generis* service, having quasi-institutional features. According to its Article 1(2), the EEAS is a 'functionally autonomous body' with the legal capacity necessary to perform its tasks and achieve its 'objectives'.³⁸ Subsequent amendments to the financial regulation and the staff regulations described the Service as an 'institution' for budgetary and staff purposes.³⁹

³⁶ It should be noted that Article 21(3) TEU, too, stresses that the High Representative should assist the Council and the Commission in ensuring external action consistency, while Article 26(2) TEU, located in the CFSP Chapter of the EU, states that the Council and the HR shall ensure 'the unity, consistency and effectiveness of action by the Union'.

³⁷ Cf. CFI, Case T-309/03 *Camós Grau v Commission* [2006] ECR II-1173, para 66; in this sense, see also GC, Case T-264/09 *Technoprocess v Commission and Delegation of the European Union to Morocco* [2011] ECR II-00208, para 70; GC, Case T-395/11 *Elti d.o.o v Delegation of the European Union to Montenegro* [2012] nyr, para 36.

³⁸ Article 1(2).

³⁹ See Regulation 1081/2010/EU/Euratom of the Parliament and of the Council, OJ 2010 L 311/9; Regulation 1080/2010 of the European Parliament and of the Council, OJ 2010 L 311/1.

However, such anomalies can be disregarded for the purpose of the present analysis, since the EEAS cannot adopt instruments by which to steer EU policy,⁴⁰ and so it truly functions as a service for the performance of Union activities.

This characterisation of the EEAS as a service naturally leads one to analyse a second important aspect of Article 27(3) TEU. According to this provision, the EEAS 'assists' the HR. In other words, the EEAS is the 'administration' that 'supports' the HR in carrying out his or her mission (Article 298 TFEU). However, as seen above, the HR has *multiple* missions, including (but not limited to) implementing the CFSP and acting as a Commission Vice President. Does the EEAS support the HR in the performance of all his or her tasks? A possible reading of Article 27(3) TEU may be that the EEAS should be a service operating merely in the CFSP area. This provision is part of the CFSP chapter of the TEU, and its paragraphs 1 and 2 describe the CFSP mandate of the HR. Moreover, considering that paragraph 3 mentions the HR's 'mandate'—in the singular, not in the plural—it may be argued that the EEAS should not assist the HR in his or her capacity as a Vice President of the Commission.

Such a reading of Article 27(3) TEU is misleading. The EEAS is certainly responsible for implementing the CFSP in practice, since it is the only administration that may assist the HR in this task. Even so, the Service is not a purely CFSP body; if it were, it would be unable to assist the HR in performing its overarching function, that of ensuring coherence. Neither the Member States nor the EU institutions have ever doubted that the EEAS should participate in coordinating external action, in CFSP and non-CFSP areas alike, in order to enhance its coherence.⁴¹ The EEAS Decision confirms this. On the one hand, the Decision is numbered not as a CFSP act (2010/427/CFSP) but as a non-CFSP instrument (2010/427/EU). On the other hand, Article 2 of the Decision clearly states that the Service should support the High Representative in fulfilling his or her 'mandates', thereby including the mandate as a Vice President of the Commission, and that the Service should support the attainment of increased coordination and coherence in external action.⁴² Therefore, it is clear that the problem lies with the language of Article 27(3) TEU. The rationale for locating the legal basis of the EEAS decision in the CFSP chapter of the TEU can be questioned.⁴³ It would be more logical to locate it in Article 18 TEU, since this is the main provision providing for the HR's mandates. The drafters of the Treaties can also consider

⁴⁰ Van Vooren (2011), p. 491.

⁴¹ Cf. European Council Conclusions, 16 September 2010, EUCO 21/1/10 REV 1, Annex I para f; Commission and High Representative, Issue paper on the European External Action Service, Annex II to Council doc. 9956/05, para 7. See also the European Parliament Resolution on the institutional aspects of setting up the European External Action Service, 2009/2133(INI), 22 October 2009, preamble, letter J. Notice also that some versions of Article 27(3) TEU explicitly mention the HR's 'functions' (in the plural); see the Italian version ('funzioni') and the Portuguese ('funções').

⁴² See also Articles 3(1) and 9(2). Cf. Duke (2012), p. 50.

⁴³ Blockmans et al. (2013), p. 11.

clarifying directly in new Article 18 TEU what the EEAS's overall task is: namely, to ensure coherence.

Once it is established that the EEAS should promote external action coherence, it remains to be seen whether it can coordinate the external actions of the EU and how this coordination can affect the interplay of coherence and institutional balance. Considering that the EEAS is the HR's administration, it should be able to exercise the HR's powers. Consequently, it should implement the CFSP and should have some role in managing Commission policies. The problem, of course, lies in deciding *which* role is suitable for the Service, and to what extent this may affect the exercise of Commission powers. The next section shows that in theory the EEAS can promote coherence without interfering in the exercise of Commission powers, and that it can do so by cooperating with the Commission's departments. However, legislators have considered such cooperation to be insufficient, and they consequently entrusted the EEAS with a direct role in non-CFSP policy management; this issue is discussed in Sect. 10.5.

10.4 Is Cooperation a Solution to the Coherence/Conferred-Powers Conundrum?

Certain aspects of the EEAS Decision appear to indicate that the Service is disconnected from the Commission structure and cannot interfere with the institution's activities. Article 1 claims that the Service is 'separate from [...] the Commission', and that its assistance to the HR/VP should be 'without prejudice to the normal tasks of the services of the Commission'.⁴⁴ Therefore it may seem that only through a dialogue with Commission departments can the Service promote coherence across the CFSP/non-CFSP divide. From this perspective, the EEAS's 'coordination' of Commission external relations [Article 18(4) TEU] would be tantamount to the Service's 'cooperation' with Commission structures.

The mutual cooperation of EU bodies is a principle of EU law, mainly set forth in Article 13(2) TEU, stating that 'the institutions shall practice mutual sincere cooperation'.⁴⁵ Such cooperation may seem a solution to the coherence/institutional-balance conundrum. On the one hand, cooperation so construed does not threaten the institutional balance, since every institution by definition cooperates with other bodies in exercising its *own* powers. At the same time, mutual cooperation is

⁴⁴ Article 2(1).

⁴⁵ Union institutions are in fact subject to the same mutual duties of sincere cooperation that govern relations between Member States, on the one hand, and EU institutions, on the other. See ECJ, Case 230/81 *Luxembourg v European Parliament* [1983] ECR 255; ECJ, Case 204/86 *Greece v Council* [1988] ECR 5323, para 16; ECJ, Case C-65/93 *Parliament v Council* [1995] ECR I-643, para 23. For a general survey on the principle of sincere cooperation, see Chap. 5 by Casolari in this volume.

conducive to coherence, since it may create connections among institutions, and hence among policies. The obligation of sincere cooperation also applies to the HR, since it consists of a duty 'of general application',⁴⁶ which consequently concerns not only institutions but also noninstitutional bodies and offices of the EU. It is not clear whether Article 13(2) TEU may bind the EEAS directly,⁴⁷ but it certainly applies to the Service in an indirect manner: given that the HR must cooperate with other bodies, the EEAS should cooperate with their administrations.

The EEAS Decision confirms this requirement of the EEAS and the Commission to cooperate. Article 3 (significantly titled 'Cooperation') stipulates that the EEAS must support, and work in cooperation with, the services of the Commission. The same provision also confirms that such cooperation is a means by which to 'ensure consistency between the different areas of the Union's external action'. The practical modalities of cooperation are addressed in the remainder of Article 3. Paragraph 2 states that 'the EEAS and the services of the Commission shall consult each other on all matters relating to the external action of the Union in the exercise of their respective functions, except on matters covered by the CSDP'. Although cooperation may take also other forms, this provision has an important consequence: the EEAS must be informed of all the Commission actions having external consequences, and it can raise its concerns to other departments.⁴⁸ Paragraph 3 enables the adoption of 'service-level arrangements' between the EEAS and other services, including Commission services, so that they can institutionalise their cooperation. The most important of the arrangements that have already been finalized is probably the one titled 'Working Arrangements between Commission Services and the EEAS in relation to external relations issues'⁴⁹ (Working Arrangements), which clarifies the division of labour between the EEAS and the Commission departments. Such arrangements are unlikely to have legal effects concerning the management of EU actions, since neither the EEAS nor its counterparts have the

⁴⁶ ECJ, Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, para 58.

⁴⁷ If the EEAS were directly bound by an obligation, it would arguably be a legal person, something that seems to be ruled out by the letter of the EEAS Decision (although this aspect is far from certain); since this matter goes beyond the scope of the present analysis, it will not be addressed in any greater detail. However, see Article 1(2) of the EEAS Decision; see also Van Vooren (2011).

⁴⁸ The Service may even slow the decision-making process, by not approving the proposals for the College of the Commissioners which are prepared by other departments. In the absence of consensus on a proposal, the Commission would indeed be able to adopt a Decision only through a lengthy oral procedure, whereas the agreement of all departments enables the use of a rapid written procedure in the College, cf. Commission rules of procedure, Commission Decision 2010/138/EU, Euratom, of 24 February 2010, OJ 2010 L 55/60, Articles 8, 12 and 23(3).

⁴⁹ SEC (2012) 48, 10 January 2012, not published in the OJ. It is worth stressing, for the sake of accuracy, that the Working Arrangements are not formally an interservice arrangement, since they appear as an internal Commission document. However, they are *de facto* a service-level arrangement, since they were negotiated 'word by word' with the EEAS. This was pointed out to me by two EEAS officials I interviewed in September 2012 and confirmed by two Commission officials I interviewed in September 2012.

autonomy to enter into binding agreements on policy-making.⁵⁰ They are nonetheless important for the promotion of coherence, since they structure the dynamics of administrative cooperation.

An analysis of the EEAS's cooperation with the Commission suggests two considerations. In the first place, since inter-institutional cooperation is essential to the pursuit of the EEAS's goals, it would be logical to render this duty explicit in primary law (even if it can be inferred through a systematic reading of the Treaties). And, in the second place, if cooperation is in fact necessary and contributes to the promotion of coherence, it does not seem to entail a 'coordination' capable of ensuring coherence. As long as the Service does not take the 'lead' in implementing a policy, it is not likely to have the expertise and, consequently, the legitimacy required to steer the conduct of Commission departments. More generally, it is evident that cooperation becomes impossible if one party does not 'work with' the other. It has been reported that some Commission directorates-general are not too cooperative,⁵¹ since their officials sometimes suspect that the EEAS is undermining the Community method.⁵² Therefore it is possible that effective 'coordination' may require a stronger interference of the EEAS with the administration of Commission policies.

This is the case, in particular, with development cooperation. This policy is managed under procedures resembling the archetypal Community method, but it has often pursued the same objectives as the CFSP, ranging from the promotion of democracy and the rule of law to the protection of human rights⁵³ (see *infra*, Sect. 10.5). Notwithstanding any concerns one may have about an unwarranted 'politicisation' of development aid, legislators sought to give the EEAS some means by which to influence the way cooperation with third countries is conducted.

10.5 Balancing Coherence and Conferred Powers: The EEAS and Development Aid

Development cooperation is a Union policy conducted through instruments based on Article 209 TFEU, or on a combination of Articles 209 and 212, the latter concerning cooperation with third countries other than developing countries.⁵⁴ The

⁵⁰ It cannot be ruled out that the EEAS may enter into binding arrangements on administrative issues. However, this question exceeds the scope of this chapter and is consequently not analysed here.

⁵¹ Grant (2013).

⁵² House of Lords (2013).

⁵³ Dusepulchre (2008), p. 273.

⁵⁴ Or, more accurately still, current instruments are based on former Article 177 of the Treaty establishing the European Community (now Article 209 TFEU), and in some cases on Article 181a TEC (now Article 212 TFEU). Notice that the existing instruments are presently being reviewed. This analysis addresses the instruments as they exist, but the conclusions it reaches probably will hold in the future as well, since the overall architecture of development cooperation is likely to remain unchanged. Cf. Commission and High Representative, Joint Communication to the European Parliament and the Council, *Global Europe: A New Approach to Financing EU External Action*, COM (2011) 865 final, 7 December 2011.

objectives of development aid are broad, in the sense that the EU's cooperation should pursue primarily the eradication of poverty (Article 208 TFEU), but it may lawfully involve a variety of specific measures.⁵⁵ In particular, development is linked to the CFSP, since, as is well known, 'there can be no sustainable development and eradication of poverty without peace and security'.⁵⁶

Development funds are mainly managed in the phase known as 'programming', which leads to the adoption of 'strategic documents' identifying development priorities and allocating resources by country and priority area. Before the Lisbon Treaty, this policy belonged to the Communitarian framework; therefore, the 'programming' of financial instruments was done by Commission services at the administrative level, and it was concluded at the political level through Commission decisions.

With the recent reform, development cooperation was grouped with the non-CFSP strand of external action; consequently, it should be implemented by the Commission [Article 291(2) TFEU]. Article 9 of the EEAS Decision acknowledges that the management of the Union's external cooperation programmes falls under the responsibility of the Commission. Nonetheless, the same provision, under paragraphs 3 to 6, reshuffles programming responsibilities between the EEAS and the Commission services. Since the language of the EEAS Decision is not completely straightforward, the precise allocation of responsibilities in this area was subsequently determined by the Commission and the EEAS in negotiations whose result is contained in the Working Arrangements.

An analysis of Article 9 of the EEAS Decision, complemented by the Working Arrangements, suggests an apparently fuzzy division of labour between the EEAS and Commission services. In some cases, the distribution of tasks is quite clear-cut: the EEAS is solely responsible for managing crisis-response funding, which forms the short-term part of the Instrument for Stability (IfS),⁵⁷ and electoral observation, which is financed under the European Instrument for Democracy and Human Rights (EIDHR).⁵⁸ In other cases, responsibilities overlap. The programming of the most 'technical' cooperation initiatives, i.e., the thematic programmes of the Development Cooperation Instrument (DCI),⁵⁹ is performed by Commission services under

⁵⁵ ECJ, Case C-268/94 *Portugal v Council* [1996] ECR I-06177, para 37.

⁵⁶ See ECJ, Case C-403/05 *Parliament v Commission* [2007] ECR I-9045, para 57; ECJ, Case C-91/05 *Commission v Council* [2008] ECR I-3651, para 65.

⁵⁷ Regulation of the Parliament and the Council 1717/2006/EC, OJ 2006 L 327/1, Article 3. The crisis-response part of the IfS is by definition non-programmable, in that as it deals with emergencies. Commission decisions in this field are nonetheless prepared by administrative departments, i.e. the EEAS and the Foreign Policy Instrument Service, a Commission department under the authority of the High Representative/Vice-President, which is co-located with the EEAS. For the sake of simplicity, the management of short-term part of the IfS is addressed here along with the programming of other development instruments.

⁵⁸ Regulation 1889/2006/EC of the European Parliament and of the Council, OJ 2006 L 386/11.

⁵⁹ Regulation of the Parliament and of the Council 1905/2006/EC, OJ 2006 L 378/41. 'Thematic' programmes, which are subsidiary to 'geographic' programmes, 'encompass a specific area of activity of interest to a group of partner countries not determined by geography, or cooperation activities addressed to various regions or groups of partner countries, or an international operation that is not geographically specific' [Article 11(1)].

the responsibility of the Commissioner for Development and in consultation with the EEAS. Conversely, the programming of the Instrument for Nuclear Safety Cooperation (INSC),⁶⁰ the long-term crisis preparedness initiatives financed under the IfS,⁶¹ and the promotion of human rights (supported by the EIDHR) are done by the EEAS, operating under the responsibility of the HR/VP and in consultation with Commission departments. The division of labour becomes even less transparent in the case of the biggest financial instruments, namely, the European Development Fund (EDF),⁶² the European Neighbourhood and Partnership Instrument (ENPI),⁶³ and the geographical programmes of the DCI. These instruments fall under the responsibility of the Commissioners responsible for development and neighbourhood policy; in theory, it may seem that the EEAS should take the lead in the administrative management of these instruments, since Article 9(3) EEAS Decision explicitly states that the Service is 'responsible' for their programming, and the Working Arrangements stipulate that the EEAS prepares programming documents 'in agreement with' the Directorate-General (DG) Development and Cooperation (Europeaid). In practice, the situation looks different: since the EEAS lacks Europeaid's focus on development, the two services appear to be placed, at least, on an equal footing with respect to the management of the chief cooperation instruments.⁶⁴

The EEAS's intervention in managing development programmes was soon described as problematic for institutional balance. As has been noted by Van Reisen,⁶⁵ 'the Treaty does not provide for a split of responsibilities between the EEAS and the Commission, and there are no arrangements to allow a sharing of

⁶⁰ Council Regulation 300/2007/Euratom, *OJ* 2007 L 81/1. To be sure, the INSC is based neither on Article 209 nor on Article 212 TFEU but on Article 203 Euratom, which is the 'flexibility clause' of this Treaty. Nonetheless, the INSC appears to be related to both development and nondevelopment cooperation, since it is likely to foster both the interests of the EU and the development and welfare of developing countries, not unlike other thematic instruments, like the EIDHR and the IfS.

⁶¹ See Regulation 1717/2006/EC, *supra* n. 57, Article 4.

⁶² Regulation of the Council 617/2007/EC of 14 May 2007, *OJ* 2007 L 152/1. Even the EDF is not based on Article 209 TFEU but on an 'internal agreement' among the Member States (*OJ* 2006 L 247/32), an agreement that in turn serves to implement the ACP-EC partnership agreement, Signed in Cotonou on 23 June 2000, revised in Luxembourg on 25 June 2005, and newly revised in Ouagadougou on 22 June 2010, see *OJ* 2000 L 317, *OJ* 2004 L 297, *OJ* 2005 L 209, *OJ* 2005 L 287, *OJ* 2006 L 247, *OJ* 2010 L 287. Even so, the EDF is indubitably an instrument for the Development Cooperation of the Union, which is managed through procedures that closely resemble those applicable in the former Communitarian framework (see also ECJ, Case C-316/91 *European Parliament v Council of the European Union* [1994] ECR I-625, para 41). Therefore, for the sake of simplicity, the EDF is analysed here along with other development-cooperation instruments.

⁶³ Regulation 1638/2006 of the European Parliament and of the Council, *OJ* 2006 L 310/1.

⁶⁴ Interviews with six Europeaid officers March–July 2011, June 2012; interviews with three EEAS officers April–June 2012.

⁶⁵ Van Reisen (2010).

policy implementation under the Treaty'. From a formalistic perspective, this concern does not seem justified. The EEAS Decision does not formally allocate any power to the EEAS.⁶⁶ All legal acts relating to development cooperation must be adopted by the Commission, which also sets the rules for the implementation of external action instruments.⁶⁷ However, this formalistic perspective appears insufficient, since the EEAS's action in development aid impinges as a matter of fact on the exercise of Commission powers. Programming documents are written by relying on the expertise of numerous trained officials, and the College of Commissioners can hardly question their analyses. Since the Commission should be the only entity setting the priorities of international cooperation during the implementation phase, and the EEAS is formally separate from the Commission, it may theoretically seem logical that the programming of external action instruments should remain with the Commission services.⁶⁸

Why did legislators introduce an apparent compression of the Commission's powers and a possible modification of the institutional balance? A partial answer may be garnered from Article 18(4) TEU, according to which the HR is responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. Article 9(2) of the EEAS Decision confirms the existence of a link between the EEAS's involvement in development cooperation and Article 18(4) TEU, by stating that external action instruments are a means for the HR to ensure 'overall political coordination of the Union's external action, ensuring the unity, consistency and effectiveness of the Union's external action'. Since the HR would be unable to coordinate external action if development cooperation were programmed solely by departments under the responsibility of other Commissioners,⁶⁹ the solution adopted by legislators may seem to be inspired by a systemic reading of Article 291(2) TFEU and Article 18(4) TEU.

However, even this argument is insufficient. It is not clear, in particular, why the EEAS's involvement in development cooperation should take different forms in different programmes. More generally, it may be asked whether Article 18(4) TEU can justify any degree of EEAS involvement in Commission policies. A closer look at the division of labour between the EEAS and the Commission departments clarifies these issues. The solution adopted by legislators, and recalibrated through inter-service negotiation, has a clear rationale, its point being to enable the EEAS to intervene where it can bring added value through its officials' expertise in the 'political' arena. Arguably, the EEAS's responsibilities in the Common Security

⁶⁶ The Service cannot have any formal power as concerns the management of development cooperation, simply because, like the Committee of Permanent Representatives (COREPER), 'it is not an institution of the Communities upon which the Treaty confers powers of its own'. See ECJ, C-25/94 *Commission v Council* [1996] ECR I-1469, para 26. See also Van Vooren (2011).

⁶⁷ Blockmans (2011), p. 16; Van Vooren (2011). Cf. Article 9(3) of the EEAS Decision.

⁶⁸ Mekonnen (2010), p. 13.

⁶⁹ Duke and Blockmans (2010), p. 11.

and Defence Policy account for its administrative control on crisis-response funds under the IfS; similarly, the Service's authority on diplomacy⁷⁰ justifies its exclusive administrative responsibility relating to electoral observation. In the prominent role of the EEAS in the CFSP area probably lies the rationale for its preponderant influence on sectors close to 'high politics', such as security management at large (INSC and crisis preparedness under the IfS) and human-rights promotion (under the EIDHR). Finally, the EEAS's tasks as a political coordinator presumably explain its partial control of the main development-cooperation instruments, which are rather 'technical' in nature but have some 'political' import because of their financial size: as an EEAS official put it, the Service participates in the programming of these instruments in order to make sure that the actions of development specialists in Europeaid is coherent with the Union's overall political priorities.⁷¹ Therefore, the EEAS's involvement appears to be proportional to the functional proximity between development programmes and 'political' issues, and thus to the concern about coherence between CFSP and non-CFSP actions.⁷²

The approach adopted by legislators leads to two partial conclusions. In the first place, legislators seem to have balanced the principle of coherence against the delimitation of the powers conferred on the Commission. The variable degree of EEAS intervention suggests that when there is a strong concern with coherence (e.g., crisis response, under the IfS), a 'flexible' interpretation of Commission powers may be justified; when this concern is not present (e.g., DCI thematic programmes), conferred powers are interpreted in a rather rigid manner. Consequently, the distribution of powers is not abstract, rigid, and static, as the language of the Treaties would suggest, but pragmatic, multiform, and dynamic: the division of labour between services is also based on practical concerns, it takes different forms in programmes (even if they have similar legal bases), and it may change over time, since the EEAS and Commission services may negotiate the details of their relations via inter-service arrangements.

Secondly, the EEAS's role in the non-CFSP area cannot be disproportionate to its ability to achieve coherence and effectiveness in a given area. In this respect, the non-paper recently introduced by fourteen Member States⁷³ in the context of the incoming revision of the EEAS Decision may raise some concerns. According to these states, 'the HR/VP (and the EEAS) should be responsible for Neighbourhood Policy as this constitutes a central area of European foreign policy'; moreover,

⁷⁰ See Article 221 TFEU and Article 5 of the EEAS Decision.

⁷¹ Interview, April 2012.

⁷² It may be noted that the legislators preferred this approach to other scenarios originally suggested by C. Ashton (such as the transfer of the entire programming to the EEAS and a regional division of labour in which the Commission would have been responsible for Africa and the Service would have taken care of Asia and Latin America, cf. Tannous 2013, p. 334).

⁷³ Ministries of foreign affairs of Austria, Belgium, Denmark, Estonia, Finland, Germany, Italy, Latvia, Luxembourg, Netherlands, Poland, Slovakia, Spain, and Sweden, Non-paper: Strengthening the European External Action Service, 1 February 2013, available at http://eurotradeunion.eu/documents/20130201_nonpaper.pdf. Accessed 18 June 2013.

'strategic and multi-annual programming in the area of development cooperation should be conducted under the overall authority of the High Representative'. This appears to suggest that the EEAS should, *inter alia*, become solely responsible (at the administrative level) for managing the ENPI. This solution, if confirmed, would appear to be not entirely compatible with the Treaties. On the one hand, it would considerably restrain the Commission's discretion. On the other hand, it would not necessarily bring about increased coherence and effectiveness; Europeaid should maintain a pivotal role in the management of programmes in developing countries (including those belonging to the EU Neighbourhood), since this DG is where development expertise lies within the EU.⁷⁴

In summary, the EEAS was given a primary role in the management of development cooperation, by balancing the concern with coherence against the delimitation of conferred powers. As a result, the division of labour between the EEAS and the Commission departments is not abstract, rigid, and static but rather pragmatic, multiform, and dynamic. It remains to be seen whether the same approach can be applied to other sectors; in other words, the question is whether the current Treaty rules allow for an augmentation of the EEAS's responsibilities. The most important test in this regard lies in crisis response, and that is consequently the topic examined in the next section.

10.6 Conferred Powers as an Obstacle to Coherence: The EEAS and Crisis Response

While development cooperation shows that legislators balanced coherence against conferred powers, crisis response shows that a rigid delimitation of conferred powers still prevails in certain areas. However, this section suggests that the current Treaties leave some margin for an increased coordination in this area.

The EU is well equipped to deal with crises outside its borders: not only does it directly manage substantial funding through its instruments for international cooperation, but it carries out humanitarian and military operations in several countries, maintains a wide diplomatic network, and supports Member States in coordinating civil protection. EU institutions show an increasing interest in the coherence of crisis response, so much so that it is now commonplace to refer to a 'comprehensive approach' in this area. However, the coordination of crisis response encounters two obstacles. The first of these lies in institutional balance. While the HR and the EEAS implement the CFSP, crisis-related non-CFSP actions should be managed by

⁷⁴ Cf. House of Lords (2013), p. 46. In this sense, the Parliament is probably right to reject 'any intergovernmentalisation' of the neighbourhood policy. See European Parliament recommendation to the High Representative of the Union for Foreign Affairs and Security Policy and Vice President of the European Commission, to the Council and to the Commission of 13 June 2013 on the 2013 review of the organisation and the functioning of the EEAS [2012/2253(INI)], para 7.

the Commission and its departments. The second obstacle lies in the autonomy of humanitarian aid. This policy, which is likely to be part of most EU crisis responses, should be implemented in keeping with the principles of international law [Article 214(2) TFEU] and the principles forming the European Consensus on Humanitarian Aid, i.e., humanity, impartiality, neutrality, and independence.⁷⁵ Therefore it is important that humanitarian aid not be used to pursue political goals, such as the ones that inform the CFSP. In sum, EU crisis response is evidently characterised by a duality between CFSP and non-CFSP actions, a duality expressed at the institutional level by the bipartition between the EEAS and the Commission.

Neither primary nor secondary law provides any explicit solution to the EEAS/Commission duality in crisis response. So far, the practice has not gone far beyond the letter of the law. The Commission in principle acknowledged the Service's coordinating potential by affirming in 2010 that the EEAS can make it possible 'to improve consistency between disaster response and possible political and security related elements of the EU's overall crisis response'.⁷⁶ However, in the view of the Commission, the coordination brought by the Service should entail mutual cooperation but not a compression of the Commission's own powers. This is made evident by the 2011 proposal for a Union Civil Protection Mechanism, where the Commission acknowledged that it should 'inform' the EEAS during crises in order to allow for 'consistency' between civil-protection operations and EU relations overall. Nonetheless, according to the Commission, it falls not to the EEAS but to the Commission itself to ensure that Member States are coordinated in carrying out civil-protection operations.⁷⁷

Inter-institutional cooperation, as suggested above, is insufficient to ensure coherence. In fact, it is evident that the CFSP/non-CFSP dichotomy has negative consequences on crisis response. On the one hand, there is a duplication of structures. For instance, both the EEAS and the Commission have crisis rooms, called EU Situation Room and Emergency Response Coordination Centre (ERCC), respectively. Although the ERCC may not be 'an exact reproduction' of the Situation Room, as an EEAS official has said,⁷⁸ the mandates of the two structures largely overlap, since they both also monitor crises outside the EU.⁷⁹ On the other hand, the CFSP/non-CFSP cleavage leads to cumbersome procedures. For example,

⁷⁵ Casolari (2012), p. 152.

⁷⁶ Communication from the Commission to the European Parliament and the Council, Towards a stronger European disaster response: The role of civil protection and humanitarian assistance, COM (2010) 600, 26 October 2010.

⁷⁷ Proposal for a Decision of the European Parliament and of the Council on a Union Civil Protection Mechanism, COM (2011) 934, 20 December 2011, Articles 11(7) and 16(3).

⁷⁸ Interview, September 2012.

⁷⁹ Even the Working Arrangements do not clarify the issue, since they tautologically affirm that the division of labour between the ERCC and the Situation Room is to be determined 'by the nature of [the] crisis'. See Working Arrangements, *supra* n. 49, 30. See also, in this sense, the EEAS Review, *supra* n. 7, p. 5.

when the Civil Protection Mechanism is activated to provide consular assistance to EU citizens in third countries⁸⁰ DG ECHO and the EEAS must *both* intervene. The former keeps contacts with national civil-protection bodies, whereas the latter is responsible for facilitating consular cooperation among Member States (Article 35 TEU), and it coordinates the *mise à disposition* of military means by Member States.⁸¹ The EEAS and the Commission must therefore 'cooperate' ... in order to 'coordinate' Member States.

As in the case of development cooperation, the EEAS is well placed to provide coordination in crisis response, and it can therefore solve the problems mentioned above. The Service already participates in coordinating the CFSP strand of crisis response. An EEAS official chairs the Political and Security Committee (PSC), the Council preparatory body that exercises political control and strategic direction of CFSP crisis management. Moreover, the Service comprises the bodies supporting the PSC, namely, Civilian Planning Conduct Capability, which controls civilian crisis-management missions. The EEAS also plays a significant crisis-management role transversally to external action, since it controls crucial assets: it provides diplomatic coordination on the ground, via the Delegations, and it collects and distributes intelligence within the EU through its Intelligence Analysis Centre as well as through the Delegations.⁸²

The HR tried to put the EEAS's coordinating potential into practice by appointing a Managing Director for Crises Response and Operational Coordination, as well as by setting up a Crisis Response System (CRS). The CRS consists of organisational and standard procedures for coordinating and overseeing the implementation of the EEAS's response to crises outside the EU, and its composition includes *inter alia* the Crisis Platform, an ad hoc entity to be activated if a crisis arises outside the Union. The Platform is chaired by the HR and comprises crisis-related services belonging to the EEAS, to the Commission, and to the General Secretariat of the Council. The Platform should define options, shape decision-making, and streamline information in order to provide the EEAS with the requisite parameters and guidance for working out the appropriate response to a specific crisis. To this end, the conclusions of Crisis Platform meetings are endorsed by the High Representative or his or her assistants, and they constitute instructions to EEAS departments.

Arguably, the Platform has the potential to become a coordination hub cutting across the CFSP/non-CFSP divide, since it brings together all the EU administrations having an interest in crisis response. Such an evolution is not likely to encounter insurmountable legal obstacles. The Platform may be enabled to provide Commission services with a clear strategic objective for managing a given crisis, and it may also give them instructions, in order to make crisis

⁸⁰ Article 2(10) of Council Decision 2007/779/EC, Euratom.

⁸¹ Working Arrangements, *supra* n. 49, 32.

⁸² Gatti (2012), pp. 190–191.

response more coherent. Such reinforcement of coherence should not significantly jeopardise the institutional balance and the CFSP/non-CFSP divide, since the Commission would maintain the ability to override the Platform's instructions on non-CFSP activities (e.g., humanitarian aid), and it might retain responsibility for adopting non-CFSP acts whose adoption is recommended by the Crisis Platform. So, the Platform can allow the EEAS to ensure a more efficient coordination 'within the Commission',⁸³ thus bringing in the added value of the Service as a crisis-management coordinator.

The reinforcing of the Crisis Platform mandate may take place through a Commission decision, whereby the Commission entrusts the EEAS with the administrative coordination of non-CFSP crisis-management activities, or through the revision of the EEAS Decision (which must be approved by the Commission). However, such an outcome is improbable, since the Commission seems reluctant to cede coordinating responsibilities to the EEAS.⁸⁴ It may be that if the mandates of the HR and the EEAS in primary law are clarified, their legitimacy as crisis response coordinators will be reinforced and the Commission will take a more open attitude.

10.7 Conclusion, with a Recommendation for Treaty Reform

The process of European integration has led to the creation of numerous external actions at the EU level, and these should now be brought together to reinforce the coherence of EU foreign affairs. The attainment of coherence finds an apparently insurmountable obstacle in the delimitation of the powers conferred on EU institutions, since a rigid separation of the powers of Union bodies hinders the generation of positive connections among EU policies. The Lisbon Treaty sought to increase coherence in foreign affairs in part by creating the European External Action Service. The relation between the EEAS and the delimitation of conferred powers is problematic; the involvement of the Service in the implementation of development aid, in particular, has been criticised for allegedly interfering with the exercise of a Commission power.

This analysis has sought to explain the peculiar division of labour between the EEAS and the Commission departments in light of the Service's overarching objective. It has been argued that the EEAS mandate consists in promoting

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'coherence', that is, synergy, in EU foreign affairs, by coordinating the Union's different actions. The EEAS's coordination generally takes the form of cooperation with the Commission, through which Service and Commission departments create positive connections between CFSP and non-CFSP policies, each carrying out its respective functions. However, this cooperation may prove insufficient to ensure coherence in practice. Therefore, the Service was entrusted with a primary role in the implementation of certain (non-CFSP) development programmes functionally close to the 'political' and 'diplomatic' sphere managed by the EEAS. Legislators adopted a peculiar technique to allow for the EEAS's involvement in development cooperation: they balanced the principle of coherence against the delimitation of conferred powers in order to allow a 'flexible' interpretation of institutional balance. It is possible, and maybe appropriate, to extend this approach to the other areas where the promotion of coherence is hindered by a rigid delimitation of powers, and specifically to the area of crisis response. It may also be asked by analogy whether the legislators' 'flexible' understanding of institutional balance might justify a pragmatic approach to the delimitation of EU competences. One may envisage, in particular, the EEAS being entrusted with a stronger mandate as concerns the coordination of the Member States' foreign affairs, especially in areas where the Service brings an obvious added value, such as diplomacy, consular protection, and crisis response at large. This issue evidently requires further investigation as concerns both the theory and the practice of EU external relations.

The analysis has clarified that some provisions of primary law do not reflect the spirit of the Lisbon reform, which is more accurately embodied in the practice relating to the establishment of the EEAS. It may be possible to cope with the existing Treaties, considering that legislators have already managed to balance the principle of coherence against the delimitation of conferred powers in the effort to ensure increased coordination. However, some amendments to primary law may be called for, so as to bring Articles 18 and 27 TEU in line with the spirit of the Lisbon reform. By clearly reaffirming the coordinating duties of the EEAS, the drafters of the Treaties may further legitimise the Council's interpretation of primary law and dispel any residual concerns commentators may have as to the legality of the EEAS Decision. Moreover, the drafters would increase our awareness of what the EEAS is for, what its mandate is, and what its place is in EU external relations, thus reinforcing its legitimacy as a coordinator vis-à-vis other Union bodies. It must be stressed that since the necessary amendments would not enter into the details of the EEAS's role and tasks, but would simply clarify its function and goals, their practical effect should be to make for *greater* synergy going forward, rather than to hinder it.

It would be advisable to modify primary law in six respects (Table 10.1). First, the Treaties should speak of external action 'coherence' rather than 'consistency', since the meaning of the word *consistency* does not precisely reflect its content in the current legal framework. Second, the legal basis of the Decision establishing the EEAS should not be the CFSP chapter of the TEU but should be sought in the institutional provisions concerning the HR, i.e., Article

Table 10.1 Recommended amendments to Article 18 TEU (Lisbon version)

Article 18 TEU (Lisbon version)	Amendments
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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**A LEGAL-INSTITUTIONAL PERSPECTIVE ON THE
EUROPEAN EXTERNAL ACTION SERVICE**

BART VAN VOOREN*

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ABSTRACT

It is beyond doubt that setting up the European External Action Service will have a deep impact on EU external policy making. Both in legal and policy terms, this new player thoroughly changes the institutional balance in EU external relations. The goal of this paper is to examine the legal side of that coin, by exploring the legal and institutional nature and position of the EEAS in the EU's external relations machinery. To that end, it queries the meaning of the EEAS' *sui generis* status in the EU institutional set-up: what does it mean to say that the EEAS is 'functionally autonomous' from the Council and Commission? What are the implications of its absence of legal personality? What are its formal powers – if any, and could the EEAS be subject or object of Court proceedings? Against the backdrop of seeking answers to these questions, the paper then queries to which extent the legal choices on the nature of the EEAS still reflect the age-old tension entrenched in EU external relations law: the EU's nature as an internally diverse entity, which seeks to present a coherent Union voice to the world.

1 INTRODUCTION

At a recent event on the future of EU foreign policy, the foreign minister of Finland Alexander Stubb, said the following: "Many may not realize it yet, but the institutional balance in EU external relations has changed fundamentally ... the EU diplomatic service is a real institution."¹ The Lisbon Treaty has indeed brought about deep changes to the institutional and constitutional organization of EU external relations: the Common Commercial Policy now includes investment, the CFSP relationship to other external policies has been redefined, and the objectives of all EU external policies have been thoroughly overhauled. This Working Paper will focus on one particular aspect of the post-Lisbon institutional set-up, the new European External Action Service.² (EEAS) In highlighting that novelty, the purpose of this contribution is to move beyond policy discussions and political debates on structure and composition, and to provide a distinctly legal assessment of the words expressed by the Finnish foreign minister. To which extent has the institutional balance changed? What is the EEAS' legal nature, what are its powers, and could it be subject or object of Court proceedings? Indeed, is the EEAS a new institution? This paper will then develop a broader argument, examining the final institutional choices on the structure of the EU External Action Service against the backdrop of what is generally considered the dominating tension of EU external relations law. That is, the tension between competence delimitation among EU institutions and between the EU and its Member States, and the need to present a coherent Union voice to the world.³

¹ Foreign Minister of Finland Alexander Stubb, speaking at an event organized by the Danish Institute for International Studies, Lighthouse Europe Series, 16 November 2010, Copenhagen, Denmark.

² B. Crowe, *The European External Action Service – A Roadmap for Success* (Chatham House, 2008); S. Duke, 'The European External Action Service', *DSEU Policy Paper* No. 2 (July 2010); M. Lefebvre and C. Hillion, 'The European External Action Service: towards a common diplomacy?', *SIEPS European Policy Analysis*, June 2010; S. Duke and S. Blockmans, 'The Lisbon Treaty stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) establishing the organisation and functioning of the European External Action Service', *CLEER Legal Brief*, 4 May 2010; S. Vanhoonaeker and N. Reslow, 'The European External Action Service: Living Forwards by Understanding Backwards', 15 *EFA Rev.* (2010), 1-18.

³ C. Tietje, 'The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy', 2 *EFA Rev.* (1997), 211-233; S. Nuttall, 'Coherence and Consistency', in C. Hill and M. Smith (eds.), *International Relations and the European Union* (Oxford, Oxford University Press, 2005), 91-112; M. Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy', in P. Craig and G. de Búrca (eds.) *The Evolution of EU Law* (Oxford, Oxford University Press, 1999), 137-169; M. Cremona, 'Coherence through Law: What difference will the Treaty of Lisbon Make', 3 *Hamburg Review of Social Sciences* (2008) 11-36; C. Hillion, 'Tous pour un, un pour tous! Coherence in the external relations of the European Union', in M. Cremona (ed.) *New Developments in EU External Relations* (Oxford, Oxford University Press, 2008), 10-36.

In a first section, I will briefly expand on this 'decades-old tension' of EU external relations and briefly discuss how this tension influenced the negotiation process leading up to establishing the EEAS. In the second and largest section of this Working Paper, the legal nature of the EEAS is explained. Through characteristics such as legal personality, powers to adopt acts with legal effect, autonomy from the institutions, and standing before the Court, it is queried whether the diplomatic service is a new EU institution, an agency ... or indeed an inter-institutional body with a *sui generis* character? The fourth and fifth sections will then position the EEAS against the traditional institutional triangle, and will employ the duty of cooperation and its accountability to parliament to map the new institutional balance in EU external relations. The final section offers a brief conclusion which queries whether the decades-old tension of EU external relations has been resolved, alleviated, or simply continues with a new actor on stage.

2 COHERENCE VS. DELIMITATION IN THE NEGOTIATION OF THE EEAS

The position of the Union as an autonomous actor on the international scene has never developed by purposive design, but rather is a piecemeal construction of political and legal developments pushed forward by geopolitical and economic stimuli internal and external to the European continent. The early years of European Political Cooperation coincided with the process leading up to the Helsinki final act, as well as events in the Middle East.⁴ The birth of CFSP in the Maastricht Treaty could be linked to the collapse of the USSR, and the subsequent failure to formulate a common response to events in the former Yugoslavia spurred realization that the CFSP required reform through the Amsterdam Treaty. This dynamic has continued in the 21st century. For example, the first ever European Security Strategy was drawn up after the debacle over the Iraq war. Each of these geopolitical realities prompted EU-internal change to the legal and political machinery shaping 'European Union' external action.⁵ The European Union External Action Service is then a continuation of that process: a new institutional set-up against a decades-old struggle of the Union seeking to develop a single voice for the EU on the international scene, counterbalanced by the Member States' desire to retain control over key aspects of foreign policy. The decades-old tension of *Union* external relations is then clear: the legal structures of the Treaties seek to separate different spheres of external relations authority, while recognizing that such fragmentation is an obstacle to speaking with a single voice. The broader purpose of

⁴ S. Nuttall, *European Political Cooperation* (Oxford, Clarendon Press, 1992); and S. Nuttall, *European Foreign Policy* (Oxford, Oxford University Press, 2000).

⁵ This argument is further developed in B. Van Vooren, *A Paradigm for Coherence in EU External Relations: The European Neighbourhood Policy* (Doctoral Thesis, European University Institute, Florence, 2010).

this contribution is then to examine where the EEAS can be positioned in this legal framework, and to study which direction the scale has tipped with the EEAS: coherence or delimitation? The following paragraphs will highlight this dynamic through outlining the different negotiation positions that shaped the EEAS Council Decision finally adopted on 26 July 2010.⁶

The Lisbon Treaty entered into force on 1 December 2009, and provides for establishing the EEAS in Article 27 (3) TEU. Due to the failed Constitutional Treaty and the bumpy road towards ratification of the Lisbon Treaty, the final institutional set-up was decided in a rather hurried negotiation that commenced in Autumn 2009. Predating the Lisbon Treaty's entry into force were two reports of 22 and 23 October 2009, the first by the European Parliament and the second by the Swedish Presidency, and both provide useful insights into the debate that was to follow.⁷

Starting with the report drawn up by Elmar Brök, coherence in EU external relations was mentioned several times, though it was by no means central to the Parliamentary Resolution.⁸ Instead, the document was most specific on how the EEAS should be structured. It spoke of the EEAS as "a logical extension of the *acquis communautaire* in the sphere of EU external relations".⁹ It should be "a service that is *sui generis* from an organizational and budgetary point of view; [but] the EEAS must be incorporated into the Commission's administrative structure."¹⁰ The report further added that the Council Decision on the EEAS "... should ensure in a legally binding manner [that the EEAS] is subject to the decisions of the Council in the traditional fields of external policy (CFSP and CSDP) and subject to the decisions of the College of Commissioners in the field of common external relations."¹¹ In terms of policy substance, incorporating the CCP into the EEAS's field of action was never really on the table, but development was more contentious and Parliament addressed this specifically. It thought it necessary to remind the addressees of its Resolution that "development cooperation [is] an autonomous policy area with specific objectives and on an equal footing with other external policies."¹² This was because many in the development community were worried that giving a role to the EEAS in EU development policy was a rouse of the Member States to ensure that aid resources presently managed by the Com-

⁶ For a full account of the process leading up to the Council Decision see L. Erkelens and S. Blockmans, 'Setting Up the European External Action Service: An Institutional Act of Balance', *CLEER Working Papers* 2010/8, forthcoming.

⁷ Report on the institutional aspects of setting up the European External Action Service, Committee on Constitutional Affairs, European Parliament, Rapporteur Elmar Brök, 20 October 2009, 2009/2133 INI (Adopted as EP Resolution on 22 October); Presidency report to the European Council on the European External Action Service, 14930/09, Brussels, 23 October 2009.

⁸ Report on the institutional aspects of setting up the European External Action Service, paragraphs 5 and 6b (consistency) and once in the preamble coherence is mentioned as well.

⁹ Report on Institutional Aspects, para C.

¹⁰ Report on Institutional Aspects, para 7.

¹¹ Idem.

¹² Report on Institutional Aspects, para I.

mission would be used for strategically directed objectives rather than long-term structural development objectives.¹³

The Swedish Presidency report of October 2009 was representative of the broad agreement among the Member States, and recognized that development should remain the responsibility of the relevant Commissioners and DGs of the Commission.¹⁴ The overall tone on the positioning of the EEAS was different, with coherence being more rhetorically present, and it also spoke more of cooperation and consultation between the Commission, Council, Parliament.¹⁵ The legal status and position of the EEAS in the 'EU system' were conceived differently from that proposed by Parliament: "The EEAS should have an organisational status reflecting and supporting its unique role and functions in the EU system. The EEAS should be a service of a *sui generis* nature separate from the Commission and the Council Secretariat."¹⁶ Hence, both reports recalled the overarching coherence objective of setting up the EEAS, but there was thorough disagreement on the institutional position of the EEAS.

After Catherine Ashton was appointed at the end of 2009, a High Level Group was formed to support her in the initial-drafting of the Council Decision.¹⁷ By 25 March 2010 HR/VP Ashton published her proposal on the structure of the EEAS, prompting the immediate rejection (within the hour) of the European Parliament for lack of political accountability, the internal hierarchical organization of the EEAS and other reasons.¹⁸ In the following months a Quadriologue unfolded through which the European Parliament forcefully used its powers in the ordinary legislative procedures on the necessary amendments to the Staff and Financial Regulations.¹⁹ Defining the nature of that Quadriologue is itself illustrative of the negotiation environment from which the EEAS sprouted. In debating the Council response to a written question from an MEP on how the Council intended to cooperate with Parliament, the Netherlands emphasized that the text did not speak of 'quadrilat-

¹³ R. Youngs, 'Fusing Security and Development: Just Another Euro-Platitude?', 30 *Journal of European Integration* (2008), 419-437, 432. See, for example, the position of OXFAM International's EU Office quoted in Euractiv, 'The EU's new diplomatic service - Positions', 09 July 2010, <www.euractiv.com>.

¹⁴ Report of the Swedish Presidency, para 6.

¹⁵ See Report of the Swedish Presidency, paragraphs 3, 10, 13, 15.

¹⁶ Report of the Swedish Presidency, paragraph 16.

¹⁷ This group was chaired by Ashton and was composed of Ashton's Head of Cabinet, the Secretaries General of the Commission and Council respectively, the Directors-General from DG RELEX and DG E, heads of the respective legal services, the head of the EU delegations in third countries as well as the Director of the Policy Unit of the Council and representatives of the trio Presidencies.

¹⁸ Statement by Guy Verhofstadt (ALDE), Hannes Swoboda (S&D), Rebecca Harms and Daniel Cohn-Bendit (Greens/EFA), 25 March 2010.

¹⁹ Council Regulation (EC, Euratom) No. 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, *OJ L* 248, 16.9.2002, p. 1; Regulation No. 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, *OJ* 45, 14.6.1962, p. 1387/62. English special edition: Series I Chapter 1959-1962 p. 135.

eral negotiations' but rather of 'quadrilateral talks'. That Member State argued that "the Council does not negotiate with the EP on all aspects of the package, only on those parts of the EEAS on which they have competence."²⁰ The final version of the written reply indeed reads that the Council will engage with the European Parliament in the form of "quadrilateral consultations between the institutions concerned."

On 10 June 2010, the three rapporteurs of the European Parliament on the European External Action Service (EEAS), Brok, Verhofstadt and Gualtieri then presented their report on the quadriologue. In it, they stated that agreement had been reached on the position of Human Rights promotion in the EEAS as well as crisis management. However, on several issues the Parliament stated that 'it would not compromise'. The first was its submission that the Service should be communitarian rather than intergovernmental in character, and Parliament insisted that the service be attached to the commission rather than a separate *sui generis* body within the Union. The second was the exact position of development policy, and the role of the EEAS and Commission throughout the various programming stages. The third issue was that of staffing, where Parliament argued that the EEAS should be predominantly staffed by 'permanent community officials(sic)', and this for reasons of promoting the 'Union' spirit. By 21 June 2010 a final agreement was reached on the Council Decision, as well as two non-legally binding documents constituting the EEAS compromise: the 'political declaration on political accountability', and the 'statement to the plenary of the European Parliament on the basic organization of the EEAS central organization'.²¹ Though of unequal legal stature, these two documents should be considered an integral part of the soft and hard legal documents that define the EEAS' institutional status, together with the Council Decision which was published in the official journal on 3 August 2010.²²

There is little doubt that these three documents reflect the aforementioned dichotomy in the internal legal organization of EU external relations. The EEAS founding instruments oscillate between delimiting competencies and attaining a coherent external policy. The preamble of the Council Decision reaffirms that coherence remains the final objective of setting up the EEAS, and does this by copying and pasting the text of Article 21.3 second paragraph TEU.²³ Article 2 of

²⁰ Reply to written question E-1384/10 put to the Council by Elena Basescu (PEE), 9520/10. See notably amendments to the draft reply, 12 May 2010.

²¹ Draft Declaration by the High Representative on political accountability, *OJ C* 210/1, 3.8.2010; Addendum to the Note, Adoption of a Council Decision establishing the organization and functioning of the EEAS, elements for the statement given by the High Representative to the plenary of the European Parliament on the basic organization of the EEAS central organization, 12401/10, Brussels, 20 July 2010.

²² Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJ L* 201/30, 3.8.2010.

²³ Article 21, 3, second paragraph reads: 'The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.'

the EEAS Decision then describes the two tasks of the EEAS attaining that objective. First, Article 2.1 states that it "shall support" the High Representative in fulfilling his mandates as outlined in Articles 18 and 27 of the TFEU. Three indents follow that statement, one for each of Mrs. Ashton's hats. The first indent requires the EEAS to support Mrs. Ashton as High Representative while carrying out the CFSP and ensuring the consistency of the Union's external action. The second and third indents require the EEAS to support her in her mandate as President of the Foreign Affairs Council and as Vice President of the Commission. Importantly, this is each time qualified by stating that "this is without prejudice to the normal tasks" of the General Secretariat of the Council, and the "normal tasks" of the Commission services respectively. Paragraph 2 of Article 2 further adds that the EEAS also functions to assist the President of the European Council (currently Van Rompuy), the President of the Commission (currently Barroso), as well as the Commission itself, "in the exercise of their respective functions in the area of external relations." Hence, the division of labour that has permeated EU external relations in the past continues in the structure of the EEAS.

What then, are the 'normal tasks' of the General Secretariat and the Commission services different from those of the EEAS? Indeed, the very idea of normalcy has shifted dramatically with the introduction of the Lisbon Treaty and the EEAS.²⁴ Given that the EEAS is still in its transitional phase from launch to full operability, there is no conclusive answer to this question. According to one member of the Council Legal Service, the wording 'normal tasks' was chosen to be as neutral as possible.²⁵ According to him, that wording should be interpreted in line with existing practice under Article 23.1 of the Council rules of procedure: "The Council shall be assisted by a General Secretariat...". Whether 'business as usual' is really possible with the arrival of the EEAS is however an open question, and as was the case with the creation of the CFSP itself, several years of practice will indeed be required to flesh out the new *modus vivendi* captured by this legal framework. That said, the rules laid down setting up the EEAS is of course not an empty vessel, and much of the language has been carefully drafted to reflect the political compromise reached during the summer of 2010. The following section will examine what the new institutional balance in EU external relations look like. Is the EEAS a new institution, or indeed, a sui generis cog in the EU's institutional machinery?

²⁴ As pointed out in both M. Lefebvre and C. Hillion, *op. cit.*, 7, and S. Duke, *op. cit.*, 2.

²⁵ Comments by Gilles Marhic, discussant on the legal panel at the conference "The Diplomatic System after Lisbon – Institutions Matter", 18-19 November 2010, Maastricht University.

3 THE 'SUI GENERIS' LEGAL NATURE OF THE EEAS AND ITS IMPLICATIONS

3.1 Mapping the Key Characteristics of the EEAS

The principle of institutional balance is both a legal and a political principle.²⁶ In legal terms it implies a principle to be respected by the institutions, and infringements can be sanctioned by the Court of Justice. In political terms, it describes the organization of the institutional interrelationships within the Union. Both legally and politically, the institutional balance in the field of EU external relations has changed thoroughly.²⁷ The Council Decision states that it establishes a *functionally autonomous body* of the Union *under the authority* of the High Representative.²⁸ (Article 1 of the EEAS Council Decision) To examine what that implies, it is necessary to reproduce that article in full:

"Article 1 – Nature and scope

1. *This Decision establishes the organisation and functioning of the European External Action Service ("EEAS").*
2. *The EEAS, which has its headquarters in Brussels, shall be a functionally autonomous body of the European Union, separate from the General Secretariat of the Council and from the Commission with the legal capacity necessary to perform its tasks and attain its objectives.*
3. *The EEAS shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy ('High Representative').*
4. *The EEAS shall be made up of a central administration and of the Union Delegations to third countries and to international organisations.*"²⁹

The status of the EEAS, and its position in the EU institutional set-up has been in flux throughout the negotiation process. In the October 2009 Presidency report it was stated that the EEAS should have an organizational status reflecting and supporting its unique function in the EU system.³⁰ This implied that "the EEAS should be a service of a sui generis nature separate from the Commission and the Council Secretariat."³¹ The European Parliament argued against that direction on the new structure.³² According to Elmar Brok "the EU does not need a new bureaucracy located in the middle between the Council and the Commission which in the long term would lead a life of its own to become an independent kingdom outside our control."³³

²⁶ J.-P. Jacqué, 'The Principle of Institutional Balance', 41 *CML Rev.* (2004), 383-391, 383.

²⁷ Later in this contribution I will query whether the EEAS can even be considered as part of the institutional balance at all.

²⁸ Preamble, para 1.

²⁹ Emphasis added.

³⁰ Presidency Report, 14930/09, 23 October 2009, 6.

³¹ *Idem.*

³² Press Release, 'The conference of Presidents on the External Action Service', 10 June 2010.

³³ Quoted in Euractiv, 'The EU's new diplomatic service', *op. cit.*

The Parliament has lost out in the final compromise, and the EEAS has not been attached to the Commission. Instead, it is defined as a body with functional legal capacity and functional autonomy under the authority of the High Representative. The vague notion of the EEAS 'sui generis' employed in the Swedish Presidency report has not been retained in the Council Decision.³⁴ This is understandably so since it is not a satisfactory legal classification, and even from a heuristic perspective, its utility is largely colloquial. Hence, the Decision speaks of the EEAS as being 'functionally autonomous' from the Council and Commission in its function of assisting the High Representative which – in this author's view – still reflects the underlying idea of it having a sui generis status in the EU institutional set-up.

This contribution will seek to shed light on the legal implications of this deep shift in the EU's external relations machinery by comparing the EEAS to the key organizational features of the EEAS with those of EU bodies already in existence. The selection of characteristics examined here is perhaps slightly arbitrary, but these four features are arguably key towards defining the position of an actor in the EU legal order: 1) legal personality; 2) independence from, or relationship to the EU's political institutions; 3) powers to adopt decisions which resort legal effect, and 4) *locus standi* and review of legality before the EU Courts. An inquiry into these features will require utilizing existing examples from within the Union, and here too the selection of options most closely resembling the legal nature of the EEAS might seem somewhat arbitrary. The selected yardsticks for comparison are: the Service could be considered as (fulfilling the functions of) an EU institution proper (ex. Commission; Council), those of an Agency of the Union (ex. European Defence Agency), or those of an auxiliary body attached to the institutions (ex. Council Secretariat, Commission DG or COREPER³⁵). In selecting these examples the notion of functional autonomy was essential and hence, I have excluded bodies of a purely supportive nature such as the Office for Infrastructure and Logistics (OBI). More importantly, when contrasting the EEAS with the Council and Commission and these institutions' services (e.g. the General Secretariat and the Commission DG's), it is the idea of functional autonomy accorded to the EEAS from the Commission and Council – as opposed to the Secretariat and the DG's – which has led me to *legally* assimilate these services with the respective institutions as a whole. However, from an organizational perspective it will at times be appropriate to look specifically at the role of these two institutions' services. Exemplary of this is that in the Treaties the General Secretariat figures more distinctly *organizationally* than the Commission services. In Section 4 of Part 1, Title 1, Chapter 1 of the TFEU on the Commission as an EU institution, most Treaty articles are devoted to the procedure related to appointing the Commissioners.

³⁴ M. Lefebvre and C. Hillion, *op. cit.*, 5.

³⁵ Article 240, 1 TFEU: "A committee consisting of the Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the latter."

Additionally, in Article 249.1 TFEU the departments of the Commission only get briefly mentioned as follows: "The Commission shall adopt its Rules of Procedure so as to ensure that both it and its departments operate." The Treaty is more generous in describing the role of the General Secretariat in relation to the Council and European Council. Article 240.2 of the TFEU states that "The Council shall be assisted by a General Secretariat, under the responsibility of a Secretary-General appointed by the Council." (Emphasis added) The General Secretariat also provides support to the European Council, as mentioned in article 235 TFEU. Compare this with the TEU article that foresees in setting up the EEAS. Article 27.3 TEU reads: "In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. [...]" (emphasis added) Hence, from a legal perspective this text will normally assimilate the Council or Commission with its services, but from an organizational perspective it will at times be appropriate to compare the EEAS with the Council General Secretariat or with the Commission's various DG's. The highlighted passages 'shall be assisted' in above quotes are illustrative of this. These quotes give the impression that the EEAS is in an analogous position to the Council General Secretariat, an organizational line of enquiry worth exploring. However, as the following paragraphs will show, that is only superficially the case, and the EEAS is indeed legally, institutionally and organizationally 'sui generis'.

3.2 Legal Personality & Legal Capacity of the EEAS

The first feature towards classifying the EEAS is that of legal personality and its corollary, legal capacity. Starting with EU Agencies as the comparator from the EU legal order, the practice of setting up agencies can be traced back to the early 1990's. While these bodies are by no means uniform, one constant has been that they have all been explicitly granted legal personality.³⁶ The EEAS has not been granted such legal personality, in contrast with for example the European Defence Agency (EDA). Article 6 on legal personality of the 2004 Council Joint Action establishing the EDA states that "The Agency shall have the legal personality necessary to perform its functions and attain its objectives."³⁷ The Joint Action then continues to impose on the Member States the obligation to ensure that the EDA enjoys "the most extensive legal capacity accorded to legal persons under their

³⁶ E. Chiti, 'An Important Part of the EU's Institutional machinery: Features, Problems and Perspectives of European Agencies', 46 CML Rev. (2009), 1395-1442; A. Ott, 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield between European and International law', 13 EFA Rev. (2008) 515-540.

³⁷ Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ L 245/17, 17.4.2004.

laws", so that it can "acquire or dispose of movable and immovable property, and be a party to legal proceedings." In the Council Decision on the EEAS, the analogous provision has been split into two articles. Towards the end of the Decision is Article 12 which deals solely with immovable property without mentioning legal personality to acquire it, and instead Article 1 on the scope and nature of the EEAS partially deals with this issue. In Article 12.1 it is said that the Council Secretariat and the Commission services "shall take all necessary measures" so that the transfer of personnel can be accompanied by the transfer of immovable property necessary for the functioning of the EEAS. Hence, unlike the EDA there seems no need to acquire movable or immovable property independently, and no statement is made on the EEAS' possibility to be a party to legal proceedings. Article 1 of the EEAS Decision is indeed interestingly different from the EDA Joint Action, since the EEAS founding instrument states only that it has the "legal capacity necessary to perform its tasks and attain its objectives." The difference between legal capacity and legal personality not merely differentiates the EEAS from the many agencies of the EU, but it has broader implications on the exact nature of this new body. Legal personality is the legal quality through which the entity can participate in legal life: engage itself (extra-) contractually, be subject to rights and responsibilities, enforce its prerogatives before a Court of law, and so on. Legal capacity then denotes the scope of its power to engage in such legal relationships.

The state of affairs where the EEAS has the capacity to enter into legal relationships without having been conferred legal personality is analogous to that of the European Union itself before the Lisbon Treaty. Prior to 1 December 2009, Article 24 TEU-Nice allowed for the EU to conclude international agreements in the context of the Common Foreign and Security Policy, without however having been explicitly conferred legal personality. In the case of the European Union, the reason for that absence was political, namely the aforementioned dichotomous relationship between power delimitation and the single EU voice in international relations. It was evident that for the Union to act effectively on the international scene, it would need the capacity to conclude international binding agreements. While the Amsterdam Treaty thus gave the Union such capacity, the discussions at the IGC made it clear that certain Member States were not prepared to recognize the Union as a distinct actor carrying out its Common Foreign and Security Policy.³⁸ Legal personality was thought to do exactly that. In a similar vein, the absence of *explicit* legal personality of the EEAS is arguably not so much a legal choice as it is a political one: it solely had the objective of diminishing the 'distinct political nature' of the EEAS as against the EU institutions to ensure that the EEAS would not become – as Elmar Brok called it – "a separate kingdom"³⁹ with no political

³⁸ See for example the discussion at the Westendorp Reflection Group: Westendorp Report, 'Report by the Reflection Group: A Strategy for Europe, presented to the European Council', 5 December 1995, <www.ena.lu>.

³⁹ See note 33.

accountability to Parliament and changing the nature of 'Community' external action. For the European Parliament, the EEAS should not have existed separately from the Commission at all, but that position proved to no avail. While the conferral of legal capacity without legal personality therefore does not indicate a choice to deprive this body of the ability to act in legal life, it should be queried whether this is without impact on the EEAS? For example, does this have any impact on the possibility for the EEAS to defend its prerogatives through review of legality before the Court of Justice? Arguably not, but I will return to this issue separately below, since a further consideration of the nature of the EEAS and the legal effect of its acts is prerequisite towards considering their eligibility for review before the European Courts.

In sum, where the EEAS has no legal personality, its position is thus formally dissimilar from that of regulatory agencies, and seemingly closer to that of the Council General Secretariat or the Commission DG's: A position of support with no legal existence distinct from the institution – or in this case the hybrid position of the HR/VP – to which it is connected by the EU Treaties.

3.3 The EEAS' Formal Powers in the EU Policy-making Process and its 'Functional Autonomy'

The second feature positioning the EEAS is its role in the EU's political decision-making process, and whether it has any power to formally and legally decide on the direction of EU external policy. The third related feature specific to the EEAS, is its 'functional autonomy' stated in article 1.2 of the EEAS Decision, and the fact that it is 'separate' from the Council and Commission. Defining its formal powers and the meaning of functional autonomy and separateness from the institutions will be carried out using three yardsticks: the EU institutions as listed in Article 13 TEU, the EU Agencies as the yardstick, and the legal position of COREPER and the Council Secretariat in relation to the Council. Autonomy in this context is interpreted broadly: In policy terms it is defined as the extent to which the EEAS could independently steer the EU policy making process, and the extent to which it is bound by instructions from the Council or Commission in carrying out its mandate. In legal terms it is the extent to which the EEAS has been conferred powers to do so in a legally binding fashion.

First, could the EEAS be considered as an equivalent to a new institution of the Union, in the sense of Part Six, Title 1, Chapter 1 of the TFEU? A purely formalistic answer in the negative can be deduced from Article 13 of the TEU, which firmly and exhaustively states that "the Union's institutions shall be [...]", thereafter naming the seven institutions. The EEAS is not listed and therefore formally not an EU institution. But more substantive indicators do exist. Aside from the fact that the references to its *sui generis* nature indicate the absence of political will to create an institution proper, the Council Decision indicates that the EEAS is treated as an 'institution' solely within the meaning of the Financial and Staff Regulations, i.e. specifically for the application of those two specific instruments

of secondary law.⁴⁰ This means that the EEAS has a separate heading in the budget like the EU institutions proper, and is subject to discharge by the European Parliament. The final argument with most strength is of course that a new institution can only be set up through primary law, and it is clear that the Lisbon Treaty had no intention of doing so: Article 27.3 TEU solely foresees in setting up a 'service' "to assist" the High Representative. Where that article states that the 'organisation and functioning of the EEAS' shall be established by Council Decision, the EEAS cannot be considered a new institution of the Union.

Second, if its powers of 'assisting' the HR/VP are not akin to those of an institution proper, could the EEAS be considered as having been delegated powers of the EU institutions, and whether, hence, the *Meroni* doctrine applies? According to this doctrine, it is compatible with the Treaty to delegate powers of the EU Institutions which are clearly circumscribed by specific objectives set by the delegating authority, and which are of an executive or administrative nature only.⁴¹ It is then incompatible with the principle of institutional balance to delegate wider discretionary authority of the EU institutions, namely powers through which the secondary body has discretion in substantive policy-making. If this doctrine were to apply, that would allow characterising the autonomy and policy role of the EEAS as analogous to that of some of the EU regulatory agencies. The question as to whether the *Meroni* doctrine applies to the EEAS is however largely moot, given that the establishment of the EEAS has been explicitly provided for in primary law. Article 27.3 TEU then makes clear that the Council Decision is not so much delegating authority of the Institutions, but rather setting up 'a body' meant to 'assist' the office of the High Representative. That role of assistance is entirely separate from the institutions of Article 13 TEU. The EEAS is therefore neither an institution with the prerogatives that this entails, nor is it in a relationship of delegated powers to the Institutions.

While the EEAS is *formally* not in a position of delegated authority, the example of EU Agencies does provide a useful yardstick against which to assess the *substantive* tasks of the EEAS. That, in turn, will provide inroad into substantiating the functional autonomy and legal capacity of the EEAS. The EDA – one of the three agencies in the area of the CFSP – provides a useful further comparison. That Agency was set up in 2004 and has since received an explicit legal footing in the TEU. (Art. 42.3 TEU) The limitations flowing from the *Meroni* doctrine applying to the EDA are then clearly visible. Contrast notably Article 45 TEU, elaborately describing the EDA's supportive function to the Council, with the brief mentioning of the EEAS in Article 27 TEU in relation to the High Representative.

⁴⁰ See paragraph 8 of the preamble of the EEAS Council Decision.

⁴¹ Cases C-9/56 and C-10/56 *Meroni v High Authority*, [1957-1958] ECR 133; I have followed the description of the broad academic consensus on the *Meroni* doctrine as formulated by E. Chiti, 'An Important Part of the EU's Institutional machinery: Features, Problems and Perspectives of European Agencies', 46 *CML Rev.* (2009), 1395-1442, at 1421. See also G. de Búrca, 'The institutional development of the EU: A Constitutional Analysis', in P. Craig and G. de Búrca *op. cit.*, at 77.

Article 45 TEU is extraordinarily detailed in outlining and circumscribing the EDA's tasks in contributing to the CSDP; whereas Article 27 TEU only says that it will 'assist' the High Representative in her mandate.

Hence, the constitutional and institutional positioning of the EDA and that of the EEAS is distinct, though in substance the opposite may be true. A comparison of the EEAS' functions with those of the regulatory EU agencies may then provide further insight into the former's substantive tasks. In the recent discussion on the position of agencies in the EU's system of governance, the Commission has classified the powers of the more than two dozen regulatory⁴² agencies according to the functions they perform.⁴³ There are five kinds in that classification: Those agencies that can adopt individual, legally binding decisions (ex. OHIM⁴⁴); those that provide technical or scientific advice (ex. ERA⁴⁵); those that coordinate operational activities (ex. FRONTEX⁴⁶), those that gather and analyze information and set up stakeholder networks (ex. CEDEFOP⁴⁷); and finally those that provide practical services to agencies and institutions. (ex. CDT⁴⁸) It bears repeating that these agencies cannot have the power to adopt general regulatory measures. Their powers are limited to taking individual decisions in specific areas where a defined technical expertise is required, and this under clearly and precisely defined conditions. Agencies cannot have genuine discretionary power, and cannot be entrusted with responsibilities explicitly conferred on the EU institutions.

Given that the tasks of the EEAS are made hierarchically dependent on – and are proscribed in function of – those of the High Representative, the EEAS' substantive powers can only be defined by looking at the definition of the High Representative's mandate. Subsequently, the crux of the issue is to examine what it means for the EEAS "to assist" her in that function, and how this compares to the functions fulfilled by EU agencies.⁴⁹ I shall first examine the scope of the EEAS tasks in function of those of the HR/VP, and subsequently examine the interpretation of 'to assist'.

There is no single description of the HR's mandate, and it needs to be puzzled together from different articles in the Treaty on European Union. According to the TEU, the High Representative 'shall conduct the CFSP' (Art. 18.2 TEU); 'shall be responsible within the Commission for responsibilities incumbent on it in external

⁴² I exclude here the executive agencies which have the task of administering EU programmes.

⁴³ Communication from the Commission to the European Parliament and the Council, European Agencies – The Way forward, COM(2008) 135 final, 11.3.2008.

⁴⁴ Office for the Harmonization of the Internal Market.

⁴⁵ European Railway Agency.

⁴⁶ Coordination of Member States in management of EU external borders.

⁴⁷ European Centre for the Development of Vocational Training.

⁴⁸ The EU translation centre.

⁴⁹ Stated differently, the EEAS merely assists the HR/VP, and it operates under her legal and political authority. Where Article 27.3 TEU uses the terminology of 'shall assist' it is perhaps not explicit about that 'line-of-command', but Article 1.3 of the EEAS Council Decision states so explicitly. The HR/VP and EEAS can therefore not be equated in organisational terms, and hence the need to examine the meaning of the relationship of assistance of Article 27.3 TEU.

relations and for coordinating other aspects of the Union's external action' (Art. 18.3 TEU); 'shall ensure the unity, consistency and effectiveness of action by the Union in the CFSP' (Art. 26.2 second indent TEU, together with the Council); shall 'put into effect the CFSP' (Art. 26.3 TEU); 'shall chair the Foreign Affairs Council' (Art. 18.3 TEU & 27.1 TEU); 'shall contribute through his proposals towards the preparation of the CFSP' (Art. 18.2 TEU & Art. 27.1 TEU); 'shall ensure implementation of the decisions adopted by the European Council and the Council' (Art. 27.1 TEU); 'shall represent the EU for matters related to the CFSP'; 'shall conduct political dialogue on the Union's behalf'; she 'shall express the Union's position in international organisations and at international conferences' (Art. 27.2 TEU) and finally, she has an important role in (initiating) decisions relating to the CSDP (Article 42.4 TEU). Now consider that description of the mandate of the High Representative against the functional classification of EU Agencies – keeping in mind of course that the EEAS' position is one of assistance to the High Representative's mandate: The most strongly formulated tasks of the High Representative are those of conducting the CFSP, coordinating EU external action, ensuring its unity and effectiveness and implementing decisions of the (European) Council. The EEAS' function of assisting Mrs. Ashton thus – at the very least – requires gathering information, providing expert advice, provide assistance to the institutions, and coordinating standpoints and networks at EU and Member State level. It is indeed not the EEAS which 'puts into effect' the CFSP but the High Representative, and given the position of assistance, the substantive tasks of the EEAS its position is at least partially parallel to that of some of the EU's agencies. The question is then whether the EEAS is endowed with a certain level of policy discretion, beyond the limits imposed on EU agencies as required by the Meroni doctrine? Depending on the answer to that question, what does this imply for the legal nature of its acts?

The High Representative has a significant role in preparing the policy initiatives of the European Council, Council and Commission; as well as implementing them upon approval. In assisting the HR/VP in these tasks, the EEAS could be considered to combine most if not all of the tasks of EU agencies currently in existence, except for the adoption of individual legally binding decisions. One qualification is therefore crucial; assisting the HR in carrying out her mandate as described above in no way confers final, independent policy discretion. That remains with the Institutions proper, and with the office of the High Representative as described in the TEU. In terms of our institutional taxonomy, some of the EEAS administrative and executive tasks resemble those of agencies, but in legal terms the EEAS is closer to services of the Commission and the Council General Secretariat, and bears little resemblance to the position of EU agencies.

The EEAS would not be *sui generis* if there were no exceptions to that finding, and it is a rather crucial one, the EEAS' new role in EU development policy: A specific task not mentioned in the Treaty on European Union but in the EEAS Decision itself is the EEAS' role in the multi-annual planning cycle of EU development policy.⁵⁰ The EEAS is given the (shared) responsibility of preparing the Commission decisions on the three strategic, multi-annual steps within the development programming cycle: country and regional allocations; country and regional

strategy papers; and national and regional indicative programmes. (Article 9 EEAS Decision) This function in particular has the consequence that the EEAS powers are beyond duties delegated to agencies, duties which are clearly circumscribed by specific objectives set by the delegating instrument. Indeed, the power given to the EEAS in development involves identifying funding priorities to attain objectives set at the EU's highest political echelons. This entails at least some policy discretion, beyond the scope of the *Meroni* doctrine. The fact that the Policy Unit of the Council Secretariat as well as DG RELEX and parts of DG Development are transferred *en bloc* to the EEAS supports that description of the EEAS' substantive policy role. While the nature of the EEAS' powers thus includes discretion beyond that of agencies, no independent decision-making powers are conferred. Indeed, all initiatives prepared by the EEAS still require approval by the appropriate political decision-making authorities of the Union. In development notably, the EEAS contributes to preparing decisions of the Commission, but does not take the decision itself.

In conclusion, a distinction must be made between the EEAS political role and its legal position: In policy terms the EEAS is without a doubt vested with significant influence on EU external relations policy-making; in legal terms it has not been formally conferred with powers to adopt instruments to as an EU institution steer EU policy.

That being the assessment of the EEAS, does that mean that this body should then be considered an auxiliary body to the EU institutions *pur sang*? As mentioned, according to Article 1 of the EEAS Decision, the Service is placed "under the authority" of the High Representative. Article 2 of the Council Decision describes the EEAS' tasks, and contains two paragraphs. The first states that it is to 'support' the High Representative and the second says that it is to 'assist' the presidents of the European Council and the Commission, and the Commission itself in exercising their external relations functions. Given this statement of assistance and relationship of authority, might one view the EEAS' institutional position as similar to that of COREPER? (Article 240, 1 TFEU) This organ equally has great influence on EU policy-making, but possesses formally no independent decision-making powers. While politically and organisationally there is certainly no identity between COREPER and the EEAS, it may legally be the case? In its judgment on voting arrangements to the FAO, the Court of Justice stated that "Coreper is not an institution of the Communities upon which the Treaty confers powers of its own but an auxiliary body of the Council, for which it carries out preparation and implementation work."⁵¹ The consequence of the FAO judgment was that COREPER could not have 'adopted' a decision on how to vote at that international organisation, and that its decision did not resort legal effect. Instead the Decision of the Council was subject to the ECJ's review of legality. Recall furthermore that according to the Council rules of procedure "Coreper shall be responsible for preparing the work of the Council and for carrying out the tasks assigned

⁵⁰ See for an assessment of this power as against primary Treaty law: S. Duke and S. Blockmans, *op. cit.*

⁵¹ FAO judgment, para. 26 (emphasis added).

to it by the Council." (Art. 19.1 Council Rules of Procedure⁵², emphasis added) Viewing the EEAS' institutional position as identical to COREPER is however not entirely satisfactory. While there are certainly overlaps in its supportive tasks, COREPER is much more deeply connected to the Council than the EEAS. While the Committee of Permanent Representatives 'carries out the tasks assigned to it' by that institution, the Council Decision on the EEAS is unequivocal about its 'separateness' from the Council or the Commission and its 'functional autonomy'. The EEAS is not an intra-institutional body responsible for attaining consensus among the Member States, it is an inter-institutional body with legal capacity under authority of the HR/VP.

Given the negotiation history to the EEAS these notions of functional autonomy and separateness should arguably be interpreted as meaning that in supporting the High Representative, the EU diplomatic service does not take instructions from the Council or the Commission. Its instructions come from the *office* of the High Representative,⁵³ who is in her turn accountable to the EU institutions proper – notably the Parliament. The EEAS is therefore not an auxiliary body to the EU institutions, it has no powers delegated to it by the institutions, nor is it an institution itself. The diplomatic service is certainly part of a command structure which runs vertically via the High Representative, then through to the Council and up to the European Council, but not horizontally as an institutional participant in the EU's institutional balance, nor as part of an Institution itself.

To further situate its position of functional autonomy, one could compare the Service with the independence the European Central Bank. That EU institution has a strong measure of independence to avoid being captured by public or private interests. According to the TFEU the ECB "shall not seek or take instructions" from anyone at EU or Member State level. (Art. 130 TFEU) The institutional position of the EEAS has a similar rationale: sitting (slightly uncomfortably) atop what were formerly first and second pillar EU competences, it should neither be a purely intergovernmental or communitarian body.⁵⁴ Hence, it can only take (most of its⁵⁵) instructions from the one office that combines the Council and Commission hat, that of Mrs. Ashton. This kind of strong definition of independence is therefore not applicable to the EEAS, and its functional autonomy lies somewhere

⁵² Council Decision of 22 March 2004 adopting the Council's Rules of Procedure, O.J. L 106/22, 14.4.2004.

⁵³ It should be noted that the Heads of the EU delegations can receive instructions from the Commission in areas where they exercise powers conferred upon it by the Treaties. Otherwise the Delegations only receive instructions from the High Representative (Art. 5.3 EEAS Decision).

⁵⁴ Note that trade is entirely excluded from the EEAS' ambit. That this separation is somewhat artificial is illustrated by the appointment of the new head of delegation to the WTO on 23 November 2010. Indeed, it was Catherine Ashton who appointed the former deputy head of the EU delegation in Washington to that crucial position for the EU's trade policy. In her statement, she said "As I continue the process of setting up the External Action Service I am delighted to appoint Angelos Pangratis as the new head of the EU Delegation to WTO. The Geneva WTO Delegation is central to the delivery of the EU's common trade policy." See Document A 237/10. High Representative / Vice President Ashton, 23 November 2010, Brussels.

⁵⁵ See note 54 above.

'in between' that enjoyed by the ECB and by COREPER. A further analogy between the EEAS and the European Defence Agency may serve to qualify where on the sliding scale the diplomatic service finds itself. In the Joint Action establishing the EDA it is stated that the Agency "shall act under the Council's authority" (Art. 1.2 EDA Joint Action⁵⁶), whereas the EEAS "shall be placed under the authority" of the High Representative. (Art. 1.3 EEAS Decision) Arguably the EDA formulation is more constraining since it will only 'act' under the authority of the Council, given also the clearly circumscribed mandate of Article 45 TEU; whereas 'being placed' under the HR's authority implies carrying out tasks within broad chalk lines set by the chain of command.⁵⁷ That interpretation is in line with the EEAS being "a functionally autonomous body of the European Union": it has less autonomy than the ECB, less than the institutions proper, but more than COREPER or the EDA.

3.4 The EEAS' actions and the Court of Justice of the European Union

Returning to the description of the tasks of the High Representative, how then should the nature of the EEAS' powers in 'assisting' and 'supporting' her to fulfill that mandate be defined? What legal consequences do acts of the EEAS entail, and can they be reviewed by the ECJ? What is arguably certain is that the *formal* powers of the EEAS go further than those of COREPER: Whereas the Court decided that COREPER is a purely preparatory organ which cannot adopt decisions which resort legal effect vis-à-vis third parties, the EEAS has the 'legal capacity to perform its tasks and attain its objectives.' Recalling the parallel with EU agencies, the EEAS Decision does not give the Service any powers to adopt individual and binding decisions vis-à-vis third parties.⁵⁸ However, in the EEAS Council Decision one can find at least two explicit instances where actions of the EEAS will directly resort legal effect, or indirectly affect legal positions:

- First, the EEAS has been explicitly given the possibility of concluding "service-level arrangements" in accordance with Article 3.3 of the Council Decision. These kinds of acts could potentially entail legal effects vis-à-vis third parties, within the meaning of Article 263 TFEU on the review of legality. Given that no such arrangements have as of yet been negotiated, their content is uncertain. However, one possible example which has already been sig-

⁵⁶ Quoted above.

⁵⁷ Compare this further with Article 4.1 on the Central administration of the EEAS which states that "The EEAS shall be managed by an Executive Secretary-General who will operate under the authority of the High Representative." Operate is arguably also more restrictive than 'being placed under the authority'.

⁵⁸ Given that the purpose of this contribution is to provide a more macroscopic look at the new institutional balance, I do not specifically study the issue of staffing the EEAS and decisions which may pertain individually to them.

nalled is an inter-service agreement on the support services the EEAS will receive from the Council General Secretariat.⁵⁹

Second, the EEAS has been given a substantial role in the multi-annual programming cycle for development. Article 9.3 of the EEAS Decision states that "the EEAS shall contribute to the programming and management cycle for the [financing instruments pertaining to development] on the basis of the policy objectives set out in those instruments. It shall have the responsibility for preparing the ...decisions of the Commission regarding the strategic, multi-annual steps within the programming cycle." The final sentence of this passage implies that the EEAS is vested with what could be (perhaps boldly) called 'quasi-institutional' prerogatives in the process of implementing EU development policy. Part of the task which was previously carried out by DG Development under the authority of the Commissioner for development has now been transferred to the EEAS for reasons of coherence in policy-making. While this is borne out at the level of secondary law, the formulation of the EEAS' relationship with the Commission implies a set of prerogatives which are reminiscent of institutional prerogatives in the EU decision-making process. In the case of the EU institutions proper this would be captured by the principle of institutional balance at the level of primary law. That principle does not apply to the EEAS – at this stage in its development at least – but the Council Decision is an EU instrument laying down policy prerogatives of the EEAS with legal binding effect.

In sum, while practice will be required to further define the nature of the EEAS' actions as a legal actor in the EU legal order, there should be no doubt that the Service's actions may resort, or be directly or indirectly endowed with legal effect. That is a finding crucial to considering whether the EEAS' actions could be subject to review of legality before the Court? Additionally, could the EEAS itself seek legal enforcement of its prerogatives before Union Courts, or should Union institutions have to do so on its behalf? If so, would Mrs. Ashton have to act via the Council or the Commission, and would that not be schizophrenic if it pertains to an inter-institutional conflict between these two actors?

Continuing the parallel of agencies; an agency such as Office for the Harmonization of the Internal Market has been endowed with final administrative powers is subject to full review by the Union Courts. While the EEAS does not have final decision-making authority that resembles the position of that Office, it can conclude inter-service arrangements, it possesses legal capacity of which the full extent of its use is not yet known, and it has what resembles institutional prerogatives which could be infringed upon by the Commission.⁶⁰ If perhaps not self-evident,

⁵⁹ General Secretariat of the Council to COREPER, Note on the annex to the draft Decision Establishing the organization and functioning of the EEAS, 8804/10, 20 April 2010, 2.

⁶⁰ See more elaborately on this caselaw in the post-Lisbon Treaty setting B. Van Vooren, 'The Small Arms Judgment in an Age of Constitutional Turmoil', 14 *EFA Rev* (2009), 231-248. See also under the Nice-Treaty legal setting from the same author: 'EU/EC External Competences

there should be no doubt that the new institutional setup of EU external relations has the potential of leading to inter-institutional litigation. One such possibility is the following: Recall that the October 2009 report of Parliament on the EEAS expressed concern over the position of the EEAS in EU development policy, and that the development community was concerned that development objectives might be subjugated to foreign and security policy objectives. While formally the first and second pillars have been abolished, this distinction remains in the substance of the TEU and TFEU. (Art. 40 TEU) The CFSP remains separate in chapter two Title five of the TEU, and EU development competence remains in the TFEU. (Art. 208 TFEU) This distinction has in the past led to litigation between the Commission and the Council, where the former argued that the latter had infringed upon the EC's development competence by adopting a decision to combat illegal trade in small arms and light weapons.⁶¹ Where the EEAS has been set up to overcome that decades-old schism of EU external relations, it could end up in the eye of the storm on continuing disagreement on the security-development nexus in EU external policy.

Two scenarios ought then to be considered: whether actions by the EEAS can be subject to review under Article 263 TFEU (former article 230 TEC); and whether the EEAS itself could seek to protect its prerogatives or legality review of acts that are of direct concern to it.

As regards the first scenario, actions of the EEAS could indeed be subject to review by the Court of Justice. The absence of legal personality of the EEAS has no bearing on that issue, and the formulation of Article 263 TFEU leaves no doubt that acts of the EEAS could be reviewed: "acts of bodies, offices or agencies of the Union" can be reviewed by the Court, on the condition that they are "intended to produce legal effects vis-à-vis third parties." Two further questions then emerge: Does the EEAS have the legal capacity to adopt instruments that produce legal effects against third parties? And if yes, to which extent is review complicated due to the position of the EEAS in the CFSP? The first issue has been previously touched upon: The EEAS' legal capacity is functional towards attaining its objectives, i.e. circumscribed by its objectives, although the Council Decision is entirely silent on the kinds of acts the EEAS could independently adopt with legal effect. Silence on that issue does not necessarily entail absence of such powers, though in this contribution I have argued that the Service has no independent decision-making authority. The form of acts resorting legal effect has never been considered relevant for the Court of Justice,⁶² and this means that acts of the

after the Small Arms Judgment', 14 *EFA Rev* (2009), 7-24. Further: C. Hillion and R. A. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness', 46 *CML Rev* (2009), 551-586; A. Dashwood, 'Article 47 TEU and the relationship between first and second pillar competences', in A. Dashwood and M. Maresceau (eds.) *Law and Practice of EU External Relations* (Cambridge, New York, Cambridge University Press, 2008), 70-103.

⁶¹ Case C-91/05, *Commission v Council (Small Arms/ECOWAS)*, [2008] ECR I-03651.

⁶² Case C-60/81 *IBM v Commission* [1981] ECR 2639, para 9.

EEAS could for example be reviewed for being ultra vires. Furthermore, its participation in the policy-making process is such that institutional prerogatives are potentially at stake – especially in relation to the security-development nexus – and the EEAS can be party to “service level arrangements” to ensure their protection. However, this notion of ‘arrangements’ used in Article 3 of the EEAS Council Decision was without a doubt chosen to differentiate it from ‘inter-institutional agreements’.⁶³ The latter have now been giving explicit legal basis in the Lisbon Treaty, and that article is explicit that they can be legally binding. (Article 295 TFEU) The choice for a different name thus implies an intention by the drafters of the Decision to avoid agreements with legal effect; although it could also be read as being due to the fact that the EEAS is not an institution. Legal effect is therefore not *a priori* excluded, and in any case, in the past the Court has ruled that the form in which acts having legal effects is immaterial for review under Article 263 TFEU. Recall then that Article 2 in the EEAS Decision spoke of the EEAS tasks being to support the Council and Commission, without prejudice to these institutions’ normal tasks. Insofar as these inter-service arrangements outline which are the ‘normal tasks’ of the Council or Commission as against the EEAS, such arrangements cannot be denied the capacity of affecting the legal interests of either these EU institutions or the functionally autonomous body of the Union. Given the procedure laid down in Article 263 TFEU and the grounds for review of legality, it remains to be seen whether a case with the EEAS as respondent could actually emerge? Assuming that a dispute would not arise over an inter-service arrangement itself, but rather over an act that infringes it, the inter-service arrangement could be seen as ‘any rule of law relating to the application of the Treaty’ as stated in Article 263 TFEU. However, the act of the EEAS would have to be the definitive act which resorts legal effect. Given the character of the EEAS as assisting/supporting the High Representative, it is more likely that such would be an act of the Commission or Council. Then, as the Court pointed out in *IBM v. Commission* “whilst measures of a purely preparatory character may not themselves be the subject of an application for a declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step.”⁶⁴ That would then have the politically awkward consequence that cases on prerogatives of the EEAS would be litigated between the Commission and Council. The EEAS and the unique position held by Mrs. Ashton which combines the roles of High Representative for the CFSP and Vice President of the Commission were exactly drawn up to pre-empt such inter-institutional disputes, and avoid that such disputes would hamper coherent and effective EU external action. A further legal question is then whether the Institutions could in fact act on an infringement of the EEAS’ prerogatives laid down in secondary law? The EEAS might not be the actor whose acts constitute the defi-

⁶³ An assessment confirmed by Mr. Gilles Marhic at the Conference on the EU Diplomatic System after Lisbon, *op. cit.*

⁶⁴ Case C-60/81 *IBM v Commission*, *op. cit.*, para 12.

nite legal act, but it is arguably not compatible with the EEAS Decision that the Institutions act on behalf of a functionally autonomous body of the European Union.

The second scenario is then whether the EEAS itself could enforce its own prerogatives laid down in an inter-service arrangement, or any other legal document? Or would perhaps the High Representative/Vice President have to act on its behalf, and is that even possible?

Assume that the EEAS has concluded an agreement with the Commission DGs involved in the implementation of EU development policy, thereby further fleshing out EEAS – Commission cooperation and their respective ‘normal tasks’ as outlined in Article 9 of the EEAS Decision on ‘External Action Instruments and Programming’. The EEAS has a distinct role to play in the development programming cycle, prerogatives which are not those of the Commission and not those of the Council. According to Article 263 paragraph 1 TFEU acts of bodies of the Union intended to produce legal effects can be reviewed, and paragraph 5 adds that the acts setting up those bodies may lay down conditions concerning actions brought by natural or legal persons against such acts. That fifth paragraph is a new addition inserted with the Lisbon Treaty, and is directed at the organisation of review of individual acts of EU agencies, for example trademark cases directed against OHIM. That article is silent on the standing of such Union bodies themselves as against EU institutions, and in such a case the rules on standing for non-privileged applicants provide the only possible avenue. (Art. 263 para 4 TFEU.) That of course raises a number of issues: First of all, that paragraph speaks of ‘any natural or legal person’ which may institute proceedings. That could encompass the EEAS, but it may be problematic that – as seen – it has not been conferred legal personality. That is a minor obstacle as the Court could resolve that by stating that legal personality can be logically implied from it exercising its legal capacity. Second, the case-law on direct and individual concern developed in relation to direct actions from individuals in the Member States is very strict, and seems hardly suitable to the present hypothesis. Illustrative is that so far – to the best of this author’s knowledge – there are no cases where Union bodies such as agencies have brought cases against an EU institution.⁶⁵ Third, the grounds for review in Article 263.4 TFEU are restricted to individual acts addressed to that person and to regulatory (and therefore non-legislative) acts which directly concern them. A case relevant for the present inquiry would be *Fédération nationale d’agriculture biologique des régions de France*. Here the Court refused standing to the applicant where it argued a breach of the institutional balance since it was not individually and directly affected by breach of that principle of EU law.⁶⁶ Suppose that the procedural prerogatives laid down in Article 9 EEAS Decision on development are not respected by the Commission. It is likely not possible for the EEAS – not

⁶⁵ OHIM itself has of course been subject to many proceedings, and setting up an agency has also been subject to an action by the United Kingdom. See Case C-217/04, *United Kingdom v Parliament and Council (ENISA)*, 2 May 2006.

⁶⁶ Case C-345/00 P *Fédération nationale d’agriculture biologique des régions de France v Council* [2001] ECR I-3811, para 41.

being an institution itself – to invoke a breach of the institutional balance and be individually affected? If its prerogatives laid down in the Council Decision have not been respected, it is not even certain whether the institutional balance is the relevant legal ground for review? The EEAS falls outside of the institutions named in Article 13 TEU, and its prerogatives pertain to the implementation of rules laid down in secondary law, not primary law. The same reasoning *mutatis mutandis* applies to the office of the HR/VP, and hence, in the end, should legal enforcement of EEAS prerogatives be necessary, it would have to be the Council or Commission defending the EEAS' interests as the case may be. The ground for review in such cases would then most likely be overstepping competence boundaries as seen in the litigation over the initiatives combating trade in small arms, and not so much the principle of institutional balance.⁶⁷ However, aside from the political awkwardness due to Mrs. Ashton's different institutional hats, it is then unsure whether that scenario is possible since the EEAS is 'functionally autonomous' and is 'separate' from those institutions. In sum, should the institutional or substantive position of the EEAS be the subject of litigation, it will most likely be as the passive subject of proceedings between Parliament, Commission, or Council. Where the EEAS Council Decision foresees that the EU's Diplomatic Service will have a legal department, its role is unlikely to be one of litigation before the ECJ. (Art. 4.3.b EEAS Decision)

Against these – admittedly abstract – procedural considerations, a further obstacle is the fact that the Court's jurisdiction has been limited in the area of CFSP to the monitoring of Article 40 TEU (the non-affect clause) and review of legality of decisions taken on the basis of Article 275 TFEU (sanctions). In the Eurojust judgment, the ECJ found Spain's action to review the legality of staff appointment measures inadmissible largely because it was an EU rather than an EC agency.⁶⁸ Article 263 TFEU now explicitly includes bodies such as agencies or the EEAS, but the restriction of jurisdiction remains. This implies that acts with legal effect of (or perhaps: acts in which it is involved) the EEAS could be subject only to partial review by the ECJ, depending on whether the disputed act is outside of the CFSP, unless the dispute itself concerns whether the act should or should not have been adopted on a CFSP or other EU legal basis.⁶⁹

In sum, the sui generis nature of the EEAS has broken new ground for review of legality by the Court of Justice. While scenarios in which the EEAS is an applicant or respondent before the Court are difficult to envisage, they cannot be a priori excluded. The EEAS is sure to acquire significant influence over EU decision-making in the formation of EU external relations and questions of institutional positioning, form and policy substance in which it is involved are sure to

⁶⁷ Case C-91-05, see note 62.

⁶⁸ Case C-160/03 *Spain v Eurojust* [2005] ECR I-2077.

⁶⁹ The fact that legislative acts are excluded in the CFSP context has no bearing on this issue, since the distinction legislative vs. non-legislative has no bearing on whether or not an act has legal effects. See for more on this issue: M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', 45 *CML Rev.* (2008), 617-703, at 624.

arrive in due course. The key message from this theoretical inquiry is that, as the Court argued in *les Verts*, in a Union based on the rule of law⁷⁰ lacunae in legal accountability are to be avoided.

4 THE EEAS' LEGAL DUTY OF COOPERATION

The core ratio behind setting up Mrs. Ashton's triple-hatting and the structures and procedures that tie EEAS to the Union's other institutions was exactly to avoid inter-institutional disputes. Exemplary of that reasoning is the rather lengthy Article 3 of the Council Decision, which spells out the duty of cooperation between the EEAS and various other services and institutions. The duty of cooperation is a fundamental principle of the law governing EU external relations,⁷¹ and there should be no doubt that this principle which governs interactions between EU institutions and member states in the pursuit of EU Treaty objectives equally applies to the EEAS.

The general duty of sincere cooperation is laid down in Article 4.3 TEU, with a specific provision for the CFSP in Article 24.3 TEU and a duty applicable specifically to the EU institutions in Article 13.2 TEU. While successive case-law of the ECJ has elaborated a duty that arguably weighs more heavily on the shoulders of the Member States than on the institutions in the vertical relationship,⁷² Article 3 of the Council Decision articulates elaborately how the EEAS shall cooperate with other bodies of the Union. The first paragraph of Article 3 reads that it "shall support and work in cooperation with the diplomatic services of the Member States, as well as with the General Secretariat of the Council and the services of the Commission, in order to ensure consistency between the different areas of the Union's external action and between those areas and its other policies." Although this formulation gives the impression of a 'one-way street' incumbent on the EEAS, as an elaboration of the more general duty of sincere cooperation this article should arguably be read as going in both directions. This especially since the Court of Justice has both in the horizontal inter-institutional, and the vertical EU-Member State context emphasized this duty's reciprocal nature.⁷³ In the broader institutional balance the EEAS will henceforth assume the position of interlocutor between all different levels and actors that form EU external relations, and that

⁷⁰ That is the reasoning which brought the Court to include acts of Parliament to be included in judicial review. Case 294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECR 1339.

⁷¹ M. Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance', in M. Cremona and B. De Witte (eds.) *EU Foreign Relations Law – Constitutional Fundamentals* (Oxford, Hart Publishing, 2008), 125-169.

⁷² See for example the most recent ruling of the Court of Justice in C-246/07 *Commission v Sweden* (Stockholm Convention on persistent organic pollutants), nyr.

⁷³ C. Hillion, 'Mixity and Coherence in EU External Relations: the Significance of the 'Duty of Cooperation'', in C. Hillion and P. Koutrakos (eds.) *Mixed Agreements Revisited – The EU and its Member States in the World* (Oxford, Hart Publishing, 2010), 87-115.

objective can but be achieved if there is full reciprocity in cooperating towards a coherent EU external policy. The negotiations leading up to this provision do however paint a different picture.⁷⁴ The version of the EEAS Decision as originally proposed by Mrs. Ashton on 25 March 2010 only spoke of 'working in cooperation', and did not mention that the EEAS 'shall support' the diplomatic services of the Member States.⁷⁵ Blockmans has rightly argued that that change in language should be read in step with the change to Article 5 (9) of the EEAS Council Decision.⁷⁶ The proposal of Mrs. Ashton indeed originally spoke of EU delegations working in close cooperation with the diplomatic services, and stating that they shall provide all relevant information "on a reciprocal basis". The final version of Article 5 (9) now reads that EU delegations shall work in close cooperation and share information with the diplomatic services, without mentioning said reciprocity. These *travaux préparatoires* thus illustrate the tension that was outlined at the outset of this paper. It is almost a truism to state that reciprocal cooperation is indispensable towards coherent EU external relations, but other interests often gain the upper hand in EU institutional negotiations to the detriment of the coherence objective in EU external relations. (Articles 21 TEU and 2 (1) EEAS Decision)

That desirable sense of reciprocity is explicit in the next paragraph of Article 3 EEAS Decision, which concerns specifically the relationship between the Commission and the EU diplomatic service. There it is stated that the EEAS and Commission services "shall consult each other on all matters relating to the external action of the Union in the exercise of their respective functions except on matters covered by CSDP". That passage thus starts out well by employing the words "each other", implying the kind of reciprocity required to attain coherent external relations. Unfortunately the scope of this obligation is limited by the use of 'within their respective functions' and by excluding matters covered by CSDP. The latter exclusion is understandably the consequence from Member States' sensitivities regarding security and defence matters,⁷⁷ though again raises questions from the perspective of policy coherence. Considering the example of coherence between EU development and security initiatives, CSDP missions commonly concern the more strategic deployments of the Union in crisis areas. Development is generally viewed as the structural socio-economic engagement of regions beyond the Union's borders. However, the dividing line between CFSP and development is sometimes thin, and initiatives such as those undertaken under the Stability Instrument⁷⁸ are

⁷⁴ See L. Erkelens and S. Blockmans, *op. cit.*

⁷⁵ Credit goes to Prof. Dr. Steven Blockmans for pointing this out to me.

⁷⁶ *Idem.*

⁷⁷ X. Kurowska, *The Politics of a Policy: Framing European Security and Defence Policy* (Doctoral Thesis, European University Institute, Florence, 2008); M. Merlingen and R. Ostrauskaite (eds.), *European Security and Defence Policy – An Implementation Perspective* (London, Routledge, 2008).

⁷⁸ See for example the policy priorities laid out in 'The Instrument for Stability – Multi-annual Indicative Programme 2009-2011', C(2009)2641, 8.4.2009.

arguably a follow-up to the objectives pursued by EU CSDP missions.⁷⁹ Hence, there would be no harm in legally requiring a duty of reciprocal consultation where such could be evidently useful to attain policy coherence. However, given that the second paragraph of Article 3 only excludes a duty of consultation on CSDP, one can conclude through an *a contrario* reasoning that between the Commission and the EEAS (and of course within the EEAS!), a weaker duty of information does exist in initiatives where CSDP and other Union policies such as development are interrelated. That argument is borne out by Article 21 TEU (to which the EEAS Decision regularly refers), the constitutional requirement of external policy coherence.

In paragraph 4 of Article 3 of the Council Decision, the EEAS is mandated "to extend appropriate support and cooperation" to the other institutions and bodies of the union, "in particular to the European Parliament." While the EP gets special mention for cooperation, it is significant that this institution is mentioned separately from the earlier paragraphs, and the key question is then what constitutes 'appropriate support' from the EEAS to the parliament, and whether that is a weaker obligation of cooperation from previous paragraphs? When contrasting the notion 'appropriate support' with the obligation of consultation between the EEAS and the Commission in Article 3.2, it is safe to assume that the EEAS' obligations under this article imply a status quo. At the very least it requires the continuation of appearances and discussions such as those by Javier Solana and Benita Ferrero-Waldner before the plenary and in the relevant committees in the past.

The relationship between the European Parliament and the EEAS cannot be captured solely through the prism of that provision of the EEAS decision on the duty of cooperation. Through the Quadriologue Parliament has obtained from HR Ashton an agreement on a 'political declaration on political accountability', as well as 'a statement to the plenary of the European Parliament on the basic organization of the EEAS central organization'. These documents are important towards a better understanding of two aspects of the new institutional balance in EU external relations: the relationship of accountability of the EEAS to the European Parliament, and more generally, the role of Parliament in EU external action.

5 THE EEAS' RELATIONSHIP WITH THE EUROPEAN PARLIAMENT

The declaration on political accountability⁸⁰ (DPA) by the High Representative reflects many of Parliament's past complaints over its role in EU external relations. According to the single introductory paragraph, this declaration addresses Ashton's relationship with Parliament in line with its role in ensuring political

⁷⁹ While the EEAS has a say in the multi-annual programming cycle of the Stability Instrument, the day-to-day administration and implementation remains with the Commission.

⁸⁰ Draft Declaration by the High Representative on political accountability, *op. cit.*

accountability, as well as the adjusted role of the High Representative through the new TEU. The declaration is explicit that it builds on past commitments on consultation, information and reporting undertaken by Solana and Ferrero-Waldner. Importantly, the declaration is applicable to all functions of Mrs. Ashton, i.e. both in her role in the CFSP as well as a member of the Commission and President of the Foreign affairs council.

The first numbered paragraph of the political declaration is an interpretative provision to Article 36 TEU which lays out the obligation of the HR to consult with Parliament 'on the main aspects and the basic choices of the CFSP'. An important concession on the part of the High representative is that exchanges of views on mandates and strategies on the CFSP will take place *prior* to their adoption rather than *ex post facto*. However, the conduct of foreign policies often requires a certain expediency and level of secrecy, and balancing political accountability and democratic involvement against those exigencies can be challenging. The DPA reflects this when it comes to hearings of newly appointed Heads of Delegations and EU Special Representatives. Parliament requested that it could hold hearings of new potential appointees to countries and organizations the Parliament considers of strategic importance. Committing to such an obligation would have gone too far for the HR,⁸¹ and Parliament can now hold 'exchanges of views' (which the Declaration explicitly says is different from a hearing)⁸² after their appointment but before they take up their posts. Although not as far-reaching as initially sought-after, Elmar Brok was pleased with this right to 'hear' EU ambassadors. Early October 2010, this arrangement soon led to serious disagreement between Parliament and the HRVP in the lead-up to the appointment of the new EU envoy to Japan, Austrian diplomat Hans Dietmar Schweisgut.⁸³ Ms. Ashton called off the plan to allow these hearings to go forward after the EP's foreign affairs committee had planned to hold hearings in public, and before having been formally installed in their posts. The spokesperson for the High Representative stated that "It is the HR/VP's wish that if these hearings eventually take place, they should take place as previously agreed with parliament, in camera. The HRVP reminds everybody that these hearings are in no way so-called Congressional-style hearings."⁸⁴ Practice will indeed have to shape the final outlook of the EU's external relations machinery, and legal and institutional rules paint only part of the picture.⁸⁵

⁸¹ C. O'Shea, 'Ashton cedes ground to Parliament', *Europolitics*, 11 May 2010.

⁸² Paragraph 5 of the political declaration.

⁸³ EU Observer, 'Ashton calls off EU ambassador hearings', <<http://euobserver.com/9/30957/7rk=1>> (last consulted on 5 October 2010).

⁸⁴ *Idem*.

⁸⁵ For a more elaborate discussion on the relationship between Parliament and the EEAS see L. Erkelens and S. Blockmans, *op. cit.*

6. CONCLUSIONS: PLUS ÇA CHANGE, PLUS ÇA RESTE LA MÊME CHOSE?

Two threads of argument ran through this working paper, the first related to the legal-institutional position of the EEAS in the European Union, the second concerning its impact on that ever elusive goal of coherent EU external relations.

On the first point, the EEAS certainly deserves its *sui generis* label. The new diplomatic service is partially a preparatory organ to the institutions, possibly an organ of the Union for purposes of international representation, an EU institution for the purposes of budget and staff, with powers that resemble but go beyond those of EU agencies. While the comparison never led to a finding of complete identity between the EEAS and the chosen yardstick, it did provide useful insight into the institutional and legal position of the EEAS. The diplomatic service does not have legal personality, which may be due to political sensitivity as to its institutional (in)dependence now and in the future. In that sense its position was closer to that of the Council General Secretariat than to that of EU regulatory agencies. As to its independence, the EEAS is not in a position analogue to that of the European Central Bank, but it is also not as dependent as COREPER on the Council. In substance, the EEAS' powers do not go as far as some of the EU agencies which are endowed with powers to take individually binding decisions with legal force. Nonetheless, its functional legal capacity, its possibility of concluding serve-level arrangements and its specific prerogatives in EU external policy making are such that legal effects of its acts or actions cannot a priori be excluded. It was argued that this has important consequences on the EEAS' position before the Court of Justice.

Second, does setting up the EEAS with such a complex legal framework do anything to resolve, alleviate, or continue the decades-old tension of EU external relations under a new guise?

Article 3 on the duty of cooperation is exemplary of the carefully crafted new institutional balance in EU external relations: Clearer links have been established with national diplomatic services, though practice will show whether that is a reciprocal cooperative relationship. Arguably, the general duty of cooperation laid down in the Treaties requires that it is. The legal obligations of cooperation are the strongest between the Commission and the EEAS, while relations with the Council and its 'normal tasks' are less clear. While not covered exhaustively in this article, it is clear that the accountability of the EEAS to Parliament is extensive. The separation of CFSP/CSDP from former Community competences remains, as does the tensed relation between Parliament's wish for greater involvement in external relations, and the Council's push to keep that institution out. Much has changed, so does everything remain the same?

As to its future contribution to coherent and effective EU external relations, no inter-institutional reconfiguration is perfect and the diplomatic Service is clearly a compromise between the many different institutional and member state interests involved. As was argued at the outset of this article, EU external relations have always developed in a piecemeal fashion, as a Harlequin's costume of failed or successful initiatives, institutional and political innovations, and ad hoc responses

to geopolitical and socio-economic stimuli within and outside the European continent. This is exactly the case with the EEAS as well. In many areas the new diplomatic service has merged elements that used to function separately, but past tendencies of delimitation remain. The role of the EEAS as an interlocutor between various desks, services and institutions, and the merger of staff from the three key spheres of authority in EU external relations provides good ground for avoiding conflicts such as those in small arms. However, the legal and institutional innovations are far from perfect and will require further elaboration through practice. Success in implementing a coherent external voice for the EU will then not necessarily depend on further tweaking of EU institutional structures or EU law, but on commitment off all those directly involved to make the EEAS work. The spat between Mrs. Ashton and Parliament of early October 2010 shows that this is very much a work in progress.

Should review of the EEAS' institutional setup be necessary – and this article has indicated that several lacunae remain – the final provisions of the EEAS Decision foresee that by mid 2013 the High Representative will review the functioning and organization of the EEAS. Subsequently, the Council should make a decision on adjusting the Service as appropriate no later than the beginning of 2014. The importance of such an a priori built-in mechanism should not be underestimated, given the tendency of EU external relations to develop in a piecemeal fashion as against international geopolitical and socio-economic events. When the CFSP was inserted into the TEU with the Treaty of Maastricht, this fledgling policy formed an awkward compromise between what could be crudely termed the intergovernmentalist and communitary camps of the 1992 IGC. The 'pro-Community' camp had clutched the compromise that the CFSP would be put to review by 1996, in what became the Amsterdam Treaty. Whereas the Amsterdam Treaty has often been viewed as a relative failure, some important innovations took place in the sphere of EU foreign policy, among others, the streamlining of CFSP instruments, the creation of the post of High Representative and EU treaty making powers. Those innovations took place against the debacle in the former Yugoslavia, and arguably strengthened the CFSP on its path to maturation. Similarly, the EEAS will have to continue along this path of 'progressive experimentation' that marks the development of coherent and effective EU external action.

In conclusion, the EEAS is not more of the same, but has the potential for being the sea-change that the Union needs to bridge its decades-old capability-expectations gap.⁸⁶ Perhaps it is appropriate to end as this article started, by paraphrasing the Finnish Foreign Minister: "The EU should pursue a dignified foreign policy." This implies "first, putting our own house in order and avoiding mixed messages; second, speaking in harmony across all 27 Member States; and thirdly, speak softly, in compromising terms, employ a big carrot, and hold on to European values."⁸⁷ This author is optimistic – albeit cautiously – on the future role of the EEAS in attaining that goal.

⁸⁶ C. Hill, 'Capability-Expectations Gap, or Conceptualizing Europe's International Role', 3 *Journal of Common Market Studies* (1993), 305-328.

⁸⁷ Foreign Minister of Finland Alexander Stubb, speaking at an event Organized by the Danish Institute for International Studies, *op. cit.*