Henri de Waele

Legal Dynamics of EU External Relations

Dissecting a Layered Global Player

Second Edition

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Preface to the Second Edition

Harold Wilson famously remarked that a week is a long time in politics. Law would seem to be different, in that developments dating back several years can still be easily tagged as 'recent' by *la doctrine*. Nevertheless, even in the legal realm, the passing of half a decade will normally entail a vast series of events producing considerable upheavals; and undeniably, in the field of EU external relations law, a lot has happened since the first publication of *Layered Global Player* in 2011. In particular, the arrival of new judgments, policy developments and scholarly publications called with ever greater urgency for a thorough updating, adjusting and revising.

Accumulated experiences in teaching have, moreover, prompted a slight repositioning of this volume, and a measured modification of its outward appearance. With the kind support of the publisher, it is now consciously styled and marketed as an academic textbook rather than a scholarly monograph (a conversion that has helped to slightly bring down its price tag, too). Content-wise, the changes will be equally noticeable in the inclusion of chapter overviews, clarifying boxes and supplementary examples. A careful combing through of the previous manuscript has sought to ensure that the accessibility of the discussions and analyses is not compromised, but instead further enhanced where possible.

The temptation to expand the number of chapters was actively resisted. While seemingly justifiable for some domains in light of their topicality (e.g., the Area of Freedom, Security and Justice), the focus continues to lie on what is arguably the 'general part' of this sub-domain of EU institutional law. As before, the intention is to offer an advanced introduction; in this regard Goethe's famous line, *in der Beschränkung zeigt sich erst der Meister*, nails it perfectly. Once the fundamentals are mastered, proficient readers should be able to explore and establish for themselves how the main rules and principles (may be expected to) apply in specific or adjacent fields.

A brief remark is in order with regard to the refurbished titles that grace the cover. Without intending to shift the blame—after all, it does take two to tango—this eye-catching alteration was carried out on the request of the managing editor at Springer, notwithstanding some personal heartache and hesitation. While I remain of the opinion that the previous setup only carried a minimal risk of confusion, the argument gradually won me over that a subtle reversal would make the book easier

to spot and trace. While it was definitely not the most compelling reason, the switch might assist in further boosting the sales record as well.

A quick note on terminology: the reader will find that in the pages that follow, the abbreviation 'ECJ' is maintained—not only because this major branch has been most influential in shaping the law but also because to my mind, it is often simply erroneous to refer to the 'CJEU'. After all, since the entry into force of the Lisbon Treaty, the latter designation refers to the institution as a whole—no more and no less. For clarity's sake, the General Court is distinguished and separately mentioned whenever its specific case law is envisaged. In contrast, the term 'CJEU' is used sparingly, with the exclusive intention to indicate the overarching structure.

In the preparation of this edition, I have greatly benefited from comments and suggestions supplied by countless colleagues. To this list may be appended several cohorts of obliging students, both in Nijmegen and Antwerp. As usual however, they must all be exonerated from any possible errors or inaccuracies; obviously, the final responsibility for the text is mine and mine alone.

On that thread, it *almost* goes without saying that I continuously look forward to receiving feedback from my readership—undergraduates, postgraduates, fellow scholars, possibly even practitioners—on any positive or negative aspect of this book.

Nijmegen/Antwerp Henri de Waele
April 2017

Preface to the First Edition

At the present day and time, a course on the external relations law of the European Union adorns the teaching catalogue of nearly every self-respecting academic institution. Also, the number of universities that offer MA and LLM programmes in EU law and European studies continues to grow. Unfortunately, in many of these courses and programmes, students take part that only possess rudimentary knowledge of the Union's rules and structures. Either they never took more advanced courses (precisely their reason for enrolling in an MA or LLM programme), or they have come to forget the finer points of the subject matter after having passed the relevant exams in a distant past. When one is subsequently exposed to the complex set of norms and principles that govern the Union's external action, the deficiencies make themselves felt most painfully.

In recent years, a great number of studies have been published on the international relations law of the EU. Yet, these books tend to be very heavy going, even for graduate students. They contain invaluable research output and are extremely useful as reference works, but often intend to be nothing else. Occasional chapters from these works find a deserved place in course readers, and render the latter more weighty in every sense of the term.

Nowadays, almost every general EU law handbook contains a dedicated section on the subject area, yet the authors invariably tend to be succinct in their treatment. Moreover, it appears as if the need to restrict the size of the overall volume, understandable as it may be, has induced many of them to let brevity triumph over clarity.

To the mind of the present author, there exists an evident need for a compact study: a treatise that explains the basic legal notions underpinning the EU's international relations, while simultaneously covering the full breadth of its external policies. Such a volume would occupy a middle ground, somewhere between the available reference works, which require a bit too much prior knowledge, and the general handbooks, which are slightly too superficial in their treatment. It would form an ideal backbone to a course at Master's level: after perusing the relevant paragraphs, students are well prepared to immerse themselves more fully in topics during class, and better able to tackle the primary sources on their own.

In all then, the present monograph does not purport to be encyclopaedic, but means to offer a solid introduction to the Union's external relations law. It focuses

on the general concepts of the field and the central principles of the different policies. Once students have grasped the fundamentals, they may proceed to consult more specialist books and articles on subjects of specific interest. Having said this, seasoned scholars might still take a casual interest in this volume and be intrigued by the (occasionally deviant) discussion of a particular clause, notion or judgement.

The structure of this book might already strike some readers as odd. To an extent, it has been inspired by academic writings on multi-level governance. Predominantly however, it is premised on the approach taken by Günter Grass in his *Beim Häuten der Zwiebel*. My main idea has been to 'unpeel' the Union like an onion, starting with its 'outer layer', moving through the middle parts and ultimately arriving at its essence. There are, admittedly, flaws to this metaphor, and the book's structure is open to criticism. Nevertheless, when it comes to providing clarity, the chosen approach has, at least to the mind of the author, the edge over any other. Unusual as the structure may be, it should still prove efficacious, enabling readers to separate the wood from the trees more adequately, while at the same time doing justice to the multi-faceted dimension of this gripping field of law. Nevertheless, I do look forward to receiving feedback from my readership, fellow scholars, students, possibly even practitioners, on any positive or negative aspect of this work.

Finally, one short remark as regards gender neutrality. Throughout the book, when referring to the Union's top offices, the male form is employed. Readers are however urged not to take any offence, as this choice was made for reasons of convenience only. By no means does it intend to suggest that the incumbents cannot be female. Indeed, it actually fell to a woman to take up office as the very first High Representative for the Union's Foreign and Security Policy. If it had not seemed arrogant or silly, this book would have been dedicated to her.

Nijmegen/Antwerp Henri de Waele
April 2011

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Abbreviations

AA	Association agreement
ACP	African, Caribbean and Pacific countries
ACTA	Anti-Counterfeiting Trade Agreement
AFSJ	Area of freedom, security and justice
ASEAN	Association of South East Asian Nations
ASEM	Asia-Europe Meeting
BSP	Biosafety Protocol
Bull.	Bulletin of the European Communities/European Union
C	Communications series of the Official Journal
CCP	Common Commercial Policy
CCT	Common Customs Tariff
CETA	Comprehensive Economic and Trade Agreement
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CHG	Civilian Headline Goal
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CIVCOM	Committee for Civilian Aspects of Crisis Management
CMPD	Crisis Management and Planning Directorate
COPS	*Comité politique et de securité*
COREPER	*Comité des représentants permanents*
CPCC	Civilian Planning and Conduct Capability
CSDP	Common Security and Defence Policy
CT	Treaty establishing a Constitution for Europe
DCI	Development Co-operation Instrument
DDA	Doha Development Agenda
DEVCO	Development and Cooperation—EuropeAid
DG	Director General/Directorate General
DSB	Dispute Settlement Body of the WTO
DSU	Dispute Settlement Understanding of the WTO
EAEC	European Atomic Energy Community
EAP	Environmental Action Programme
EaP	Eastern Partnership

EC	European Community/European Communities
ECHO	European Commission Humanitarian Aid Office
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EDA	European Defence Agency
EDCP	EU Development Co-operation Policy
EDEM	European Defence Equipment Market
EDF	European Development Fund
EEA	European Economic Area
EEAS	European External Action Service
EEC	European Economic Community
EEP	External Environmental Policy
EFTA	European Free Trade Association
EHAI	European Humanitarian Aid Instrument
EHRP	External Human Rights Policy
EIDHR	European Instrument for Democracy and Human Rights
EMUNI	Euro-Mediterranean University
ENP	European Neighbourhood Policy
ESDC	European Security and Defence College
ESDP	European Security and Defence Policy
ESS	European Security Strategy
ETS	Emissions Trading System
EU	European Union
EUGS	EU Global Strategy
EUISS	EU Institute for Security Studies
EUMC	EU Military Committee
EUMS	EU Military Staff
EUSC	EU Satellite Centre
EUSRs	EU Special Representatives
EUSS	EU Security Strategy
FAC	Foreign Affairs Council
FAO	Food and Agriculture Organization
GAC	General Affairs Council
GAERC	General Affairs and External Relations Council
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GC	General Court
GSP	Generalised System of Preferences
HHG	Helsinki Headline Goal
HR	High Representative of the EU for Foreign Affairs and Security Policy
HRC	Human Rights Council of the United Nations
ICAO	International Civil Aviation Organization

ICJ	International Court of Justice
ILO	International Labour Organization
IMF	International Monetary Fund
INTCEN	EU Intelligence and Situation Centre
IO	International organisation
ITLOS	International Tribunal for the Law of the Sea
JHA	Justice and Home Affairs
L	Legislation series of the Official Journal
MDG	Millennium Development Goals
MEP	Member of the European Parliament
MFN	Most Favoured Nation
MPCC	Military Planning and Conduct Capability
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organisation
OCCAR	*Organisation conjointe de coopération en matière d'armement*
OCT	Overseas Countries and Territories
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
OSCE	Organisation for Security and Co-operation in Europe
PCA	Partnership and Co-operation Agreement
PMG	Politico-Military Group
PNR	Passenger Name Records
POLARM	Council Working Party on a European Armaments Policy
PSC	Political and Security Committee
QMV	Qualified majority voting
SDG	Sustainable Development Goals
SEA	Single European Act
SPS	(Agreement on the application of) Sanitary and Phytosanitary Measures
TBR	Trade Barriers Regulation
TBT	(Agreement on) Technical Barriers to Trade
TEAEC	Treaty establishing the European Atomic Energy Community
TEC	Treaty establishing the European Community
TECSC	Treaty establishing the European Coal and Steel Community
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TFTP	Terrorist Finance Tracking Programme
TPC	Trade Policy Committee
TRIPs	(Agreement on) Trade Related Aspects of Intellectual Property Rights
UCC	Union Customs Code
UfM	Union for the Mediterranean
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea

UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties
WEAG	Western European Armaments Group
WEAO	Western European Armaments Organisation
WEU	Western European Union
WHO	World Health Organization
WTO	World Trade Organization

Introducing a Layered Global Player

1

Contents

1.1 Introduction

In this chapter, we will familiarise ourselves with the layered structure of the European Union, its presence and activities on the global scene and the legal underpinnings thereof. In the following sections, we will be discussing, in subsequent order, the differing characteristics of the various layers (Sect. 1.2), the division of competences and the attendant interrelation between the EU and its Member States (Sect. 1.3), the Union's international legal personality (Sect. 1.4), EU treaty making (Sect. 1.5), and the system of judicial review (Sect. 1.6). Once we have become acquainted with these general features, the ground is sufficiently prepared for an in-depth study of the Union's 'outer', 'middle' and 'inner' layers that contain its different external policies, and are explored further in parts I, II and III of this book.

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1.2 The EU as a Layered Global Player

Although the EU is still regularly qualified as an international organisation and although its legal order, up to the present day, continues to be based on international treaties, it contains a number of elements that are commonly found in national federal systems. In a number of policy areas, for example, the Union enjoys exclusive competences, entailing that the Member States have no part of their own to play on the international plane. Since the entry into force of the Lisbon Treaty, there exists a *Kompetenzkatalog* (albeit in weak form), modelled after the one present in the German constitution, specifying the areas where the EU countries have relinquished, retained or decided to partly transfer their powers.[1] Moreover, already several decades ago, the European legal system was equipped with a quasi-federal doctrine of 'implied powers'.[2] Nevertheless, compared to other international organisations as well as national states (federal or otherwise), the Union remains a rather unique creature—an unprecedented experiment in transnational cooperation that has hitherto proven to be remarkably successful.

The unique character of the EU resides mostly in its layered structure, whereby external relations are conducted on the basis of different sets of rules. Consequently, external policies may be enacted and furthered in different ways and to differing extents, dependent on the specific powers that have been attributed in the layer concerned.[3]

In Title V of the Treaty on European Union, one finds the main foundations for EU external action. Chap. 1 of this Title contains some general provisions; Chap. 2 the Common Foreign and Security Policy. All other external policies have been tucked away in the Treaty on the Functioning of the EU.

The 'outer layer' or 'skin' of the European Union consists of the Common Foreign and Security Policy.[4] The CFSP has a relatively young pedigree, only officially becoming part of EU law with the Treaty of Maastricht in 1993. Nevertheless, it forms a general framework that in theory encompasses all 'foreign policy' issues, and potentially governs all the Union's activities on the global scene. The CFSP represents the EU's 'front office', as in everyday reality, it is the most visible way in which the Union manifests itself to its international partners. Nevertheless, in legal terms, the CFSP has not proven to be an all-encompassing policy: rather than outstripping or replacing the other external fields of competence at the European level, it occupies a special, separate domain that has less prominence than one might think.

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[1] Articles 3–6 TFEU.

[2] See Case 22/70, *Commission* v *Council* (ERTA). More on this in Sect. 1.4.1 below.

[3] Among the first to promote this particular view of the EU's institutional set-up were Curtin and Dekker (1999). Similarly, Krajewski (2004) depicted the body of rules as a 'multi-level constitution' of EU foreign relations.

[4] Which consists moreover of the Common Security and Defence Policy, but the CSDP is closely connected to the CFSP and can be viewed as its sub-domain. The interrelation between the two is clarified further in Chap. 3.

The 'middle layers' are composed of those areas of external competences that previously formed part of European Community law, and are now contained in the Treaty on the Functioning of the EU. From the inception of the European Communities, the most prominent of these competences has been the one pertaining to the Common Commercial Policy (CCP). Over time, other external policies have taken shape and gradually acquired their own legal basis in the EC Treaty. In this book, three of these policies are singled out for more detailed discussion: the rules pertaining to the environment, to human rights and to development cooperation.[5] As we will observe, in contrast to the outer layer, there is no trace of intergovernmental law- and policy-making here; entrenched in the TFEU, we find the supranational approach or classic 'Community method', with an ever-stronger role for the Commission and the Parliament, and an array of possibilities for the European Court of Justice to exercise judicial control.

In the 'inner layer', we encounter the EU Member States themselves, without which the EU institutions would not be able to function. The Member States, in their own individual capacities, continue to lie at the core of the Union. Yet they have voluntarily consented to become ever more enveloped by European law, to the detriment of their once fully autonomous and sovereign position. They nevertheless do retain a number of external competences, and at least in those fields, they do remain active and visible on the international scene. Moreover, despite the grand ambitions of the CFSP, the Member States remain at liberty to conduct an own foreign policy that reflects their own national interests, within certain limits.[6] Additionally, political and diplomatic relations with non-EU countries are still to a considerable extent maintained by the Member States themselves, albeit that they do operate as collective within EU structures where the Treaties so dictate (for example, in the enlargement process, whenever official steps are to be taken with regard to (potential) acceding countries). In the third part of this book, we will zoom in on this 'hard core' of the layered global player, evaluate when and how Member States can occasionally still escape and deviate from European rules, examine where the EU has drawn the red lines, and explore the ways in which rules of public international law continue to play a role here.

1.3 The Union's Legal Personality

The EU has no physical existence but is an intangible creature, a juridical construction like many others. In civil law, already in classical antiquity, the concept of a 'legal person' was invented so as to enable traders to engage in commercial transactions in a non-private capacity. The persistence of this concept has been

[5] Including economic, financial, technical cooperation and humanitarian aid.

[6] See e.g. Case C-124/95, *The Queen, ex parte Centro-Com Srl* v *HM Treasury and Bank of England*. More on these limits in Chap. 9, Sect. 9.3.

remarkable: at the present day and time, budding lawyers across the world have to familiarise themselves with this abstraction at some point during their studies.

Generally, (the possession of) legal personality denotes the capacity to enter into legal relations, and to be recognised as being capable to enter into legal relations, despite the fact that one is not a natural person. A company may, for example, conclude contracts, bring claims and be held accountable in courts of law. Due to its legal personality, other natural and legal persons will regard it as an equal and competent actor that they can do business with. The judiciary will take the same view and regard the entity as a valid vehicle that is competent to act, can be held accountable for its actions and is to be distinguished from the (natural) persons who are sitting on its board or are active in its employment.

As originally confirmed by Article 210 of the EEC Treaty, the European Economic Community possessed such legal personality, which entailed that it had the capacity to enter into legal relations and was recognised as being capable to do so.[7] However, this appeared to pertain to *internal* matters—thus denoting that the Community could, for example, acquire goods, rent buildings, hire personnel, etcetera. The question was whether Article 210 extended further and also formed an affirmation of its *international* legal personality—the capability to operate as an international actor and, e.g. negotiate and conclude treaties, be recognised in diplomatic traffic, bring claims before and be held accountable before international courts and tribunals.[8] For the European Coal and Steel Community, the possession of international legal personality was expressly confirmed in Article 6 of ECSC Treaty. The European Atomic Energy Community was granted the status in Article 101 of the EAEC Treaty. As regards the European Economic Community, however, no explicit provision existed. Reasoning *a-contrario*, one could have assumed that international legal personality had been deliberately withheld. The matter was addressed in the *ERTA* case of 1971, in which the ECJ reached the opposite conclusion.[9] In its judgment, the Court ruled that Article 281 TEEC had to be taken to mean that the Community enjoyed the capacity to establish contractual links with third countries over the whole field of objectives included in Part one of the EEC Treaty. This brought an end to academic speculation and settled the matter for the next 20 years.

[7]See also what was originally Article 211 of the EEC Treaty: 'In each of the Member States, the Community 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 Community shall be represented by the Commission.'

[8]Other privileges include the right to send representatives and be represented in international forums, and the right to enjoy immunities also accruing to other actors.

[9]Case 22/70, *Commission* v *Council* (ERTA).

Box 1.1 The *ERTA* Case
In the Spring of 1970, the Member States of the EEC, meeting in the margins of a Council of Ministers session, prepared to conclude the European Road Transport Agreement. Subsequently, however, the Commission proceeded before the European Court of Justice, contending that not the Member States but rather the Community itself ought to seal this deal. The ECJ assumed a valiant position, which in retrospect may be regarded as giving birth to the field of EU external relations law. One key section of this hallmark ruling pertained to the capability of the EEC to conduct itself as an actor at the international level to begin with—an issue the Court was not inclined to spill too much ink on. Hence, it deigned to give an affirmative answer, yet in almost *obiter dictum* fashion.

The discussions on international legal personality were reignited in the 1990s, upon the conclusion of the Treaty of Maastricht. Thereby, a wholly new actor was created (the European Union), which could potentially go on to occupy an own place on the international scene, distinct from both the Member States and the EEC, ECSC and EAEC frameworks. Although several countries advocated the attribution of such international legal personality to the Union, in the 1991 negotiations that preceded the signing of the TEU, others were vehemently opposed. This difference of opinion is said to have resulted in the absence of any word or provision on the topic in the final text authorised in 1992. However, this *blocage* did not prevent the Union from evolving further in actual practice, nor could it restrain scholars who preferred to take a more flexible position on the matter.

By the end of the decade, in many quarters, the EU was regarded as possessing 'presumptive personality'. In other words, its (international) legal personality was generally presumed to exist, notwithstanding the continuing absence of a written provision on the issue, even after the rounds of amendments pursuant to the Treaty of Amsterdam (1997) and the Treaty of Nice (2000). The arguments for this positive assessment ran along three lines. Firstly, scholars took their cue from the style and language of the Treaty provisions, emphasising the manner in which the objectives of the EU were formulated, and the way in which the EU presented itself.[10] To their mind, the idea of international legal personality loomed large across the board, and was actually attributed in an implicit manner. The mere constructing of a Union edifice had inevitably led to a separate entity, which could only operate successfully if some form of international legal personality was involved, irrespective of whether the founding members agreed to it or not.[11] Secondly, there was the everyday practice in which the Union did in fact act and present itself as an actor in its own right; there was also the subsequent acceptance

[10]Most notably in Article 11 TEU (pre-Lisbon numbering).
[11]Cf. Klabbers (1998).

and recognition of its actions by third countries and international organisations.[12] This energetic performance received a fresh impetus in 1999, when the Treaty of Amsterdam introduced a provision that explicitly provided for an EU competence to negotiate, sign and conclude treaties under the CFSP.[13] Thirdly and lastly, combining some of the above arguments, scholars pointed to the standards outlined by the International Court of Justice in the renowned *Reparation for Injuries* case. Still today, *Reparation for Injuries* (1949) represents the most authoritative pronouncement on the issue of international legal personality of international organisations. In this case, the ICJ acknowledged that the UN was to be considered an international legal person because it was intended to exercise and enjoy, and was in fact exercising and enjoying, functions and rights that could only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on the international plane; the UN would be incapable of carrying out the intentions of its founders if it was devoid of such *persona*.[14] Since the EU, similar to the United Nations in the *Reparations* case, was entrusted by its founders with certain functions, duties and responsibilities, was exercising these, and since international legal personality was an exigency for its efficacy as well, as a matter of principle, it had to be considered to enjoy that status. Nevertheless, for almost two decades, one would continue to look in vain for any form of explicit confirmation in the Treaties.

Only with the advent of the Treaty of Lisbon, which entered into force on 1 December 2009, was the question resolved once and for all: the current Article 47 TEU endows the Union *expressis verbis* with the desired quality. Of course, this endowment was inevitable, as the Lisbon Treaty collapsed the 'three-pillar structure', renamed the EC Treaty into the Treaty on the Functioning of the EU, abolished the European Community, and designated the Union as its one and only successor. Nevertheless, the phrasing of Article 47 TEU is once again limited to 'legal personality', not referring to *international* legal personality. Of course, from manifold provisions in the Treaties, one may establish the broader ambit of that pronouncement. For sure, the Lisbon Treaty could not possibly have wanted to turn back the clock and revert the EU to a pre-*ERTA* position. As the EU is nowadays the one and only entity with the capacity to enter into relations with the outside world, international legal personality forms part and parcel of its natural condition. All the same, because of the extremely short phrasing in Article 47 TEU, the ruling in the *ERTA* case remains eminently valuable and may still be applied by analogy today: it effectively spells out that the new provision, just like Article

[12]This was a gradual process however. For instance, in the early 1990s, the Member States had to operate as a collective for the conclusion of a memorandum of understanding on the administration of the Bosnian city of Mostar, as the Union itself was considered incompetent to enter into the agreement on its own behalf.

[13]Article 24 TEU (pre-Lisbon numbering). In what was then Article 38 TEU, a similar competence was installed for the former 'third pillar'.

[14]*Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, ICJ Reports 1949, p. 178.

210 TEEC before, is not limited to the internal sphere but should be seen as covering all external aspects as well.

1.4 The Division of Competences

1.4.1 The Existence of External EU Competences

For international actors seeking to engage in legal transactions with like-minded parties, the possession of legal personality is but one precondition. For, as the idea of the 'rule of law' dictates, no public authority can exercise any form of power if the corresponding competence has not first been attributed to it. In the European Union, this idea is embodied in the principle of conferred powers, at present solidly entrenched in Article 5 TEU. An additional reason for abstaining from ultra vires or *praeter legem* acts is that they may trigger liability: after all, third parties may be led to believe that their contract partner was qualified to act, could continue to demand performance and may have to be offered some form of compensation. A lack of competence forms no excuse or justification: once signed and concluded, the agreement entered into remains binding in principle and under international law (*pacta sunt servanda*). Its obligations will therefore have to be met, and its terms executed in good faith.[15] Thus, apart from international legal personality, the EU needs to possess a specific competence as well. It cannot act lawfully if there exists no legal basis for the desired action. If an incorrect legal basis was selected, the act will ordinarily still be valid under international law, but internally, one will have to erase, rewind and start anew.[16]

At the dawn of European integration, two express external competences existed, namely for enacting the Common Commercial Policy (then Articles 113 and 114 TEEC) and for setting up association agreements with third countries (then Article 238 TEEC).[17] The array of possibilities was, however, considerably broadened with the Court's ruling in *ERTA*.[18] In that case, one of the (other) controversial issues was whether the EEC was competent to conclude the European Road

[15]In line with what is stipulated in Article 27 of the Vienna Convention on the Law of Treaties 1969: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

[16]If, after an international agreement has entered into force, the ECJ finds at a later stage that it was actually concluded on a wrong legal basis, the *measure concluding the agreement* will be invalidated. In order to protect third parties and comply with the VCLT rules, the agreement itself will remain valid and binding, not just by virtue of public international law, but also as a matter of EU law: see Case C-327/91, *France* v *Commission*. Moreover, the effects of the decision are ordinarily maintained until the moment a 'corrective' act is adopted.

[17]In addition, Articles 229, 230 and 231 TEEC mandated the establishment of close cooperation with the United Nations, the Council of Europe and the OECD, and other 'appropriate' international organisations.

[18]Case 22/70, *Commission* v *Council* (ERTA).

Transport Agreement without disposing of the (explicit) external competence. The ECJ took its cue from the internal competences in the field of transport, and stated that it was necessary to take into regard the whole scheme of the Treaty. It went on to rule that the authority to enter into international agreements did not arise only from an express conferment, but could equally flow from other provisions of the Treaty, and from measures adopted by the institutions within the framework of those provisions. The Court then proceeded to assert that whenever the Community, with a view to implementing a common policy envisaged by the Treaty, adopted provisions that laid down (internal) common rules, the Member States henceforth no longer had the right (acting individually or collectively) to take up international obligations that affected those common rules. Therefore, whenever such common rules came into being, the Community and the Community only would be able to take up and carry out the corresponding obligations towards third countries. Clearly, the ECJ stood favourably vis-à-vis an enhancement of the Community's role and powers: through this doctrine of 'implied powers', the EEC would henceforth enjoy external powers in all fields where it enjoyed corresponding internal powers. Some authors christened this 'the principle of parallelism' (viz. of internal and external powers).[19]

Although many consider the *ERTA* ruling to form a striking example of judicial activism, it makes good sense from the perspectives of efficiency and transparency. After all, an abundance of practical problems and frictions would ensue if Member States retained complete liberty on the external front as regards topics where an internal EEC approach had already been agreed upon. An 'implied powers' doctrine averted the prospect of uncoordinated external representation of the EEC by the various Member States in those domains where a common interest to tackle the issues had become apparent.

All the same, the exact ambit of the *ERTA* principle was uncertain: did the external powers remain with the Member States until the corresponding internal powers had been exercised (as was the case with road transport), or did the mere attribution of internal competence suffice to presume a corresponding external competence? Support for the latter position offered the *Kramer* case of 1976, yet the judgment simultaneously confirmed the possibility of two distinct approaches to the question.[20] One year later, the ECJ's Opinion 1/76 provided decisive evidence that the *Kramer* position, further expanding the *ERTA* doctrine, had to be seen as the most relevant precedent.[21] This entailed that an external competence could indeed be inferred from the mere existence of the internal competence, without an actual exercise thereof being required. The twin conditions were, however, restated: the Treaty would have to confer internal competence for attaining a specific objective,

[19]In legal doctrine, the Roman maxim 'in foro interno, in foro externo' is also often employed.

[20]Joined Cases 3, 4 and 6/76, *Criminal Proceedings against Kramer and Others*.

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

and participation in the relevant agreement had to be necessary for the attainment of that objective (usually dubbed 'the principle of complementarity').

The implied powers mechanism was put to good use in the next few years, but its importance did diminish over the course of time, whenever more external competences were explicitly attributed. For example, in 1986, with the Single European Act, legal bases were added covering external environmental action and similar measures concerning research and development. Furthermore, in 1993, the Maastricht Treaty saw the insertion of clauses on development cooperation, monetary policy and international financial cooperation.

Presently, the EU has a wealth of external competences at its disposal. Nonetheless, the implied powers mechanism continues to play a residual role for those fields where there is no express power or where there only exists an 'incomplete' one.[22] In its modern jurisprudence, on the one hand, the Court has attached great importance to the 'necessity' element of Opinion 1/76, stressing that an external competence can only be implied if it would be impossible to realise an EU policy through domestic measures alone.[23] On the other hand, the existence of an (exclusive) external competence has been admitted when the envisaged external act pertains to an area that is largely occupied by earlier EU measures.

Box 1.2 The 'ILO effect'

In Opinion 2/91, the ECJ was asked to verify if the EC had competence to accede to ILO Convention No. 180 concerning safety in the use of chemicals at work. The Court found that the matters covered by this Convention did not affect the minimum standards contained in Community social policy directives but that there were other directives that did give workers more extensive protection. This part of the *acquis* could well be affected by the commitments arising from the Convention. The foregoing assessment led to the 'ILO effect' of an (exclusive) implied competence being held to exist when an area is already covered to a large extent by internal rules.

With the Treaty of Lisbon (following the trail of its ill-fated predecessor, the Constitutional Treaty), an attempt was made at codifying the implied powers doctrine. The outcome has been criticised for its murkiness, and many commentators have rightly questioned the wisdom of trying to cement the gist of a case law that is still evolving in everyday reality.

Article 216(1) TFEU provides that the EU may conclude an agreement with one or more third countries or international organisations where (1) the Treaties so

[22]For example, the provisions on energy and transport still do not refer to corresponding external competences.

[23]E.g. in the *Open Skies* judgments: see Case C-467/98, *Commission* v *Denmark*; Case C-468/98, *Commission* v *Sweden*; Case C-469/98, *Commission* v *Finland*; Case C-471/98, *Commission* v *Belgium*; Case C-472/98, *Commission* v *Luxembourg*; Case C-475/98, *Commission* v *Austria*; Case C-476/98, *Commission* v *Germany*; Case C-523/04, *Commission* v *Netherlands*.

provide or (2) 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 (3) is provided for in a legally binding EU act or is likely to affect common rules or alter their scope. The first situation speaks for itself. The second situation covers the *ERTA* doctrine in its modern form. In the third situation, the EU has already exercised its powers, and in the legal act adopted, it has either been conferred the pertinent treaty-making power, or a subsequent (external) act affects the instrument that was adopted earlier (the 'ILO effect'); in both these cases, the EU will have obtained the relevant external competence.

Confusingly, Article 3(2) TFEU seeks to indicate the nature of these competences but phrases them in slightly different terms. It attributes an exclusive external EU competence when (a) its conclusion is provided for in a legislative act of the Union or (b) its conclusion is necessary to enable the Union to exercise its internal competence or (c) in so far as its conclusion may affect common rules or alter their scope.

The two regimes differ in more than one respect. Situation (ii) under Article 216 (1) TFEU is broader than situation (b) under Article 3(2) TFEU since the former grants an external competence when an internal competence has not yet been exercised; the latter assumes, on the contrary, that the conclusion of an act is necessary for the (simultaneous or subsequent) adoption of an internal measure. Situation (iii) under Article 216(1) TFEU is broader than situation (a) under Article 3(2) TFEU since the former triggers an external competence on the basis of basically any legally binding act.

The key to making sense of both provisions would appear to solely reside in the realisation that Article 3(2) TFEU pertains to the grant of an *exclusive* competence. Consequently, Article 216(1) TFEU can be seen as containing the general rules for the attribution of an external competence and outlining the basic system; it does not specify whether the competence is exclusive or shared. Indeed, the phrasing of Article 3(2) TFEU does not match that of Article 216(1), but its main intention is to specify in which cases the attributed competence is an exclusive one. In other words, Article 216(1) can be regarded as the *lex generalis* on implied powers, with Article 3(2) as a *lex specialis*, indicating when those powers are exclusive.[24] Unfortunately, we cannot close the file with the foregoing assertion and will need to return briefly to the issue below in order to sketch the full picture. First, however, some further elaboration is in order with regard to the nature of EU external competences.

[24]Thus, we can e.g. conclude that when a power to conclude an international agreement is conferred by a non-legislative act, it will have to be considered as shared.

1.4.2 The Nature of External EU Competences

As discussed above, if an actor with international legal personality seeks to adopt a binding external act, the relevant competence has to exist, but the *nature* of that competence has to be ascertained as well, in order to prevent the possible invalidity of the act. In the EU, three main types of competence are to be distinguished: exclusive, shared, and complementary ones. The Union's *Kompetenzkatalog*, contained in Articles 3 through 6 TEU, outlines which competences are exclusive, which are shared, and which are complementary.[25] What these qualifications actually denote was already clarified long before, in many years of ECJ case law. In Article 2 TEU, the main threads of the Court's jurisprudence have been codified, and one may find further guidance.

When the Treaties confer an *exclusive* competence in a certain area, only the EU may legislate and adopt legally binding acts. Thus, in a field where the powers of the Union are exclusive, the Member States have no independent role to play on the international stage. Even when the EU has not (yet) exercised its exclusive competence, the Member States may not act or legislate, unless they have been so empowered by the EU or when they are implementing EU measures that instruct them to act or legislate. Nowadays, the Common Commercial Policy, laid out in Articles 206–207 TFEU, forms a prime specimen of an exclusive external competence.[26]

If the EU and the Member States *share* a competence in a specific domain, they may both legislate and adopt legally binding acts in that area. The Member States may exercise their competence to the extent that the Union has not exercised its competence. In spite of what one might presume, this is by no means a wholly static affair. The EU may gradually move to cover ever more ground within a specific domain, enacting new rules and expanding the reach of its policies, so that eventually Member States could well be left with only an extremely limited power. In the past decades, such pre-emption has taken place on more than one occasion. Conversely, it is possible for Member States to 'recoup their losses' at one point, but only to the extent that the Union has decided to cease exercising its competence.[27] The former will therefore have to stay vigilant and closely monitor when

[25] A long-standing point of mystery, unresolved by these provisions, remains the nature of the Common Foreign and Security Policy. According to some authors, the drafters of the Treaties sought to underline the specificity of the CFSP as a wholly distinct policy field, not subject to pre-emption nor merely complementary to Member State activities. See e.g. Cremona (2008), p. 64; Dashwood (2013), p. 6.

[26] In the past however, the ambit of the CCP has considerably shifted. This will be discussed in greater detail in Chap. 4.

[27] An explicit 'relinquishing' decision from the side of the EU is required for this situation to arise. Thus, a Member State may not assume that it has regained its powers by virtue of the fact that the EU has not put them to use for a protracted period of time: see Case 804/79, *Commission* v *United Kingdom*.

and where a certain tipping point will be reached, should they want to prevent the wholesale erosion of a shared competence.

In practice, most of the external activities of the Union (and its predecessors) have so far pertained to fields in which competence was shared. Shared competences necessitate a tandem approach of the EU and the Member States with regard to the issues at stake, as well as a joint effort in the relevant multilateral forums. In environmental matters, to mention but one example, a joint effort is thus required in relevant international organisations (so-called 'mixed participation'). This is equally the case for the negotiation and conclusion of international treaties or conventions in those areas (so-called 'mixed agreements'). As will be illustrated later on in this book, the management of mixity can be a most complicated affair. Striking the right balance between the interest of the Union and the Member States regularly proves difficult, and dogged turf wars are no rare occurrence.[28]

Finally, there are those areas where the EU may support, coordinate or facilitate actions of the Member States, but only under the conditions laid down in the Treaties and without thereby superseding the competences of the Member States in those areas. A supporting EU measure will still be binding, but mainly seeks to add to rules enacted by a Member State or Member States. Such a measure may not entail harmonisation of the legislation of the Member States. The competence concerning education, vocational training, youth and sport forms an illustration of this particular breed.

While the above distinction is easy enough to grasp, a minor complication arises from the existence of 'shared parallel competences'. In such a field, both the EU and the Member States may conduct policies of their own, but the measures they adopt are not supposed to clash, and expected to complement and reinforce each other. The Member States' powers are thus generally shielded from the application of the principle of pre-emption, meaning that the EU competence cannot expand into their reserved domain. On the external front, the development cooperation and humanitarian aid competence, contained in 208–211 TFEU, can be considered exemplary: whereas the Member States retain their principal powers in the area, the Union has over time assumed an autonomous role by adopting its own rules and principles, and by setting up (technical/financial) schemes administered by EU bodies, offices and agencies.

A further complication is due to the divergent phrasing of Article 3(2) and Article 216(1) TFEU that was already queried above. For one thing, the new clauses suggest that an exclusive competence can arise when the *agreement* to be concluded by the Union can affect common rules or alter their scope, whereas in *ERTA*, it was the *possibility* that one or more Member States entered into such an agreement that would lead to this result. The novel Treaty provisions also seem to rule out direct pre-emption on the basis of internal legislation alone, but this too contradicts a main tenet of the Court's earlier case law. Moreover, there is no indication that the *Herren der Verträge* desired to reconfigure the regime in this peculiar way.

[28]See further Chap. 9, Sect. 9.3.3.

Overall then, the codification exercise has not been satisfactory in this respect either. For some years, it left us with an imperfect, albeit not entirely unworkable, outcome.

As always, it fell to the ECJ to shed light on the exact breadth and purport of Article 216(1) and Article 3(2) TFEU, which it first attempted to do in the course of 2014. In the *Commission* v *Council* judgment concerning the Convention on the protection of broadcasting organisations' rights, the Court rehearsed the main tenets of its post-*ERTA* case law, stressing that for the arising of exclusive implied powers, it is not necessary that the (envisaged) international treaty and the existing EU secondary law in the field overlap fully. It may suffice that an area is largely covered by EU rules (rehearsing the 'ILO effect'), but to establish whether exclusivity could be justified on that basis, a specific analysis of the relationship between the secondary law and the international treaty will have to be conducted.[29] One month later, a similar vindication of the earlier ECJ jurisprudence, indicating that little weight should be attributed to the slightly deviant terms in the TFEU, was provided in Opinion 1/13 concerning the Hague Convention on child abduction.[30] Here also, the Court insisted on the continuing relevance of the pre-Lisbon case law, repeating that for the existence of an implied power it was not necessary that the pertinent EU legislation completely coincided with the international treaty and that to that purpose internal rules may already be affected by an external act when an area is largely covered by them. Again, to arrive at a sound conclusion, a comprehensive and detailed analysis of the relationship between the international treaty on the one hand and Union law on the other must be carried out—something that should include an analysis of their foreseeable future development, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system they establish.[31]

Both Treaty provisions, Article 3(2) and Article 216(1) TFEU, are therefore to be read in conformity with the vested pre-Lisbon jurisprudence of the ECJ. On that footing, implied powers may then be (instantly) exclusive under the conditions set out above, now contained in Article 3(2) TFEU. Though we find no reference to implied powers of a non-exclusive nature, and some authors have feared their extinction, that type should still be considered capable of arising as well, especially in areas of shared activity between the Union and the Member States.[32]

What this ultimately boils down to is that, despite the vast number of explicit competences that have now been placed at the Union's disposal, it should not be

[29]Case C-114/12, *Commission* v *Council* (Convention on the protection of broadcasting organisations rights). See also Opinion 1/03, *Competence to conclude the new Lugano Convention*.

[30]Opinion 1/13, *Accession of third states to the Hague Convention on the civil aspects of international child abduction*.

[31]Ibid., paragraphs 72–74. In this vein, see also Opinion 3/15, *Competence to conclude the Marrakesh Treaty*.

[32]Cf. Cremona (2008), p. 62.

overlooked that there are still numerous areas where the internal legal basis does not indicate the possibility for external action in the same field (e.g. agriculture, consumer protection or social policy). Consequently, the *ERTA* doctrine and its progeny certainly did not fall from grace, but retain significant value instead.

1.5 Treaty-Making by the EU: The General Sequence

As remarked, in case the Union seeks to establish durable linkages with third countries or international organisations, commonly in the form of an international treaty, a proper and sufficient legal basis should be available.[33] Yet, for the agreement to be valid under EU law, certain procedural requirements should be observed as well.[34] The general sequence to be followed is spelled out in Article 218 TFEU and roughly comes down to the following.[35]

As a preliminary step, either the Commission or (for topics within the remit of the CFSP) the High Representative will go and explore the possibilities and opportunities to engage in new treaty relations. They will subsequently submit recommendations to the Council, specifying on what topic and with which potential partner(s) negotiations may be opened. From this first stage onwards, in accordance with Article 218(10) TFEU, the European Parliament has to be immediately and fully informed.[36] The relevant committee of the Parliament will usually be briefed that the Council proposes to open negotiations. MEPs may then stage a debate on this. The Court has made clear that this duty to continuously provide relevant information cannot be diluted with regard to CFSP agreements.[37]

[33]The EU may engage in any type of undertakings binding under international law, irrespective of their formal designation: see Opinion 1/75, *Draft Understanding on a Local Cost Standard*.

[34]Again however, disregard of these 'internal' requirements does not automatically prejudice the validity and bindingness of the agreement under international law.

[35]Since the entry into force of the Lisbon Treaty, all proposed agreements need to be subjected to this procedure, irrespective of whether they lie within the scope of the CFSP or of any other external EU competence. For the Common Commercial Policy however, one should note that there is the *lex specialis* regime of Article 207(3) TFEU, which contains a number of deviations (detailed further in Chap. 4 of this book). An additional exception is to be found in Article 219 TFEU, for international agreements on monetary matters.

[36]Since the 1970s, this has been standard practice in the so-called Luns-Westerterp procedure, later codified in the various framework agreements on relations between the Parliament and the Commission. On this see e.g. Thym (2008) and Passos (2016).

[37]Case C-658/11, *Parliament* v *Council* (Mauritius agreement); see also Case C-263/14, *Parliament* v *Council* (Tanzania agreement).

Box 1.3 Taking Parliament Seriously: The Mauritius Agreement Case
In Summer 2011, the Council adopted a decision on the signing and conclusion of an agreement between the EU and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the Union-led naval force, and the conditions after transfer of suspected pirates. It was adopted on the basis of Article 37 TEU and Article 218(5) and (6) TFEU. Parliament contested the choice of legal basis, alleging that the Council had breached Article 218(10) by failing to inform it properly. The Court ultimately held that the legal basis was correct and dismissed the Parliament's first plea. However, it did accept the second argument and proceeded to annul the decision on that ground. It found as a matter of fact that the Council, after having announced to Parliament the opening of negotiations, did not inform the latter of the adoption of the decision and the signing of the agreement until 3 months later, and 17 days after their publication in the Official Journal. That negligence was held to constitute a manifest, unacceptable breach of Article 218(10) TFEU.

Next, the Council may take a decision authorising the opening of negotiations, whereby it names the EU negotiator or head of the EU's negotiation team. At this point, it may also issue certain negotiation directives and designate a special committee in consultation with which the negotiations must be conducted. The installation of such a committee aims to ensure that the outcome of the negotiations corresponds with the overall wishes of the (members of the) Council and prevents potential 'red lines' from being crossed. The Commission must provide the special committee with all information necessary for it to monitor the progress of the negotiations, such as the general objectives and the positions taken by the other parties involved. The Parliament will receive periodic briefings, and is thus able to exert influence on the course of the negotiations as well.[38] However, neither the level of detail in the Council's negotiating directives nor the powers attributed to the committee in those directives may have the effect of completely 'tying the hands' of the negotiator.[39]

The exact identity of the negotiator or negotiating team has been left undefined. In principle, the HR (or a delegated official) serves as negotiator for CFSP agreements, and the Commission for non-CFSP agreements. The latter chimes with the conferral onto the Commission of the general task of externally representing the EU, set down in Article 17(1) TEU. By not carving the usual choices in stone here, the Treaties do leave every room for deviations in practice, whenever pragmatic reasons militate in favour of assigning other actors.

[38]MEPs cannot participate directly in these negotiations, but they may be granted observer status by the Commission, subject to the diplomatic, legal and technical possibilities in the dossier concerned.

[39]Case C-425/13, *Commission* v *Council* (EU-Australia ETS negotiations).

Once the negotiations are concluded, a proposed text will be submitted to the Council. If this text is found agreeable by all its members, the Council may eventually adopt a decision authorising its signing. Optionally, the envisaged agreement can also be singled out for provisional application (i.e., preceding its official conclusion and eventual ratification by Member States).[40]

Then, Parliament is either asked for its consent, or merely consulted (or neither, in case the agreement falls predominantly within the scope of the CFSP).[41] It will have to give its consent when the envisaged treaty is an association agreement, when it involves the agreement on accession to the ECHR (as foreseen in Article 6 TEU), an agreement establishing a specific institutional framework by organising cooperation procedures, an agreement with important budgetary implications for the EU or an agreement that covers fields where either the ordinary legislative procedure (i.e., Article 294 TFEU) applies or a special legislative procedure where consent by the European Parliament is required.[42] In all other cases, with the exception of CFSP agreements, Parliament merely has to be consulted.[43]

Box 1.4 The Unstoppable Advance of the Parliament; The Demise of ACTA

Since the entry into force of the Lisbon Treaty, the European Parliament assumed a prominent role in the conclusion of international agreements. It has, inter alia, been involved in the conclusion of the Terrorist Finance Tracking Programme (TFTP/SWIFT) and the Passengers Name Records (PNR) agreements with the US and Australia. In July 2012, in a high-profiled dispute, it rejected the Anti-Counterfeiting Trade Agreement (ACTA). ACTA was a proposed international agreement on the protection of intellectual property rights between the EU, its Member States and 10 other countries. In the face of massive public outcry, and heated debates in the Parliament itself, the Commission sought to obtain the ECJ's opinion on ACTA's compatibility with the Treaties. Before the Court could proceed to do so, the EP voted it down, mainly due to concerns about the agreement's endangering of civil liberties.

[40]Provisional application can be terminated by a party to the agreement without further notice and without giving reasons (see Article 25(2) VCLT). This renders it a weak position to be in for too many years, if only from the perspective of legal certainty. Under international law, parties usually resort to it for (agreements containing) minor amendments to existing treaties. The EU shows a greater enthusiasm, with regularity applying all parts of mixed agreements that fall within the Union competence provisionally. For further reflections, see Quast Mertsch (2012).

[41]The Court has construed the word 'exclusively' in Article 218(6) TFEU to mean 'predominantly' in Case C-263/14, *Parliament* v *Council* (Tanzania agreement).

[42]In case of urgency, the Parliament and the Council may agree upon a time-limit for consent.

[43]Again, a time-limit may be set, here by the Council. If Parliament fails to deliver its opinion before the expiry of the deadline, the Council may press ahead with the conclusion.

Hereafter, on the proposal by the negotiator, the Council may adopt a decision concluding the agreement. As with its predecessors, this decision will be published in the Official Journal.

Throughout the whole procedure, the Council will take its decisions by qualified majority voting. This applies to the decision to open the negotiations, as well as those to sign and conclude the proposed agreement. However, the Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of an (internal) EU act, as well as for association agreements and accession treaties. This also entails that all CFSP agreements are authorised, adopted and concluded by unanimity.

In case the treaty lies within a field of exclusive competence, it may be considered ratified with the conclusion by the Council. However, in case of a shared competence and, correspondingly, a mixed agreement, the conclusion of the treaty will only be final once all Member States have proceeded to ratify it, in accordance with their domestic constitutional requirements. Consequently, when earlier a decision was taken on the provisional application of a mixed agreement, that application can only pertain to the elements that lie within the Union's sphere of competence.

It deserves mentioning that since the turn of the last century, instead of treaty-making, the EU increasingly resorts to non-binding agreements such as memorandums of understanding. Neither the procedure of Article 218 TEU nor a *lex specialis* applies here—which does not mean though that 'anything goes'. The scarce case law reveals that the Council calls the shots, authorising the Commission to initiate negotiations where necessary. Contrary to what the latter presumed, it does not possess the right to sign a non-binding agreement resulting from the negotiations but requires the former's prior approval for that.[44]

1.6 Judicial Control in the Various Layers

Officially, the Union has been endowed with a 'common institutional framework' since 1992. Yet, this amounted to a paper reality then, and at the present day and time, it still has not been realised in full. Following Article 13 TEU, there are seven official institutions: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice, the European Central Bank and the Court of Auditors. However, there is still no perfect unity in the way these institutions manifest themselves in the (sub-)domains of European Union law. Perhaps the most salient deviation resides in the role of the Court of Justice in EU external relations law; for the bifurcated system of judicial protection

[44]To reason otherwise would infringe the principle of distribution of powers in Article 13(2) TEU and the principle of institutional balance: see Case C-660/13, *Council* v *Commission* (Addendum to the EU-Switzerland MoU).

underscores that the *commonality* of the institutional framework continues to be slightly fictitious.

In principle, as in EU law in general, the Court has been granted full jurisdiction to interpret the Union's legal instruments, rule on their validity, express itself on possible infringements of Union law by Member States, and decide on preliminary questions referred by national courts.[45] It has been established in case law that international agreements also lie within this purview. Therefore, national courts may also approach the ECJ when any clauses of such agreements are equivocal or if their legality seems dubious.[46]

In addition, at the conclusion of any treaties or conventions, following Article 218(11) TFEU, the ECJ can be asked to pronounce on the compatibility of those agreements with the Treaties and/or EU secondary law.[47] This *ex ante* procedure is optional and not compulsory, but employed with great regularity all the same.[48] One should not be misled by the nametag 'opinion', and realise that the content of the document outlining the Court's position is binding in its entirety. By consequence, if the pronouncement turns out to be negative, the envisaged agreement cannot enter into force unless it is amended (the standard route to resolve any incompatibilities) or the Treaties revised.[49] Of course, a harsh verdict may occasionally result in wholesale abandonment of the proposal.

The background idea of this procedure is that one ought to prefer prevention to the cure: if an agreement were to be enacted which proves incompatible with EU law afterwards, the international obligations vis-à-vis third parties remain in place nevertheless.[50] For that reason, a compatibility assessment in advance is to be preferred.

There is no time-limit for submitting a request for a Court opinion, and it is not necessary that the decision to open negotiations has already been taken. All the same, the overall purpose of the envisaged agreement must be known before the ECJ is in a position to pronounce itself.[51] Usually, the agreement will have been

[45]See respectively Articles 258–260, Article 263 and Article 267 TFEU.

[46]See e.g. Case 181/73, *Haegeman* v *Belgium*.

[47]The Court has extended its competence to assess envisaged agreements of the EU whereby the Member States act as its medium (Opinion 2/91, *Conclusion of ILO Convention No. 170 concerning safety in the use of chemicals at work*) and, more controversially, to some agreements concluded by the Member States on their own behalf (Opinion 1/13, *Accession of third states to the Hague Convention on the civil aspects of international child abduction*).

[48]An extensive discussion provides Adam (2011).

[49]The latter remains a rare occurrence in EU law, and has never been triggered by the incompatibility of a proposed international agreement. However, the Court's controversial position in Opinion 2/94, where it denied that the Community was competent to accede to the ECHR, did in the long run result in a specific legal basis being inserted (at the Treaty of Lisbon, with the revision of Article 6 TEU).

[50]Again, in line with Article 27 VCLT (cf. supra, footnotes 15 and 16).

[51]See e.g. Opinion 2/94, *Accession of the Community to the European Convention on Human Rights*, paragraph 13, and Opinion 1/09, *Creation of a unified patent litigation system*, paragraph 53.

negotiated but not yet concluded. In case the agreement has been concluded already, the Court will not give an opinion.[52] The appropriate remedy for a Member State or institution that wishes to contest the agreement is then to bring an action for annulment against the decision to conclude the agreement (Article 263 TFEU).

As said, the EU knows a bifurcated system of adjudication: whereas in general, the Court enjoys an unfettered jurisdiction over the full breadth of Union law, a special exception has been made for the Common Foreign and Security Policy. At the very moment the CFSP was incorporated in the original three-pillar framework, at the Treaty of Maastricht, the Court was consciously excluded from this particular domain. The reasons for this exclusion are commonly thought to be threefold.[53] First, there is the idea that judicial control would constrain the Member States' room for manoeuvring in this highly political environment. Traditionally, foreign and security policy is an extremely sensitive field, where the national interest takes pride of place. This renders it undesirable to let lawyers and judges step in and separate the 'rights' from the 'wrongs'. A second and closely connected reason pertains to the nature of the measures enacted: pursuant to the broad powers and very general objectives of the CFSP, the instruments adopted are thought not to lend themselves well for legal review and judicial supervision. They are after all not intended as proper legislation, and imperfectly drafted to boot. Third and last, there is the fear of judicial activism—the risk that the ECJ would pick up the gauntlet in the same way it did before, disregarding the Member State's more limited ambitions, promoting further integration and extending the scope of the CFSP beyond the black-letter text. In the mid-1990s, the Court was deliberately brought into the former 'third pillar' so as to strengthen the rule of law there. Its integral exclusion from the CFSP was kept intact at the Treaties of Amsterdam and Nice (signed in 1997 and 2000).

The ECJ has nevertheless managed to broaden its grasp. It felt compelled to do so, driven by the need to ensure that no legal measures adopted in the intergovernmental domains of the Union would encroach upon the *acquis communautaire* (then made up of the primary and secondary rules of the 'first pillar').[54] In the groundbreaking *ECOWAS* litigation, from the outset, it seemed doubtful whether the Court was able to review the legality of a CFSP decision that was claimed to affect the exercise of external EC competence. The Council, supported by Spain and the United Kingdom, submitted that the ECJ had no jurisdiction whatsoever to rule on the legality of any measure falling within the CFSP. Their objections were, however, quickly brushed aside. Citing what was then Article 47 TEU, the Court

[52]Unless when it deems that there are imperative reasons to speak out nevertheless: see Opinion 3/94, *Framework agreement on bananas*, and Opinion 1/13, *Accession of third states to the Hague Convention on the civil aspects of international child abduction*.

[53]Cf. Garbagnati Ketvel (2006), pp. 79–80.

[54]Earlier case law suggested, and many scholars assumed, that such 'cross-pillar surveillance' would be possible vis-à-vis CFSP measures. A 1998 ruling in respect of a former 'third pillar' act foreshadowed the Court's comprehensive approach; see Case C-170/96, *Commission* v *Council* (Airport Transit Visa).

recalled that none of the provisions of the EC Treaty were to be affected by a provision of the EU Treaty. For that reason, it posited that it had to ensure that acts falling within the scope of Title V TEU—at least those that were by their nature capable of having legal effects—did not encroach upon the powers conferred by the Treaty on the European Community. From this followed that the jurisdiction of the Court did extend to ruling on the merits of an action for annulment brought against a CFSP act.[55]

Admittedly, the Constitutional Treaty had already intended to create an opening in this direction, but due to the breakdown of that project, the prospect initially failed to materialise. The provision concerned was nevertheless picked up by drafters of the Lisbon Treaty, and the pivotal clause is currently located in Article 275 TFEU. It does, however, still uphold the general negative rule with regard to the jurisdiction of the ECJ in the Common Foreign and Security Policy: in principle, the Court shall neither have jurisdiction with respect to the Treaty provisions on the CFSP nor with respect to acts adopted on the basis of those provisions. Nevertheless, in the second section of Article 275 TFEU, two exceptions are made, the prefigurations of which had been cropping up in the earlier case law of the ECJ.

First, in accordance with Article 40 TEU, the Court may monitor whether CFSP acts do not encroach upon other primary or secondary rules of EU law.[56] Thus, if a CFSP measure affects other EU competences, inhibits the exercise thereof in some way, or tramples over certain procedural requirements, it will have to be set aside. Yet, as Article 40(2) TEU stipulates, the '*ECOWAS* doctrine' or 'border surveillance competence' now works both ways. After the *ECOWAS* judgment and prior to the entry into force of the Treaty of Lisbon, legal acts adopted under Title V TEU could be scrutinised by the Court for a possible encroaching upon the 'acquis communautaire', and they would always be annulled if that was the case. Since the entry into force of the Lisbon Treaty, however, any other EU acts encroaching upon the CFSP suffer the same fate. Thus, where in the past one could say that 'the first pillar always wins', in the post-Lisbon era, this is no longer so.[57] Conceptually, one could say that through the new 'mutual non-affectation clause', a legal parity has been achieved between the 'outer' and the 'middle layers' of the EU external relations framework. Unfortunately, this change forces political and judicial authorities to engage in much more complex analyses. Careful attention has to be paid to the 'centre of gravity' of a proposed measure. When the limits and proper location of a suspect measure cannot be determined with complete certainty, a dual

[55]Case C-91/05, *Commission* v *Council* (ECOWAS). The contested CFSP decision that purported to implement a CFSP joint action was ultimately annulled for disavowing the EC competence on development cooperation (and clashing with parts of the Cotonou Agreement, enacted on the basis of that competence (now contained in Article 209 TFEU)).

[56]In line with Article 25 TEU, such acts will merely comprise 'decisions'. Moreover, in line with Article 24(1) TEU, which rules out the adoption of legislative acts, these will mainly be of a technical and executive nature.

[57]See e.g. Case C-263/14, *Parliament* v *Council* (Tanzania agreement).

legal basis may have to be utilised with increasing frequency.[58] This in turn places an increased burden on the shoulder of policy officers, who have to premeditate their actions well in advance when choosing the provision(s) on which to base the envisaged legal instrument.[59]

Box 1.5 *Retour à Mauritius*: An Atypical Case of Border Surveillance?
We noted above how the Parliament contested the choice of legal basis for the decision signing and concluding the agreement between the EU and the Republic of Mauritius. The Parliament hereby argued for the application of Article 218(6)(a)(v) TFEU, which provides it with the right to give (or withhold) consent. Instead, the decision was adopted by the Council on the basis of Article 218(6) TFEU, second sub paragraph, which does not entail such extensive EP involvement. On that count, the Court eventually sided with the Council, but it did not consider itself barred from reviewing whether Article 218(10) TFEU had been violated in the process. Tentatively, one might argue that the Court engaged in an atypical form of 'border surveillance' in order to verify the procedural prerogatives of the various actors.

The second exception to the general exclusion of Court jurisdiction in the CFSP, laid down in Article 275 TFEU, is that the ECJ is entitled to review the legality of decisions adopted by the Council under Title V TEU that impose restrictive measures on natural or legal persons.[60] This remedy reflects and reinforces the approach the EU Courts have taken in a long string of cases. Most of these were initiated in the wake of the attacks of 11 September 2001, and the subsequent measures adopted by the EU as part of the 'war on terror'. Notable samples are the *Kadi*,[61] *PMOI/OMPI*[62] and *Sison*[63] cases, in which, ultimately, the protection of the fundamental rights of the suspected natural and legal persons prevailed over the (alleged) overriding security interests. The defects of the adopted sanctioning measures that 'blacklisted' the targeted companies and individuals were so severe

[58]On this, see more generally Case C-178/03, *Commission and Parliament* v *Council* (Incorporation of the Rotterdam Convention), and Case C-166/07, *Parliament* v *Council* (International Fund for Ireland).

[59]As argued in van Elsuwege (2010), the trusted 'centre of gravity' test may well prove wholly unsuited for this specific domain.

[60]As regards judicial review of the measures subsequently adopted on the basis of Article 215 TFEU, the jurisdiction of the EU Courts is self-evident.

[61]Joined Cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat International Foundation* v *Council and Commission*.

[62]Case T-228/02, *Organisation des Modjahedines du peuple d'Iran* v *Council*; T-157/07, *People's Mojahedin Organization of Iran* v *Council*; Case T-256/07, *People's Mojahedin Organization of Iran* v *Council*; Case T-284/08, *People's Mojahedin Organization of Iran* v *Council*.

[63]Case T-47/03, *Sison* v *Council*; Case C-266/05 P, *Sison* v *Council*; Case T-341/07, *Sison* v *Council*.

that the ECJ felt obliged to proceed to (partially) annul them.[64] Whereas this was comparatively easy where the EU itself had adopted those measures of its own motion, a complication arose in those cases where they constituted the follow-up of rules laid down within the framework of the United Nations. Nevertheless, in the first appeal judgment in the *Kadi* case (2008), the Court displayed an unprecedented audacity, asserting that it was able to review the legality of every EU legal act, including those giving effect to UN Security Council resolutions. Emphasising the autonomous character of the Union legal order that could not be prejudiced by an international agreement, it proceeded to award an absolute priority to the EU system of human rights protection. This stern defiance of UN rules, tacit negation of the supremacy of the UN Charter and contravention of the will of the Security Council resulted in historic, groundbreaking jurisprudence.[65] Henceforth, the judicial review possibilities absent at the UN level would at least be guaranteed within the EU legal order. At the same time, this did not preclude further litigation, in particular on the standard and remit of the fundamental rights that need to be safeguarded in 'terrorist cases'.[66] In the final instalment of this saga, handed down shortly after the de-listing of the claimant by the Council, the ECJ underscored that decisions to impose restrictive measures may be subjected to intense scrutiny, and that courts should not limit themselves to a marginal assessment, leaving too wide discretion to public authorities.[67]

Originally, the prime vehicle for effectuating these two exceptions appeared to be the action for annulment (i.e., application of Article 263 TFEU). For border surveillance, the usual protagonists are thereby the Member States and the institutions; for a review of restrictive measures, natural and legal persons. In the seminal *Rosneft* judgment, the Court also allowed for the submission of preliminary references on the validity of CFSP acts, provided that the instrument concerned is either suspected of violating Article 40 TEU, or imposes sanctions on companies or individuals. In its response to a referral from a British tribunal, where a Russian oil company contested the lawfulness of its blacklisting, the ECJ held that neither the TEU nor the TFEU outlawed this procedural avenue. The Court signalled that the coherence of the system of judicial protection requires that, alongside the possibility of a direct action, the power to declare such acts invalid under Article 267 TFEU

[64]The 'blacklists' led to a wholesale freezing, in every Member State of the Union, of the financial assets and resources of the persons and enterprises concerned.

[65]The early stance of the CFI had been rather reluctant, and it only grudgingly accepted its being overruled: see Case T-306/01, *Yusuf and Al Barakaat International Foundation* v *Council and Commission*, and Case T-315/01, *Kadi* v *Council and Commission*. The judgments triggered an avalanche of scholarly writing; further references can e.g. be found in de Búrca (2009) and Cuyvers (2011). A comprehensive study offers Eckes (2014).

[66]Meanwhile, at the UN level, in the wake of the first *Kadi* appeal judgment, a special Ombudsperson was installed that can be approached by those alleging to have been blacklisted erroneously. For further details, see Boisson de Chazournes and Kuijper (2011).

[67]Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others* v *Yassin Abdullah Kadi*.

should be reserved to it as well whenever questions on their legality are raised before Member State courts.[68]

Prima facie, nothing stands in the way either of the Court reviewing the compatibility with the EU Treaties of international agreements concluded under the CFSP competence: Article 218(11) warmly welcomes the opportunity. We do await a wholehearted confirmation of this option, as it has never been effectuated so far, apart from the scrutiny of agreements that were principally based on a TFEU competence but contained a secondary CFSP component.

In recent years, some other intriguing cracks have emerged. Essentially, these gambits testify of an unflappable judiciary that is keen on protecting individual rights, and regards the exclusion rule in Article 275 TFEU as an exception that ought to be construed narrowly. Hence, in *H.*, the Court found itself competent to also review purely administrative decisions (in the case at hand, one pertaining to staff management within an EU police mission) that adversely affect individuals.[69] Equally, in *Elitaliana*, it made clear that it enjoyed jurisdiction to interpret and apply financial provisions with regard to public procurement, even when the call for tenders fell within the purview of the CFSP.[70] On a related note, already at the turn of the last century, the CFI ruled in *Hautala* that Regulation 1049/2001, in tandem with the general principle of transparency, had to be interpreted as demanding public access to documents lying within the scope of Title V TEU.[71] In the Court's view, such access could not be denied on the sole ground that these had been prepared within the field of foreign and security policy. It thereby did stress that the judicial assessment must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts, or a misuse of powers.[72]

Overall then, judicial control over EU external action forms quite a mixed bag. There would seem to exist an adequate system of remedies in the Union in general, which extends to the CFSP where it appears most crucial. It may nonetheless be questioned whether the exclusion rule contained in Article 275 TFEU totally comports with the minimum standards flowing from international human rights conventions and whether it does not excessively impede access to justice and the right to effective judicial protection. The ECtHR has hitherto been reluctant to look

[68]Case C-72/15, *Rosneft Oil Company OJSC* v *Her Majesty's Treasury*, *The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*.

[69]Case C-455/14 P, *H.* v *Council, Commission and EU Police Mission in Bosnia and Herzegovina*.

[70]Case C-439/13 P, *Elitaliana SpA* v *Eulex Kosovo*.

[71]See Regulation 1049/2001/EC regarding public access to European Parliament, Council and Commission documents, OJ [2001] L 145/43.

[72]Case T-14/98, *Hautala* v *Council*. Ms. Heidi Hautala requested access to a report of a working group on conventional arms exports. The Council acquiesced in the kernel of the Court's decision, but did lodge an appeal challenging the application of the grounds of refusal listed in said Regulation. The ECJ rejected this claim in Case C-353/99 P, *Hautala* v *Council*.

into this.[73] The ECJ has downplayed the issue, and sought to justify a continued compartmentalisation in its notorious Opinion 2/13.[74] The matter still needs to be confronted head-on if the EU were to accede to the ECHR after all, as foreseen and mandated in Article 6 TEU.

1.7 Conclusion

In the past centuries, the way in which states conduct their external relations has visibly evolved. For quite some time the executive was placed in pole position, the legislature and judiciary squeezed to the margins.[75] Few considered the attendant lack of oversight problematic. Initially, the disposition of the EEC bore a close resemblance to this setup, but as we have observed, countless shifts occurred—partly through formal amendments, partly through court action. Just like nation states, the EU and its predecessors witnessed an identical expansion of the entire spectrum of external relations, today no longer restricted to a splendidly isolated sphere but permeating ever more different policy fields.

Since the early 1990s, commentators have rushed to emphasise and exacerbate the Union's structural maladies, in particular the democratic deficit, its weak popular legitimacy, limited transparency and overall inefficiency. The Common Foreign and Security Policy was singled out for particularly harsh criticism, and at the present day and time, the discontent with regard to the effectiveness the EU's 'outer layer' has not subsided. Below the radar, however, many more results were achieved than is generally acknowledged. Moreover, the Union is not a unitary actor with a single foreign policy, nor does it pretend to be. It remains a multifaceted legal creature, with only a *common* foreign policy where possible. Additionally, in the Union's 'middle layers', one encounters a very sophisticated framework for managing legal relations with the outside world. True, the composition is bewilderingly complex—but necessarily so, due to the great variety of interests of the actors involved, which all need to be careful balanced.

Over the course of the past decades, the layered structure has been refined and polished in several ways. Since 2009, the Lisbon Treaty has brought considerable extra clarity. It for example resolved the hitherto problematic issue of legal personality, and carved out the division of competences in greater detail. The relationship between the various institutions, bodies and agencies, as well as the interaction between the various layers, is now clearer than before. Yet, until the layered system is replaced with a unitary architecture, many will consider its achievements suboptimal—and the series of disparaging pessimistic and, indeed, defeatist remarks with

[73]Compare the ECtHR judgments in *Bosphorus Hava Yollari Turizm* v *Ireland*, Application No. 45036/98 and *Posti & Rahko* v *Finland,* Application No. 27824/95.

[74]Opinion 2/13, *Accession of the European Union to the European Convention on Human Rights*.

[75]Kuijper (2014).

regard to the future of this global player are likely to persist, ignoring every progress in the opposite direction.

Equally relentlessly though, in its present form, the EU is pushing ahead with pursuing objectives that were already set down in the early 1990s, but perhaps in a much too abstract and ambiguous way. Currently, a slow but sure synchronisation of the external policies of the Member States is taking place, epitomised by the entrenching of the position of the High Representative, the enactment of a uniform set of legal instruments, the gradual emancipation of the European External Action Service, and the contemporary muscle afforded to the Parliament. Further shifts will inevitably be occurring, inside, outside, as well as in between the various layers, mainly as resultant of the dynamics between the different actors and competences involved.

It is this quasi-permanent evolution of the EU as a global player that makes the study of its external relations law so challenging and rewarding. In the preceding sections, we have become acquainted with some basic features and concepts. The ground is now sufficiently prepared for a more in-depth study of the outer, middle and inner layers.

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Part I

Legal Dynamics of the Outer Layer

The Common Foreign and Security Policy 2

Contents

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2.1 Introduction

In this chapter, we will be taking a closer look at the Common Foreign and Security Policy (CFSP). The CFSP forms one part of the framework for the pursuit and management of EU external relations, with the other part consisting of the external policies and competences contained in the TFEU. As remarked earlier, the CFSP can be roughly considered to constitute the Union's 'front office', as it is the most visible way in which the EU manifests itself to its international partners. Whenever possible, the Member States will be speaking with one voice on the global scene, channelled here through the High Representative of the Union for Foreign Affairs and Security Policy, acting on their behalf and in their collective interest.

Although the CFSP may at first glance appear to be an all-encompassing policy, regulating all the external ('foreign') relations of the EU, in reality it has a much more limited reach. As will become clear in this chapter, still today it occupies a special, separate position, and carries a more residual character.

In the following sections, we will in subsequent order go into the CFPS's historical background (Sect. 2.2); its purpose and character (Sect. 2.3); the various institutions, bodies, agencies and other actors (Sect. 2.4); decision-making (Sect. 2.5); and the array of legal instruments (Sect. 2.6).

2.2 Historical Background

2.2.1 Before 'Maastricht'

The entry into force of the Treaty of Maastricht on 1 November 1993 marked the official birth of the CFSP: on that moment, it became part and parcel of EU law. At the same time, in 1993, it did not tread upon bare ground entirely since there already existed some forms of cooperation in the fields of foreign and security policy long before 'Maastricht'.

The first attempt at forging a common approach in this field was made by the then French prime minister, René Pleven, with his famous plan for the establishment of a European Defence Community (EDC). His idea basically came down to the setting up of a unitary architecture for a seamless protection against external threats, pooling all available national resources and centralising supervision mechanisms. Put simply, a supranational framework would be erected for all military and defence matters, whereby a single European army would be launched to replace the individual armed forces of the participating Member States (France, Italy, West Germany and the Benelux countries).[1] A treaty to this effect was signed in 1952, but never entered into force due to it being rejected by a (narrow) majority in the French parliament. This failure signalled the end to another project, inextricably linked to EDC Treaty, namely the founding charter of the European Political

[1] For more details, see Ruane (2000).

Community. This scheme, the so-called Plan Fouchet, aimed to put in place an overarching framework for the pursuit of a harmonised foreign policy.[2] As an alternative, the Western European Union (WEU) was created in 1954. In contrast to the grand ambitions of the EDC, the WEU constituted a more loose-knit structure, providing a basis for defence cooperation that left national sovereignty in the field almost completely intact.[3]

It was only in 1969 that the first initiatives to compensate for the failure of the European Political Community saw the light of day. In that year, a start was made with what would soon become known as European Political Cooperation (EPC).[4] EPC involved periodic meetings of the foreign ministers and officials from the Member States of the EC, convening on average three or four times a year. The idea was to discuss topical affairs, exchange views and share information.[5] Attempts would be made to align the individual foreign policies more closely with one another, and to take common positions in international organisations when and wherever possible. However, all the dealings were rather informal, and EPC as such remained outside the scope of Community law. Contrary to the EC with its profoundly supranational character, EPC was dominated by an intergovernmental spirit. Consequently, the only legal rules applicable to the latter framework were those stemming from international law. Yet, formal and explicit commitments were only rarely undertaken within EPC.[6]

In 1987, EPC was officially 'recognised' by the European legal order. The Single European Act awarded a status equal to primary EC law to all the basic principles the Member States adhered to within the scope of EPC, and to the (few) treaties and agreements they had enacted. Nonetheless, EPC did remain separate: although a firm linkage had now been established, it was not incorporated into the existing supranational frameworks. Also, while some institutional refinements were introduced (such as a rotating presidency and some special committees), no law-making powers were created. The cooperation thus retained its political and intergovernmental character.

2.2.2 'Maastricht' and Beyond

In 1993, with the entry into force of the Maastricht Treaty, European Political Cooperation was enshrined in the main EU architecture in the form of the Common

[2]The plan was devised by and named after the French diplomat Christian Fouchet. An underlying objective was to hedge in the European Commission.

[3]The WEU lasted for almost 50 years. In 2002, it was for the largest part swallowed up by the EU. On 31 March 2010, the WEU Council officially decided to disband the organisation.

[4]The true enactment followed one year later with the endorsement of the so-called Davignon Report, drafted by a committee chaired by the eponymous Belgian diplomat.

[5]The guiding principles have been described as 'the three c's': consultation, confidentiality and consensus. See Gosalbo Bono (2006), p. 338.

[6]For in-depth studies, see e.g. Allen et al. (1982) or Nuttall (1992).

Foreign and Security Policy. Thereby, the relevant rules were rearranged, streamlined, and substantially strengthened. Furthermore, the institutional apparatus of the EC would now also function for the benefit of the CFSP (at the time referred to as the 'second pillar' of the Union), as well as for the cooperation in the field of Justice and Home Affairs (JHA, then labelled the Union's 'third pillar'). The celebrated 'single institutional framework' of the EU amounted to little more than rhetoric though. The Commission, the Parliament and the Court would, for instance, play little or no role outside the 'first pillar' (consisting of the EC, EAEC and ECSC), and the Council occupied a much more dominant place in the CFSP and JHA domains. Also, the rules underpinning the CFSP suffered from a lack of clarity, and the (legal) status of the different instruments remained uncertain.[7] Also, the decision-making was hampered by a lack of continuity, the requirement of unanimity and the corresponding veto powers of the Member States.

With the Treaty of Amsterdam that entered into force in 1999, the CFSP received a much-needed upgrade, although the progress was not exactly staggering. The position of the Union vis-à-vis the Member States was clarified, its treaty-making competence was reinforced, and the instruments were more clearly delineated. Moreover, the function of High Representative for the CFSP was introduced. Additionally, for the very first time in this politically sensitive domain, some (minor) possibilities for adopting decisions in the Council with a qualified majority were introduced.

Box 2.1 The Carrousel of High Representatives

Contrary to what is often believed, baroness Catherine Ashton, appointed in December 2009, was not the Union's first High Representative ever. She had no less than two predecessors already: Javier Solana, the Spanish former secretary-general of the North Atlantic Treaty Organization, and the much less well-known German diplomat Jürgen Trumpf. The former held the office from October 1999 to December 2009. The latter did not last nearly as long, serving as HR in his final months as secretary-general of the Council of Ministers. With the incumbent Federica Mogherini, former foreign minister of Italy, the interim total has risen to four.

The Treaty of Nice, which entered into force in 2003, only brought minor changes to Title V TEU. It was however in December 2009, with the entry into force of the Treaty of Lisbon, that the CFSP received a complete overhaul. In line with the suggestions made in the Treaty establishing a Constitution for Europe,[8] in

[7] A factor contributing to the confusion was that, instead of sticking to Arabic numerals, the provisions of the EU Treaty took their designation after letters of the alphabet (sometimes combined with numbers, leading to articles such as 'D', 'J.3', 'K.7' and 'Q').

[8] Signed in 2004, definitely shelved in 2007, first and foremost due to the negative outcomes of the Dutch and French popular referendums that took place in mid-2005.

order to increase efficiency and transparency, the rules were completely revamped. Inter alia, the number of legal instruments was reduced; the position of the High Representative was strengthened (now coordinating the external portfolios in the Commission, as well as chairing the Foreign Affairs Council); the relations between the various actors, bodies and agencies were clarified; and a broad foundation was placed under the European Security and Defence Policy, now renamed Common Security and Defence Policy (CSDP).[9]

Without exaggeration, one may say that with the Lisbon Treaty, the Union has taken a phenomenal leap forward, which all but transformed the CFSP. As a striking testimony of the new-found determination, post-Lisbon the Treaties refer to *the* Common Foreign and Security Policy, whereas previously, Title V TEU claimed to contain merely provisions on *a* Common Foreign and Security Policy.

In the first years of operationalisation, the Lisbon changes have turned out as pretty satisfying, the ramification mostly being felt in the sphere of actors and the sphere of instruments (especially their effectivity). This will be demonstrated in the sections below, which assess several aspects of the regime that was reformed in 2009 in closer detail.

2.3 Purpose and Character

The main ambitions of the European Union on the world stage may be gleaned from Article 21 TEU. Therein, one finds that the EU will be guided by, and that it seeks to advance, the lofty principles of democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, respect for the principles of the UN Charter and international law. In Article 24 TEU, it is stated that the Union's competence in CFSP matters covers all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy, which may one day lead to a common defence. We also read here that the Policy shall be subject to specific rules and procedures, which once again emphasises the special position of the CFSP within the Treaty regime. In the same provision, the differences with other domains of EU law are spelled out: the European Council and the Council are to define and implement the CFSP, in principle acting by unanimity, except where the Treaties provide otherwise[10]; the adoption of legislative acts is excluded; the High Representative has a major part to play; the Commission, the Parliament and the Court are pushed more or less to the margins.

[9] More on the CSDP and its evolution in Chap. 3.

[10] Which is exactly the reverse of the ordinary situation in EU law, namely qualified majority voting, except where Treaty provisions prescribe that decisions be taken unanimously. For further elaboration and illustrations, see Sect. 2.5 infra.

Due to its broadly phrased objectives, the CFSP may clash or overlap with other EU external policies. Therefore, it is of utmost importance to ensure consistency between the various fields. For that purpose, the 'principle of sincere cooperation', nowadays included in Article 4(3) TFEU,[11] has received a specific follow-up in Article 24(3) TEU, stressing that Member States are bound to support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. Whereas in the past, scholars have questioned the legal bindingness of the obligations undertaken in the CFSP, Article 24(3) TEU states that Member States 'shall comply with the Union's action in this area', 'shall work together to enhance and develop their mutual political solidarity', and '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'. In the absence of Court jurisdiction, however, these obligations still seem to retain a predominantly political character. This is further encouraged by the fact that Article 24(3) entrusts only the Council and the High Representative with the enforcement of these principles, thus excluding the classic remedy for non-compliance in EU law, infringement proceedings initiated by the Commission.

As regards the purpose and character of the CFSP, what one should keep well in mind at all times is that a *common* foreign and security is being pursued. This differs from unitary actors (e.g., a federal state such as the United States or Russia) that dispose of a *single* foreign and security policy.[12] Instead, the CFSP essentially forms an attempt to take a common stance; if successful, the EU Member States forfeit their sovereign privilege to conduct their own foreign policy with respect to certain dossiers. If, however, no agreement can be reached, there will be no common position to uphold and defend. In contrast to this setup, the component parts of a purely unitary actor have *a priori* no role to play on the international scene, as there is room for only one foreign policy, principally conducted at the central or federal level.

All this testifies to the fundamental intergovernmental nature of the CFSP, distinct from the supranational approach adopted in all other parts of EU law. In other words, the Member States stand on an equal footing while attempting to promote the collective interest through the European Council and the Council, without any independent EU institution being able to fix the agenda and impose its particular preferences against their will. To be sure, judging from the Treaty provisions, the CFSP is permeated by a desire for intense cooperation and synchronisation—but in this special and separate domain of EU law, there clearly exists little or no will to engage in legal integration or harmonisation.

[11]Formerly the 'Community loyalty' principle (*Gemeinschaftstreue*), incorporated in Article 10 TEC; in the post-Lisbon era also referred to as 'Union loyalty' (*Unionstreue*).

[12]Notwithstanding the fact that their goals and ambitions in these fields may be internally inconsistent, and shift over the course of time.

2.4 Institutions, Bodies, Agencies and Other Actors

We now proceed to inspect in closer detail the role, basic function and modus operandi of the various actors that are active in this particular policy area. Legal doctrine usually classifies them as either institutions, bodies or agencies. As we will notice, however, the dividing lines are not always so clear-cut, and some of the entities that give shape to the CFSP are quite hard to pin down.

2.4.1 The High Representative

The truth of the foregoing statement is underlined immediately when considering the place and function of the 'High Representative of the Union for Foreign Affairs and Security Policy' (HR). The terms institution, body nor agency apply here. Instead, although the Treaties are not crystal clear on this, we may presume to encounter a Union 'office' here.

As Article 18(1) TEU stipulates, the European Council is responsible for selecting and appointing a suitable candidate, and it may proceed to do so by a qualified majority. The European Council is also the institution that can end his term of office. Since the HR cannot be dismissed in any other way, he is placed in a relatively strong and unassailable position.[13]

Essentially, in accordance with Article 18 TEU and Article 27 TEU, the HR has a starring role to play in the CFSP. The person appointed to the office is bound to contribute to the development of the policy by making proposals, and the latter should be carried out by him in line with the mandate provided by the Council.[14] Furthermore, the High Representative convenes the Council's regular and extraordinary meetings, submits initiatives, and may refer questions to it.[15] His pivotal position becomes crystal clear from the fact that he is meant to preside over (most of) the meetings of the Foreign Affairs Council.[16]

[13]Consonant with Article 17(7) TEU, after being appointed by the European Council as HR, the Parliament needs to approve his nomination as member and vice-president of the Commission. Whereas he can be dismissed from the latter institution in several different ways (see e.g. Article 17(8) TEU and Article 247 TFEU), he will remain in office as HR until the European Council were to relieve him as well.

[14]Article 18(2) TEU; see also Article 27 TEU: 'The High Representative of the Union for Foreign Affairs and Security Policy, who shall chair the Foreign Affairs Council, shall contribute through his proposals to the development of the common foreign and security policy and shall ensure implementation of the decisions adopted by the European Council and the Council.'

[15]Article 30 TEU; see also Article 31(2) TEU.

[16]Article 18(3) TEU. However, Article 2(5) of Council Decision 2009/908/EU laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, OJ [2009] L 322/28, provides that discussions in the Foreign Affairs Council on Common Commercial Policy issues will be chaired by the six-monthly rotating Presidency. Moreover, if the HR is unable to attend a session, he will be replaced by one of the Commissioners from the 'external

The function of High Representative is usually referred to as a 'double-hatted' one, since the person in question also functions as a member and a vice-president of the European Commission. In this particular capacity, he is tasked to ensure consistency between the different facets of EU external action encapsulated in various Commission portfolios. Before the entry into force of the Lisbon Treaty, there used to be a separate Commissioner for external affairs. In mid-2009, when the Barroso II Commission took office, this post was abolished. Nowadays, the portfolios specifically related to external affairs are those of the Commissioner for Enlargement Negotiations & European Neighbourhood Policy, the Commissioner for International Cooperation & Development, the Commissioner for Humanitarian Aid & Civil Protection and the Commissioner for Trade. In addition, the portfolios of other Commissioners such as Environment, Maritime Affairs & Fisheries; Transport, Migration & Home Affairs; or Climate Action & Energy possess unmistakable external dimensions as well. In the administration presided over by Jean-Claude Juncker, as a conscious move to improve manageability, different project teams were created for interconnected portfolios. One such project team was christened 'Europe in the World', linking all aforementioned Commissioners. As vice-president and team leader, the HR performs the task of streamlining and coordinating the activities undertaken within these portfolios.[17] Legally, however, it still falls to the College of Commissioners as a whole to ensure coherence across the entire range of its external policies.

The prominence of the HR is further increased by Article 15(2) TEU, which provides that he shall take part in the work of the European Council. This is an invaluable stipulation, granting him direct access to the Union's 'movers and shakers'. In reality, it allows him to attend meetings when foreign affairs items are on the agenda, creating a bridge between the ministerial level and that of the heads of state and government.

Article 27(2) TEU entrusts the HR with representing the Union for matters relating to CFSP, and also makes him responsible for conducting political dialogue with third parties on the Union's behalf. He is also to express the Union's views in international organisations and at international conferences. In order to carry out these representative tasks effectively, he needs to attune his position with that of the President of the European Council.[18]

The High Representative also functions as a *trait d'union* with the Parliament, which he has to consult on the main aspects and the basic choices of the CFSP and CSDP. He is bound to keep the Parliament abreast of how these policies evolve and

cluster', who are to act as his deputies. The foreign minister of the Member State holding the rotating Presidency may also step in, should the need arise.

[17]To make this easier, the office physically moved from a separate edifice back to the Berlaymont building. When exercising his responsibilities here, the HR is bound by Commission procedures, albeit, as Article 18(4) TEU stipulates, only to the extent that this is consistent with Article 18 (2) and (3) TEU.

[18]Cf. Article 15(6) TEU.

needs to ensure that its views are duly taken into consideration.[19] The HR has issued a Declaration on Political Accountability in which practicalities are set out.[20]

In light of the foregoing, one might be tempted to conclude that the High Representative functions as the Union's 'foreign minister' in all but the name. However, it should be realised that the HR does not enjoy an absolute pole position. For starters, as mentioned above, when externally representing the Union on CFSP issues, he has to operate in close collaboration with the President of the European Council, who may at times outflank him. Additionally, the HR remains under the overall control of the European Council, an institution that he may try to influence, but of which he is not an official member. Moreover, the success of his actions and initiatives depends largely on the goodwill and smooth cooperation of the (members of the) Foreign Affairs Council, which may prefer to keep him on a tight leash and thwart or stall his proposals. Therefore, while compared to the past the stature of the office has been greatly enhanced, it is still potentially misleading to equate it with that of a 'true' foreign minister.

The complex and multidimensional function of High Representative evidently requires a highly skilled and flexible office holder. After all, he faces the daunting task of having to coordinate the external aspects of the work of the Commission, of safeguarding and promoting the Commission's interests at the meetings of the Council and the European Council, while simultaneously being expected to uphold the decisions of the European Council and the Council, take part in the work of the former, and preside over most of the meetings of the latter. Unsurprisingly then, the versatility and stamina of the HR is a determinant of his effectiveness. The demands become even more weighty when one considers that the function also entails directing the CSDP (which includes heading the European Defence Agency).[21] To facilitate his plight, a European External Action Service has been placed at his disposal.[22] At the same time though, supervising the EEAS consumes further energy.

To conclude, the wide remit of the HR's powers does not fail to impress, but the limits of the office are fuzzy and need to take shape in everyday practice. Some perceive the HR as being superbly well placed to forge pragmatic alliances in the choice between, or the combination of, CFSP and TFEU competences.[23] For that, he needs to obtain the unreserved confidence of Member State and Union colleagues who are comfortably able to outmanoeuvre him. In light of the Herculean nature of the task, a reconsideration of the office's institutional position or a

[19] Article 36 TEU.

[20] Adoption of a Council Decision establishing the organisation and functioning of the European External Action Service, OJ [2010] C 210/1. It stipulates inter alia that, if the HR is unable to appear before the Parliament, depending on the issue to be discussed, a Commissioner or a representative from the Council Presidency (or the trio) will act as his deputy.

[21] See Article 42(4) TFEU. The CSDP is explored in Chap. 3.

[22] Discussed infra, Sect. 2.4.10.

[23] Dashwood (2013), p. 15.

divestment of responsibilities at one point cannot be ruled out. The appraisals of how the successive HRs have been faring so far are relatively critical, and grist to this mill.[24]

2.4.2 The European Council

With the entry into force of the Lisbon Treaty, the European Council became one of the official institutions of the EU.[25] It is composed of its President, the national heads of state or government, and the President of the Commission.[26] As remarked above, the High Representative also takes part in its work.

The European Council is convened (at least) twice every 6 months. It does not exercise a legislative function, but provides the EU with the general impetus for its development, defines the general political directions and the priorities thereof. In principle, it takes all its decisions by consensus.[27]

In the CFSP, further details on the role of the European Council can be found in Article 26 TEU, which states that it shall identify the strategic interests of the Union, determine the objectives of the CFSP, define general guidelines and adopt the necessary decisions. Article 31 TEU outlines the procedure for the adoption of such decisions. However, most formal decisions in the CFSP are adopted by the Council, not the European Council. Still, this does not diminish the paramount position of the latter, evident from the fact that it sets the overall agenda, takes the most important political decisions and lays down the CFSP's long-term goals. In accordance with Article 42(2) TEU, it is also the only institution that may decide on the establishment of a common defence.

2.4.3 The President of the European Council

Contrary to the past practice, whereby the rotating Presidency of the Council also entailed that the Presidency of the European Council would change every 6 months, the Lisbon Treaty led to the creation of a more permanent regime. Since then, the new-style President is chosen by the European Council for a term of office lasting two and a half years, renewable once. While in office, the selected person is barred from holding any national political function.[28]

[24] See e.g. Helwig (2015).

[25] See Article 13(1) TEU.

[26] In the past, the European Council also included the foreign ministers of the Member States and a member of the Commission. Article 15(3) TEU now provides that, when the agenda so requires, the members of the European Council may decide to be assisted by a minister, and the President of the Commission by a member of the Commission.

[27] See Article 15 TEU.

[28] See Article 15(5) and (6) TEU.

The paramount position of the European Council, described in the preceding section, entails that its President also plays a crucial role: where the European Council is intended to plot the Union's overall course and propel it into the future, the President sits comfortably at the helm of that institution. Thus, the further development of the CFSP rests partly on his shoulders as well. Together with the President of the Commission, he prepares the European Council's agenda and is bound to drive forward its work—something that enables him to influence and steer the decision-making process.[29]

As he does not enjoy any competence to issue binding instructions, the official power he wields here seems rather limited, and mostly informal. He does exercise a large measure of control in the preparation of the European Council Conclusions, however, with his *chef de cabinet* holding the reins at COREPER level, steering the discussion on draft versions. His informal clout should not be underestimated either.[30]

The European Council President serves overall to ensure continuity, cohesion and consensus in the EU. As remarked earlier, these three elements are of particular importance for the successful management of EU external relations. For the Union to speak with one voice, and to be seen as speaking with one voice, consistency remains crucial. For that reason, in matters pertaining to the CFSP, the President needs to work in close tandem with the High Representative. As regards representing the Union to the outside world, the TEU has entrusted them with a joint responsibility.[31] In turn, together with the Commission President, they have established a troika that meets with key interlocutors at the highest political level (e.g., at recurring summits such as ASEM).

2.4.4 The Council of Ministers

The important role of the High Representative, the European Council and the European Council President notwithstanding, the bulk of decision-making in the CFSP takes place in the Council of Ministers. As known, in practice this institution has no single, static form, but meets in various different configurations. In the CFSP, the standard manifestation is that of the Foreign Affairs Council. However, as the relevant articles in the TEU only make mention of 'the Council' as the competent institution to take decisions in the CFSP, such decisions may equally be adopted in other configurations (e.g., by the Agriculture and Fisheries, Competitiveness, or Justice and Home Affairs Council). However, CFSP decisions are

[29]See Article 15(6) (a) and (b) TEU.

[30]See e.g. de Waele and Broeksteeg (2012).

[31]See Article 15(6) TEU.

ordinarily decided upon by the Foreign Affairs Council, during sessions chaired by the High Representative.[32]

At the same time, the General Affairs Council (chaired by a representative of one of the Member State) is partly responsible for the preparation of, and follow-up to, European Council meetings.[33] In this manner, the country holding the rotating Presidency of the EU can still play a small part in the CFSP, and seek to push forward its own priorities.

As the Treaty puts it, the task of the Council is to frame the CFSP and take the decisions necessary for defining and implementing it, on the basis of the general guidelines and the strategic lines defined by the European Council.[34] The Council must also, together with the HR, ensure the unity, consistency and effectiveness of EU action.[35] Additionally, it appoints 'Special Representatives', mandated with a particular policy issue, on the proposal of the HR.[36] Finally, it also calls the shots as regards the establishment of so-called permanent structured cooperation.[37]

Overall then, for all the impetus provided by the European Council, and notwithstanding the crucial guiding role of the HR, it is for the Council as the main decision-making body to keep the CFSP up and running, to establish the concrete rules and, set up specific projects and missions where necessary.

2.4.5 The Member States

Although the Member States can express their positions and preferences through their representatives in both the European Council and the Council, they also have an autonomous part to play in their 'bare' capacity as Member States.

To start with, in the same vein as the High Representative, the Member States may submit initiatives and proposals to the Council and refer question to it.[38] In this

[32]Notwithstanding the seminal influence of the Committee of Permanent Representatives (COREPER), which pre-cooks every meeting and attempts to reach agreements on most dossiers in advance. In the CFSP, there are numerous other preparatory bodies that actively supply input; an overview can be found in Annex II to Council Decision 2009/908/EU laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council, OJ [2009] L 322/28.

[33]See Article 3(1) of European Council Decision 2009/882/EU adopting its Rules of Procedure, OJ [2009] L 325/51.

[34]The decisions are generally taken on the basis of Article 28(1) and 29 TEU, and the Council may act entirely of its own motion, without any prior proposal to act. Decisions regarding the CSDP are however adopted on the initiative of the High Representative or a Member State: see Article 42 (4) TEU.

[35]See Article 26(2) TEU.

[36]See Article 33 TEU, as well as Sect. 2.4.15 infra.

[37]See Article 42(6) and 46 TEU. The concept is explored further in Chap. 3.

[38]See Article 30(1) TEU. As the second section stipulates, they may also request the HR to convene an extraordinary Council meeting if they believe that a topical event requires a quick response.

respect, the Member States (and the HR) may be considered to hold the position in the CFSP that the Commission occupies in most other domains of EU law.[39]

Next, Article 32 TEU stresses the loyalty and solidarity Member States should exhibit towards the Union, as well as their Treaty partners. They are bound *expressis verbis* to consult with one another on any CFSP matter in order to determine a common approach. Without having done so, they may not undertake any action on the international scene or enter into any commitment which could affect EU interests.[40]

Article 34 TEU contains similar requirements, stipulating that the Member States should coordinate their actions in international organisations and at international conferences and uphold the Union's positions in such forums. This includes deliberations within the framework of the United Nations: Article 34(2) specifies that those Member States holding a seat on the UN Security Council should follow concerted practices, defend the positions and the interests of the EU, and keep the other Member States and the HR fully informed. They are even bound to request that the High Representative is invited to present the Union's position with regard to a subject on the UNSC's agenda, in case the EU has already defined a particular common position on the topic.[41]

Finally, the Member States are also required to make available to the Union those civilian and military capabilities necessary to implement the Common Security and Defence Policy. The Council may then empower the countries that are willing and able to partake to engage in actual (civilian or military) field missions. Those Member States whose military capabilities fulfil higher criteria and are willing to take up more binding commitments with regard to the most demanding missions may even go on to establish an avant-garde, in the form of 'permanent structured cooperation'.[42] A decision to this effect was taken in 2017.

2.4.6 The European Parliament

Whereas the competences of the Parliament have been increased considerably over the past decades, the CFSP is one of the few domains where it remains on the margins of the decision-making process. There exists no official political nexus between this institution, the Council and the European Council. Thus, the latter cannot be held to parliamentary account or subjected to genuine democratic scrutiny for the handling of any CFSP issue. This naturally renders the legitimacy of the

[39]Cf. Article 289(4) TFEU.

[40]In accordance with Article 32(4) TEU, such obligations extend to the diplomatic missions of the Member States and the Union delegations in third countries and at international organisations.

[41]The UN does not have to respond favourably, since the EU as such continues to hold only an observer status in that organisation (alongside entities such as the Vatican, the Arab League, and the International Federation of the Red Cross and the Red Crescent).

[42]See respectively Article 42(3), 44 and 42(6) TEU.

Policy rather questionable, albeit that the individual members of the Council and European Council may still be seized, questioned or instructed in their respective national parliaments.

Article 36 TEU guarantees that the Parliament shall be regularly consulted and informed by the High Representative on the main aspects and basic choices of the CFSP and CSDP.[43] Twice a year, the Parliament will hold a debate on the CFSP and CSDP. Its views are, however, fairly non-committal; the HR only has to ensure that these are 'duly taken into consideration'. The second prerogative of the Parliament laid down in Article 36 does not amount to very much either: the institution is entitled to put questions or make recommendations to the Council or the HR. This again lacks real sting, as it will depend entirely on the voluntary cooperation of the Council and the HR whether the questions are answered and the recommendations given a follow-up.[44] However, as will be detailed below, the Parliament did establish some stronger powers of control over the EEAS.[45]

One aspect in which the Parliament definitely exercises a substantial competence concerns the budgetary sphere. All administrative expenditure involved with the CFSP is charged to the general EU budget, and the same goes for most operating expenditure.[46] The Parliament cannot be bypassed here: it needs to approve the budget in advance and grant discharge for all payments afterwards; any of its demands for alterations have to be met in order for the overall scheme to be approved.[47]

A last aspect, highlighted before, concerns the position of Parliament in the conclusion of international agreements. The duty to keep it informed during all stages, incumbent upon the other actors in that process, cannot be taken lightly—and as the Court underscored, this duty applies just as well when those agreements pertain to the CFSP.[48] Alas, Article 218 TFEU does not confer it a veto right or prerogative to be consulted on the final text of such treaties.

2.4.7 The European Commission

The role of the Commission in the CFSP is ostensibly a marginal one. Article 17 (1) TEU explicitly relieves it from its task of externally representing the EU in this

[43] As remarked in Sect. 2.4.1, the HR has set out some further modalities in a (non-binding) Declaration on Political Accountability. Of course, in her capacity as member and vice-president of the Commission, she can be subjected to parliamentary scrutiny in the same way as her colleagues.

[44] The same goes for any questions concerning CFSP issues put to the European Council President. The latter is merely bound to present a report after each of the meetings of the European Council: the Treaties do not even oblige him to appear personally before the Parliament.

[45] See Sect. 2.4.10.

[46] See Article 41(1) and (2) TEU.

[47] See Article 310-314 TFEU.

[48] Case C-658/11, *Parliament* v *Council* (Mauritius agreement).

domain. Article 21(3) TEU makes only a petty reference to the place of the Commission in the CFSP, stating that it is to ensure consistency between the different areas of its external action and between these and other EU policies, together with the Council and the High Representative. In a way then, the HR acts on its behalf in his capacity of vice-president of the Commission, aligning the (potentially) divergent interests in the various portfolios. In addition, as Article 30 TEU stipulates, it may support the questions, initiatives or proposals submitted by the HR to the Council. For the rest, the Commission as such has no formal role to play.

Box 2.2 The Commission's Informal Role in the CFSP: An Influential Actor in the Shadows

As legal sociologists never grow tired of reminding us, the law in the books nearly always fails to tell the whole story. In the same vein, the Commission's contribution to the shaping of the CFSP proves to be somewhat greater in reality than one would assume on the basis of the Treaty texts. In the shadowy world that lies outside the remit of its formal competences, it is increasingly involved in decision-making and has proven influential in one way or the other. One notable example offers the development of the EU Maritime Security Strategy (2014), a document originally of limited ambition, which the Commission managed to broaden to a cross-sectoral approach, touching upon multiple areas and reaching far beyond the CFSP.

That the TEU provisions largely 'lock out' the Commission is perfectly understandable in light of the intergovernmental nature of the domain, even when that image deserves to be nuanced on the basis of its informal activities.[49] Apart from the institution as such, we should anyhow not overlook the position of its President, who still has an official role in the development of the CFSP in his capacity of member of the European Council.

2.4.8 The Court of Justice

As remarked above, contrary to all other domains of EU activity, in the 'outer layer' of the Union the jurisdiction of the Court of Justice has been severely curtailed. Article 275(1) TFEU makes clear that the Court is generally excluded from interpreting CFSP rules and decisions or ruling on their validity. The decisions taken in this domain are therefore mainly susceptible for political review; suggestions for establishing a full judicial control over these measures have been

[49] See e.g. Smith (2004) and Riddervold (2015).

rejected. All the same, tangential remedies are available in certain circumstances, discussed in greater detail before.[50]

2.4.9 Political and Security Committee

In the CFSP, a Political and Security Committee (PSC) functions alongside the COREPER.[51] It is mainly composed of high-ranking civil servants from the foreign ministries of the Member States, and chaired by a representative seconded by the HR.[52]

Article 38 TEU entrusts the PSC with a threefold task: first, to monitor the international situation and the implementation of agreed policies under the CFSP; second, to contribute to the definition of policies by delivering opinions to the Council; third and most important, to exercise the political control and strategic direction of crisis management operations, under the responsibility of the Council and the High Representative.

The PSC is advised by a Committee for Civilian Aspects of Crisis Management (CIVCOM), which provides information, drafts recommendations, and gives its opinion to the PSC on civilian aspects of crisis management. Preparatory work is carried out by the Politico-Military Group (PMG), also chaired by a representative of the HR, which contributes to the development of (horizontal) policy, facilitates exchanges of information, and has a particular responsibility regarding partnerships with third states and other organisations (including EU–NATO relations).

Even if not endowed with firm legal competences, the PSC is to be reckoned with as a highly influential body.[53] It conducts the political supervision of a set of agencies, including the EU Satellite Centre and the EU Institute for Security Studies. It gives national foreign ministries an important means to control the execution of CFSP acts in an indirect manner. Also, it offers these ministries a direct forum for channelling their distinctive preferences, outside and in addition to the official meetings of the Council of Ministers and the COREPER.

2.4.10 The European External Action Service

Alongside the introduction of the High Representative's office, one other milestone in the recent history of the CFSP has been the creation of the European External Action Service (EEAS), as mandated by Article 27(3) TEU. The EEAS is neither an office nor an agency, but a functionally autonomous body of the EU that functions

[50] See Chap. 1, Sect. 1.6.

[51] Often abbreviated as COPS, after its French name, *Comité politique et de securité*.

[52] In tune with Article 2 of Decision 2009/881/EU on the exercise of the Presidency of the Council, OJ [2009] L 315/50.

[53] As illustrated in Juncos and Reynolds (2007).

under the aegis of the High Representative. It supports the HR in his capacity as President of the Foreign Affairs Council, as well as in his capacity of vice-president of the Commission responsible for coordinating its external action. The functionality of the Service thus stretches beyond the CFSP.

After some hefty skirmishes and several rounds of intense political debate, in mid-2010, the details of its organisation and functioning were finally agreed upon and laid down in a Council decision.[54] It was ultimately decided that the EEAS would principally serve the High Representative, but that it would also be available to support the external work of the President of the European Council, the Commission and the President of the Commission. To curry the favour of the Parliament, the HR consented to assume political responsibility for the Service's dealings. Moreover, the Parliament was awarded the right to interview proposed senior EEAS staff members, and entitled to say 'yes' or 'no' to its annual budget.[55]

With the creation of the EEAS, a *corps diplomatique* has been put at the disposal of the EU, providing it with the allure of a real 'foreign office' at long last. Previously, both the Commission and the Council had their own international delegations in the world (for example, those that functioned as special liaisons with the UN in New York and the WTO in Geneva). In addition, the Member States never relinquished their own privilege under international law to establish and maintain embassies and consulates in other countries. The EEAS is meant to operate in close cooperation with the diplomatic services of the Member States, without replacing them.[56] Since the entry into force of the Lisbon Treaty, the EU sends out unitary delegations to represent the Union across the world, in third countries as well as at international organisations. These delegations are seconded by the EEAS and consist of its staff members.[57]

The Service was created on the basis of relevant departments and functions of the Commission and the General Secretariat of the Council, which have been extracted and integrally transferred.[58] As a result, it consists predominantly of officials from those two institutions. At the same time, the diplomatic services of

[54]Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service, OJ [2010] L 201/30. After the staff regulation, the financial regulation, the budget and the members of the senior management team were approved by the Parliament, the Service became officially operational on 1 December 2010.

[55]The Service received its own section in the EU's general budget.

[56]As Article 5(9) of the Council Decision ordains, EU delegations are to work in close cooperation and share information with the diplomatic services of the Member States. Interestingly, the original proposal for setting up the EEAS added that they would provide all relevant information 'on a reciprocal basis'.

[57]For a colourful portrayal of their work, see Novotná (2014).

[58]E.g. EU Military Staff, the Civilian Planning and Conduct Capability, the Commission DG for External Relations (RELEX). The annex to the Council Decision provides a full list.

the Member States have delegated civil servants to form part of the EEAS, to the amount of roughly one-third of its total personnel.[59]

The highest-ranking official at the Service is a secretary-general. Contrary to original proposals, he is not all-powerful, but operates within a wider 'management team' which includes two deputy secretaries-general.[60] On the insistence of the Parliament, which saw a pyramidal structure as undesirable, his leadership role has been confined to administrative aspects.

The EEAS' central administration is organised in Directorates-General. These DGs comprise a battery of geographic, multilateral and thematic desks. There are also DGs for administrative, staffing, budgetary, security and ICT matters, as well as a crisis management and planning directorate. Moreover, the EEAS comprises the Civil Planning and Conduct Capability, the European Union Military Staff and the European Union Situation Centre. Because of their prominence and much older pedigree, the latter are discussed in more detail below. The Service's central administration includes a strategic policy planning department, a legal department, departments for inter-institutional relations, information and public diplomacy, internal audit and inspections, and personal data protection.[61]

The functioning of the EEAS was subjected to an incisive review a few years after its launch. This culminated in a scathing report, pointing inter alia to problems with internal (financial) management, lack of organisational coherence, and issues of demarcation/overlap with other Brussels-based organs and structures.[62] A number of suggestions for improvement were listed, some of which have in whole or in part been acted upon. None of the flaws exposed however related to (potential) shortcomings in the legal arrangements governing its operation—inviting pragmatic solutions and adjustments to its *modus operandi* instead.

2.4.11 EU Military Committee and EU Military Staff

In the Treaty texts, one finds no mention of either of these two entities. They are however essential to ensure the successful operation and development of the CFSP in general, and the CSDP in particular.

The EU Military Committee (EUMC) is the highest military body set up within the Council.[63] It is composed of the Chiefs of Defence of the Member States (with the latter's permanent Military Representatives regularly acting as their deputies).

[59]Since mid-2013, officials and civil servants from all EU institutions may apply for vacant posts in the EEAS. At full capacity, EU officials are to represent at last 60% of the staff at administrator level; at least one-third of all the staff ought to come from national diplomatic services.

[60]And a director-general for budget and administration.

[61]Elaborate reflections on the creation, merits and first achievements of the EEAS provide Vanhoonacker and Reslow (2010); Blockmans and Hillion (2013); Gatti (2014).

[62]Available at eeas.europa.eu/top_stories/2013/29072013_eeas_review_en.htm.

[63]Pursuant to Council Decision 2001/79 setting up the Military Committee of the European Union, [2001] OJ L 27/4.

The EUMC directs all EU military activities and provides the PSC with advice and recommendations on military matters. It has a permanent chairman, selected by the Chiefs of Defence of the Member States and appointed by the Council.

EU Military Staff (EUMS) was previously a department within the General Secretariat of the Council, and now forms part of the EEAS.[64] It is the Union's only permanent integrated military structure, providing in-house expertise for the High Representative. The EUMS works under the direction of the EUMC, receives regular input from it and offers support on all the military aspects of strategic planning. The EUMS is also expected to plan, assess, and come up with periodic recommendations as regards the overall military strategy.

2.4.12 Civilian/Military Planning and Conduct Capabilities

Contrary to what the name would have you believe, neither the Civilian Planning and Conduct Capability (CPCC) nor the Military Planning and Conduct Capability (MPCC) is an abstract concept that merely denotes a certain potential. The CPCC is a permanent structure of long standing, responsible for the preparation and implementation of civilian CSDP operations. The MPCC is a relatively new addition, responsible at the strategic level for the operational planning and conduct of non-executive military missions.[65]

The CPCC previously formed part of the Council Secretariat but nowadays functions with the overarching structure of the EEAS. The MPCC has been placed within the EUMS, which nowadays also forms part of the EEAS. Together, the CPCC and MPCC make up a Joint Support Coordination Cell. They are linked to the Crisis Management and Planning Directorate (CMPD), which contributes to the objectives of the EEAS in the planning of CSDP civilian missions and military operations. The CPCC and the MPCC are subordinated to the political control and strategic direction of the PSC and the overall authority of the High Representative.

2.4.13 EU Intelligence and Situation Centre, EU Satellite Centre, EU Institute for Security Studies, EU Security and Defence College

The EU Intelligence and Situation Centre (INTCEN) is the Union's most sensitive security organ. Its task is to provide intelligence analysis, early warning and situational awareness to the HR, the EEAS, the Member States and the various

[64]Council Decision 2001/80/CFSP on the establishment of the Military Staff of the European Union, OJ [2001] L 27/1, as amended by Council Decision 2005/395/CFSP, OJ [2005] L 132/1.

[65]Before the advent of the MPCC, the latter relied on Mission Commanders deployed in theatre. This created difficulties both in the planning and conduct, leaving some missions in need of more proactive HQ support. At the operational level, each mission will now be led by a Mission Force Commander, acting under the supervision of the MPCC's Director.

EU decision-making bodies. Apart from collating information and compiling its own dossiers, it receives crucial data input from national secret services. At the heart of its work is a classified-information-sharing cell, composed of intelligence officers seconded from the Member States. It operates as a round-the-clock operational contact point, monitoring and assessing international events, offering immediate facilities to support a crisis task force. Like the CPCC and CMPD, INTCEN nowadays forms part of the EEAS.

The EU Satellite Centre (EUSC) constitutes one of the Union's official agencies.[66] In sync with its name, it aims to facilitate the Council's decision-making by providing analyses of satellite imagery and collateral data. It equally supports the EEAS, Member States, the Commission, and even third countries and other international organisations. The EUSC functions under the supervision of the PSC and the operational direction of the HR.

The EU Institute for Security Studies (EUISS) is an agency as well.[67] Its official objectives are to explore a common security culture for the EU, to help develop and project the CFSP, and to enrich Europe's strategic debate. The HR serves as president of the board of the EUISS. The EUISS functions essentially as a think tank, researching all relevant security issues and providing a forum for debate. In its capacity as an EU agency, it also offers analyses and forecasts to the Council.

In somewhat similar fashion, the European Security and Defence College (ESDC), established in 2005, aims to provide strategic-level education and develop the necessary training and education tools for the CSDP. The ESDC is a virtual network college, operating on the basis of input from universities and academic institutions (both civilian and military). Participants in the courses offered by the College are mainly diplomats, civil servants, police officers, and military personnel from the Union's institutions and Member States. The latter partake and contribute to the ESDC on an entirely voluntary basis.

2.4.14 The European Defence Agency

Originally, the establishment of a European Defence Agency (EDA) was foreseen in the ill-fated Constitutional Treaty, signed in 2004 and derailed soon thereafter.

[66]Established by Council Joint Action 2001/555/CFSP on the establishment of a European Union Satellite Centre, OJ [2001] L 200/1, subsequently replaced by Council Decision 2014/401/CFSP, OJ [2014] L 188/73.

[67]Established by Council Joint Action 2001/554/CFSP on the establishment of a European Union Institute for Security Studies [2001] OJ L 200/1, as amended by Council Joint Action 2006/1002/CFSP, OJ [2006] L 409/181.

For practical reasons, it was however already launched that same year.[68] With the entry into force of the Lisbon Treaty in December 2009, the EDA finally received a legal basis in EU primary law.

The EDA is active in the field of defence capabilities development, research, acquisition and armaments. Article 42(3) TEU provides that the Agency has as its main task to identify operational requirements, to promote measures to satisfy those requirements, and to contribute to identifying and implementing any measure needed to strengthen the industrial and technological base of the European defence sector. Moreover, it participates in defining a European capabilities and armaments policy, and assists the Council in evaluating the improvement of existing military capabilities. Article 45 TEU elaborates on all these objectives in further detail.[69]

The EDA is open to all Member States that wish to take part in its activities. It is funded by its members in proportion to their GNP.[70] Specific groups within the Agency aim to bring together countries engaged in joint projects (a successful example being the development of the European Fighter Aircraft, which was commissioned by the United Kingdom, Germany, Italy and Spain).

The EDA is governed by a steering board meeting at the level of defence ministers, with the HR acting as its head. The latter appoints a chief executive for the day-to-day management. The Agency liaises with the Commission, e.g., in the undertaking and financing of research.

2.4.15 EU Special Representatives

As Article 33 TEU makes clear, the Council may entrust Special Representatives with a mandate in relation to particular policy issues. These Special Representatives of the European Union (EUSRs) carry out their mandate under the authority of the High Representative. They are affiliated with the EEAS, without being officially enlisted by that Service.

Special Representatives have been compared to 'travelling salesmen'. They are tasked to promote the Union's policies and interests in selected, often troublesome parts of the world, and play an active role in efforts to consolidate peace, stability and the rule of law.

[68] Council Joint Action 2004/551/CFSP on the establishment of the European Defence Agency, OJ [2004] L 245/17. In July 2011, the Council adopted Decision 2011/411/CFSP, OJ [2011] L 183/16, to replace the earlier Joint Action. It was in turn repealed and recast by Council Decision 2015/1835 defining the statute, seat and operational rules of the European Defence Agency, OJ [2015] L 266/55.

[69] See further Chap. 3, Sect. 3.5.1.

[70] This budget covers the Agency's operating costs; individual projects are funded separately.

Box 2.3 The World of EU Special Representatives
Over time, the number of EUSRs in office did not remain fixed, and has since the first appointments varied from less than 10 to well over a dozen. Their mandates are mainly of a geographic nature. In the past, they have been assigned to, inter alia, Afghanistan, Bosnia and Herzegovina, the Horn of Africa, Central Asia, the former Yugoslav Republic of Macedonia, Georgia, Kosovo, the Middle East, Moldova, the South Caucasus and Sudan. Since 2012, one SR has been entrusted with the 'horizontal' portfolio of human rights. Some EUSRs are resident in the country or region assigned, while others work on a travelling basis from Brussels.

EUSRs provide the EU with an active political presence in key countries and regions, acting as a local 'voice' and 'face' for the Union and its policies. Simultaneously, they may be instructed by the HR to brief the European Parliament on their activities and developments in the assigned areas.[71]

2.5 Decision-Making

Overall, the Treaties are silent on the modalities of decision-making within the various actors in the CFSP. This basically allows them to establish and pursue their own (internal) rules, though for many of them, these have been predetermined in secondary law instruments. Nonetheless, for the official institutions, the general rules are firmly spelled out by a plethora of primary law provisions, which apply by analogy in the CFSP. Thus, for example, in line with Article 250 TFEU, the Commission decides by a majority of its members.

As remarked, the bulk of official decision-making in the CFSP takes place in the Council of Ministers. The details of the decision-making by the Council (and, on occasion, the European Council) are outlined in Article 31 TEU. Unanimity is the main rule, unless the Treaties provide otherwise. This effectively amounts to a power of veto for all members. However, a qualified abstention mechanism has been put in place, whereby a Council member may make a formal declaration accepting that the proposed decision commits the Union, without being obliged to apply this measure itself. This enables all other members to go ahead with the adoption of the instrument. It is nevertheless impossible to proceed in case more than one-third of the Council members, representing at least one-third of the Member States, qualifies their abstention in this way.[72]

[71] See Article 36 TEU.

[72] See Article 31(1) TEU, second sentence.

Since the Treaty of Amsterdam, the main rule of unanimity has gradually given way to a number of possibilities for majority voting.[73] There are currently six such possibilities. Article 31(2) TEU enables the Council to act by QMV in four cases: firstly, when adopting a decision defining an EU action or position on the basis of a decision of the European Council that relates to the EU's strategic interests and objectives; secondly, when adopting a decision defining an EU action or position on a proposal from the High Representative[74]; thirdly, when adopting any decision implementing a decision defining an EU action or position; fourthly, when appointing EU Special Representatives. In addition, as Article 31(5) provides, the Council may act by a simple majority when deciding on procedural issues. Lastly, Article 41(3) contains a special regime for the financing of certain CFSP initiatives.

The number of possibilities for majority voting may be widened in the future, as Article 31(3) TEU enables the European Council to adopt (by unanimity) a decision extending QMV to other cases. All QMV possibilities are, however, subjected to two crucial limitations: if proposed CFSP decisions have military or defence implications, they should always be taken unanimously.[75] Also, in case any Council member for vital and stated reasons of national policy objects to the use of QMV, a vote cannot be taken. The High Representative may then attempt to iron out the differences, but the matter may have to be referred to the European Council for a decision by unanimity.[76] This is usually referred to as the 'emergency brake' mechanism.[77]

In all, there is nowadays considerable room for adopting measures by majority in the Council of Ministers, the central decision-making body in the CFSP. Yet, at the same time, the exceptions to the main rule of unanimity remain strictly confined. Consequently, Member States will rarely be pressed to subscribe to an act that flatly contradicts their particular interests. Moreover, it is good to realise that up until now, all the leading CFSP decisions have been taken unanimously, and the constructive abstention mechanism has failed to become popular.[78] While the possibilities for QMV may certainly boost efficiency, at the end of the day, their significance will remain limited so long as a preference for an absolute consensus holds sway.

[73]The Maastricht Treaty only contained an underexplored exception in Article J.8(2), for procedural issues and the implementation of Joint Actions and Common Strategies.

[74]This might seem to constitute a staggeringly broad possibility for QMV, but here, the proposal should always follow a specific request by the European Council (where unanimity is still required). In other words, any Member State can still throw up an effective blockade if it wants to.

[75]Article 31(4) TEU.

[76]Article 31(2) TEU.

[77]Forming a remote echo of the 'Luxembourg Compromise', the 'agreement to disagree' reached in the 1960s in order to overcome the 'empty chair crisis'.

[78]See Blockmans (2014), p. 5.

2.6 Legal Instruments

As set down in Article 288 TFEU, for furthering law and policy, the Union has three main legal instruments at its disposal, namely Regulations, Directives and Decisions. The CFSP, in this respect, once again displays its wholly different make-up: as remarked earlier, in this special domain of EU law, no legislative acts can be adopted, and the only available instruments are Decisions.[79] For the sake of completeness, it should be noted that on a daily basis, the CFSP finds a prominent expression through a variety of soft law documents (e.g., resolutions, statements and memoranda) issued by the countless actors highlighted above.

Before the entry into force of the Lisbon Treaty, three different legal instruments could be distinguished in the CFSP, namely 'Common Positions', 'Common Strategies' and 'Joint Actions'.[80] This plurality has of late been greatly reduced. However, when piercing through the veil of uniformity, one quickly discovers that the old status quo has not been completely abandoned. As Article 25 TEU specifies, the decisions to be adopted can be either those defining actions to be undertaken by the EU, those defining positions to be taken by the EU, or arrangements for the implementation of either of these decisions.[81] In Article 26(1) TEU, the European Council is instructed to 'take the necessary decisions identifying the Union's strategic interests', which amounts to a decision of the type that was previously known as a Common Strategy.[82] In Article 28 TEU, the Council is instructed 'to adopt the necessary decisions where the international situation requires operational action by the EU; such actions should shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation', which corresponds materially with what was previously known as a Joint Action—in many respects the key vehicle of the CFSP and CSDP when it came to launching concrete projects and field missions.[83] Finally, in Article 29 TEU, the Council is instructed 'to adopt decisions that define the approach of the EU to a particular matter of a geographical or thematic nature'.

[79] At the same time, one should keep in mind that, within the scope of the CFSP, international agreements can be concluded with third countries or international organisations. For this, Article 37 TEU supplies the necessary legal basis, with Article 218 TFEU setting down the procedural arrangement (discussed in Chap. 1, Sect. 1.5).

[80] There also existed the instrument of 'sui generis decisions', adopted on the rather dubious legal basis of the former Article 23 TEU. These seemed to be steadily gaining in popularity, and were adopted in ever greater numbers in the 1993–2009 period.

[81] Article 25(1) TEU also states that the Union shall conduct the CFSP by defining general guidelines and by strengthening systematic cooperation between Member States, but neither amounts to a legal instrument as such.

[82] These had more or less fallen into desuetude: only three were ever adopted, namely on Russia, the Ukraine and the Mediterranean region.

[83] Joint Actions involved financial transfers and expenditure, sending missions (from election observers to military personnel), and were also used for setting up centres and agencies. Joint actions were adopted for operations in e.g. South Africa, Bosnia, Georgia, the Democratic Republic of Congo, Kosovo, Iraq and Afghanistan.

We here stumble upon an exact copy of the phrase that was previously employed for Common Positions.[84]

Thus, although decisions are officially the only available legal instruments in the CFSP, one may at present still discern different 'flavours' that bear at least a passing resemblance to their predecessors. Moreover, as Article 25 TEU makes clear, any decision may be further implemented by a subsequent decision—which is in fact identical to the past, when a Common Strategy, Common Position or Joint Action could also receive a follow-up, often in the form of 'sui generis decisions'.[85]

The continuity between the pre-2009 situation and the current setup should nevertheless not be overstated, since the legal nature of the act has become entirely homogenous (unequivocally, all of them are Decisions). Moreover, in its adoption practice, the Council increasingly deviates from the aforementioned, seemingly distinct provisions in the TEU—not shying away from unexpected choices or combinations. Consequently, there are ever more acts that cut across the erstwhile categorisation, and it is no longer always possible to qualify a measure as being of one particular type.

2.7 Conclusion

Although time-wise the CFSP has already reached adulthood, it is legally still evolving towards a full-grown status. Despite frequent stagnation and some terribly disappointing results (with the Iraq crisis of 2003 as a spectacular nadir, when no common ground could be found to oppose British-American warmongering), its intended purpose and added value remain clear as day. Reflecting on the longitudinal trend in the dynamics of the law here, one may well regard its character to be shifting more closely towards that of a single foreign policy, an inference corroborated by the progressive amendments to Title V TEU. Obviously, getting closer in no way means that the final destination has been reached.

The CFSP's central objectives were clarified by the Lisbon Treaty, trailed by several other improvements to its internal coherence. In the period since then, its interrelation with other domains of EU external relations law became markedly smoother. What is more, where unanimity was previously the default rule of decision-making, in little over a decade, we witnessed a sizeable increase over the years in the possibilities for adopting measures through QMV. For the moment

[84]Common Positions did not concern operational action but roughly amounted to binding political statements. Common positions were e.g. adopted on specific situations related to conflict prevention, anti-terrorism, human rights, the rule of law and good governance. Economic, financial and other sanctions against third countries, suspicious organisations and individuals were also imposed in this form.

[85]Cf. supra, footnote 80. Another parallel with the past concerns the imposition of restrictive measures: presently, pursuant to a sanctioning decision under Title V TEU, follow-up measures are to be established under the TFEU (see Article 215 TFEU). In earlier times, in such cases CFSP Common Positions led to the subsequent adoption of EC Regulations.

though, the CFSP retains its distinct intergovernmental spirit, and it remains sealed off—albeit not hermetically—from the Union's other fields of external competence. As a result, disputes will continue to arise with regard to the proper place for adopting a certain instrument. Whereas in theory, any international issue could be said to concern the EU's 'foreign policy', the attribution of powers principle and the *lex specialis* rule dictate that, in reality, not each and every action should be taken under Title V TEU. Actually, it would be decidedly unhelpful if the latter were the case, since no legislative measures may be adopted in this domain.

As the preceding sections have sketched out, the CFSP is teeming with a panoply of actors (institutions, bodies, agencies and others). It was flagged in passing how this state of play gives rise to frictions and triggers problems of overlap.[86] There remains as much cause for concern and discomfort with respect to democratic legitimacy, especially in light of the fact that the most important actors (the Council, the European Council and the HR) cannot be subjected to full parliamentary scrutiny. Again, we have not arrived at a satisfactory destination just yet.

Lastly, the polychrome array of CFSP legal instruments may be a cause for bemusement. Post-Lisbon, much has been achieved to increase their effectiveness, and the fuzzy distinctions of old have all but dissipated. Nevertheless, a question mark continues to hover above the CFSP's head, pertaining to the precise legal nature of this policy. For sure, it is a serious mistake to qualify it as a realm devoid of binding commitments, as political scientists are still too often inclined to do.[87] Yet, in the absence of courts, there are few guarantees that any of the actors actually comply with the rules that have been set down. This might go a long way towards explaining the TEU's frantic underlining of the obligations of loyalty, solidarity and faithful cooperation. Should Member States or institutions decide to violate a specified procedure, or ignore or contravene positions they had earlier committed themselves to, neither the ECJ nor the Commission can sanction their conduct. As a result, the CFSP that was deliberately kept intergovernmental, continues to be plagued by its non-supranational deficiencies. Its inherently political nature may even lead one to question whether Title V of the TEU actually amounts to 'law', in the absence of any functional means of sanctioning.[88] That question is, however, intimately connected to classic questions of legal theory on which we will not dwell further, as they fall outside the scope and purpose of this book.

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[86]Cf. the extended analysis in Chap. 10.

[87]Inter alia Cardwell (2015) and Wessel (2015) attempt to debunk this myth.

[88]Compare e.g. the 'command theory of law', advanced by the philosopher John L. Austin (1790–1859).

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The Common Security and Defence Policy 3

Contents

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] Nowadays, 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 or man-made disasters, 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

[1] Article 42(1) TEU currently declares the CSDP to be 'an integral part' of the CFSP.

H. de Waele, *Legal Dynamics of EU External Relations*,
DOI 10.1007/978-3-662-54817-2_3

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 aspect from the CFSP (namely, by 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 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. In the previous chapters, we have already hinted at the specific manifestations of CFSP players and the specific application of CFSP concepts in the CSDP context. The current chapter links in with the previous and aims to 'fill in the blanks'. It discusses in subsequent order the historical evolution of the CSDP (Sect. 3.2), its foundations and main principles (Sect. 3.3), the theory and practice of CSDP operations (Sect. 3.4), CSDP resources (Sect. 3.5), and the European Security Strategy and its progeny (Sect. 3.6).[2]

Right from the start, it should be mentioned that the application of the CSDP is slightly differentiated, most prominently in the form of the permanent opt-out that was obtained by Denmark.[3] Below, we will flag the flexibility that has been offered to some other Member States as well, for instance in the so-called mutual assistance clause.

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.[4] 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, and either caution or weariness resulted in the fact that no 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

[2]The leading legal monograph on the subject is Koutrakos (2013); a lucid political science perspective offers Smith (2017).

[3]See Protocol No. 22 on the position of Denmark, O.J. [2012] C 326/299.

[4]The Pleven Plan, the earlier (stillborn) initiative for constructing a unified defence architecture was discussed in Chap. 2, Sect. 2.2.1.

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. 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.[5]

Box 3.1 The Petersberg Declaration: A First Clarion Call
The foreign ministers of the WEU gathered in Petersberg with the intention of reviewing the significant changes that had taken place in the security situation in Europe in the years before. At the end of the summit, they declared their readiness to make available military units from the whole spectrum of their conventional armed forces for military tasks conducted under the authority of WEU, noting that participation in specific operations remained a sovereign national decision. They also signalled their intention to develop and exercise the appropriate capabilities to enable the deployment of those units by land, sea or air in order to accomplish these tasks.

For the first few years however, not much came of these lofty intentions. In the mid-1990s, the conflict 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. Embarrassingly, the savage conflict dragged on for years, and it was not before the US subjected them to severe economic, diplomatic and military 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, 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 writing.[6] 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 realigned itself with the political ambitions, and a novel Article 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

[5]The full text may be obtained from www.weu.int/documents/920619peten.pdf.

[6]Presidency Conclusions, Cologne European Council, 3–4 June 1999, Annex III, Presidency Report on Strengthening of the Common European Policy on Security and Defence.

Member States and underscored the desire not to undermine NATO and UN obligations. In addition, it proffered an explicit legal basis for undertaking the tasks that were specifically mentioned in the Petersberg Declaration: 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 section of what was then Article 17 TEU, the provision was singled out for review, so as 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.[7] 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 (Articles 42–46 TEU), where previously, as remarked, there was only one single provision.

Article 42(1) TEU reiterates that the CSDP has both a civilian and a military dimension. The same provision, as well as Article 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 boils down to 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 that goal would clash with NATO obligations—something the EU Member States have studiously sought to avoid.[8]

In CSDP decision-making, unanimity is the main rule.[9] This entails that all should agree (with the representative of the government of Denmark not taking part in the deliberations and conclusions, pursuant to the opt-out mentioned earlier). The

[7] Which in turn ushered in the disbandment of the WEU per 30 June 2011—see Statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty, Brussels, 31 March 2010.

[8] As the second sentence of Article 42(2) and Article 42(7) TEU make clear. On the interaction between EU and NATO commitments, see e.g. Larik (2013).

[9] See Article 42(4) TEU, which applies here as a *lex specialis* to Article 31 TEU. One should keep in mind that Article 31(4) already rules out QMV for decisions with military or defence implications.

sole exception to the unanimity requirement pertains to adopting arrangements for the financing of certain types of operations.[10]

The initiative for the adoption of any act or instrument will come from either the High Representative or a Member State.[11] 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.[12]

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 Article 46 TEU.[13] Importantly, compared to 'enhanced cooperation' in EU law in general, a more flexible framework can be designed here, inter alia because the scheme is not conditioned by a predetermined quorum of participants.[14] In 2017, the historic decision was taken to set up such an avant-garde.

Another striking move has been the inclusion of a 'mutual assistance clause', mirroring 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 Article 51 of the UN Charter, and should not prejudice the commitments of Member States under the NATO treaty. Three further limitations are immediately apparent. Firstly, the clause only applies to armed aggression (contrary to Article 51 of the UN Charter, which covers imminent threats of use of force). Secondly, 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).[15] Thirdly, if Member States pursue a special and distinct security and defence policy (e.g., Ireland, Finland and Sweden), Article 42(7) TEU suggests that they are not obliged to provide assistance.[16] It has been contended however that

[10] Article 41(3) TEU.

[11] Again see Article 42(4) TEU.

[12] Ibid.

[13] See 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.

[14] Cf. Article 326 *et seq* TFEU.

[15] Cf. Randelzhofer and Nolte (2012).

[16] Compare the wider 'solidarity clause' of Article 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; and in contrast to the intergovernmental approach in Article 42(7) TEU, a greater involvement of Union institutions is foreseen. See also Council Decision 2014/1415/EU on the arrangements for the implementation by the Union of the solidarity clause, OJ [2014] L 192/53, wherein Article 2(2) underlines that it is to have no defence implications.

they remain bound to aid and assist, and may then do so while continuing to wear their 'neutral hat'.[17] That ought to prove feasible indeed, considering that the clause does not dictate that the assistance should always be military in nature.

Box 3.2 The First Activation of Article 42(7) TEU
On 13 November 2015, a series of heinous terrorist acts was committed in Paris that sent shockwaves across Europe. This calamity led to the first ever activation of Article 42(7) TEU four days later at a meeting of the FAC, when France officially requested aid and assistance from the other EU Member States with recourse to this provision. In particular, it asked for support for the ongoing French operations in Iraq, Syria and other regions, which would allow a redeploying of troops where they were most needed. The desired pressure-relieving contributions were offered quickly thereafter, inter alia by Germany and the United Kingdom. Some considered it highly remarkable that France decided to invoke the TEU clause, breaking with the presumed 'NATO first' policy. Yet, the choice did echo the long-standing French preference for a European approach independent from the United States.

In Article 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 shall 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 Article 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 section 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, Article 42(1) TEU makes it possible to

[17] See Rühl (2014), p. 21, pointing to the fact that the distinctive EU countries that are not NATO members have also repeatedly participated in UN missions with military contingents or observers, cooperating with NATO partners, occasionally even appending their own military contingents.

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.[18] Additionally, all these tasks may contribute to the fight against terrorism, which includes supporting third countries in combating terrorism in their territories.[19] As not even this list appears to be exhaustive, there are few types of operations 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, consent of the parties to the conflict and use of force only for self-defence as the classic elements and preconditions.[20] Over time, the concept evolved, leading to 'second generation' peacekeeping, entailing a more active role for the peacekeeping forces,[21] and 'third generation' peacekeeping, also referred to as 'robust' peacekeeping.[22] 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.[23] 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 (none have been so far). At the same time, due to the fact that Article 43 enables the EU to send out peace*making* 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. Again though, no such missions have been launched so far. 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

[18]A common synonym for peacemaking is peacebuilding, although some scholars employ a deviant terminology: cf. Merlingen and Ostrauskaite (2009).

[19]The 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.

[20]Traditional manifestations were e.g. the establishment of buffer zones, interpositioning of forces, surveillance of conflict lines and monitoring of armistice agreements.

[21]More actively promoting and consolidating peace-processes, by e.g. drawing (interim) borders, disarming warring factions, seizing and destroying arms and equipment.

[22]Here, 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.

[23]See Graf von Kielmansegg (2007), p. 633.

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.[24] In such decisions, the objectives, scope and the general conditions for their implementation should be specified.[25] The management is entrusted to the PSC, with the Civilian or Military Planning and Conduct Capability delivering practical support and instructions, supervised by the Council and the High Representative.[26] The EU Military Committee and EU Military Staff furnish strategic guidelines where necessary. For civilian missions, CIVCOM plays an important preparatory and advisory role as well. On-the-spot tactical input can be provided through e.g. the EU Intelligence and Situation Centre or the EU Satellite Centre.

As regards the procedure for adopting the decisions through which CSDP missions are established, Article 43(2) applies as a *lex specialis* to Article 42 (4) TEU.[27] Significantly, where in general CSDP decisions are adopted on the initiative of the High Representative or a Member State, the Council is free to adopt decisions *proprio motu* where it concerns operational action involving the use of civilian and military means.

In accordance with Article 44 TEU, the Council may on an ad hoc basis entrust the implementation of a task to a select number of Member States, provided that the latter possess the necessary capability and are willing to take care of it. The management of the operation then devolves to this group, which is to liaise with the HR on how they go about it. The mission as such still falls within the scope of the CSDP, and will be carried out under the overall responsibility and control of the Council.

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 30 missions have been launched, ranging from Bosnia[28] to Indonesia[29] and from

[24]Cf. Article 28 TEU.

[25]Article 43(2) TEU.

[26]Cf. Article 38 TEU.

[27]Which in itself forms a *lex specialis* for the CSDP, vis-à-vis Article 31 as the *lex generalis* in the CFSP.

[28]EUPM, since 2003; EUFOR ALTHEA, since 2004.

[29]AMM Monitoring Mission, 2005–2006.

Congo[30] to Afghanistan.[31] The objectives have varied from advising on counterterrorism[32] or strengthening the rule of law[33] to assisting in the build-up of maritime resources[34] or protecting civilians and facilitating the delivery of humanitarian aid.[35]

All this makes for an impressive record indeed. Yet, one should keep in mind that the scale and size of missions have varied considerably. At one point, an EU operation consisted of only two dozen observers and advisors.[36] Moreover, as stated, the Union does not aim to duplicate the tasks of NATO or the UN, 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.[37]

Box 3.3 The Union's First Naval Operations

The EU has not even shied away from taking to sea in eye-catching fashion. December 2008 saw the launch of its first-ever naval operation (code-named NAFVOR Somalia – Atalanta), aiming to deter and repress acts of privacy and armed robbery against private vessels in the vicinity of the Horn of Africa. An additional mission was established in April 2015 (NAFVOR Med – Sophia) to combat the smuggling of migrants and trafficking of persons in the Mediterranean and adjacent international waters. Possible use of force by the service personnel, including the capture and destruction of seized means of transport, was authorised beforehand by resolutions of the UN Security Council.

The foregoing reveals that the sophisticated institutional machinery has reached a quite reasonable 'cruising speed'.[38] For a complete picture, the unabated propensity of some countries to act outside the CSDP cadre should alas be noted. Apart from the infamous US incursion of Iraq in 2003 that was actively endorsed by the UK and Spain, just one other illustration offers the military strikes conducted inter alia by France in 2011 to topple the regime of Muammar Gaddafi in Libya. Especially the French government made clear that swift and decisive action was

[30]DRC/Artemis, 2003; EUPOL Kinshasa, 2005–2007; EUFOR Congo, 2006; EUSEC Congo, since 2005.

[31]EUPOL Afghanistan, since 2007.

[32]EUCAP Sahel Niger, since 2012.

[33]EUJUST Themis, 2004–2005.

[34]EU CAP Nestor, since 2012.

[35]EUFOR Tchad, 2007–2009.

[36]EUBAM Rafah, since 2005.

[37]E.g. the EU Police Mission in Bosnia, taking over from the UN International Police Force; EULEX Kosovo, taking over from KFOR, a NATO operation.

[38]Also exemplied in e.g. Pirozzo (2015).

called for to protect civilians and prevent an impending massacre, leaving no opportunity for protracted consultations with European or international partners. The rationale for such rampant unilateral or bilateral actions can therefore be practical, political or both.[39] They may entail an infelicitous pre-emption of CSDP operations, and the EU having to pick up the pieces afterwards.

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. The term calls for a broad understanding here, covering inter alia people, equipment, armaments, transport, technical infrastructure, etcetera. Similar to the UN, the EU may send out missions under its flag, but it does not employ its own soldiers, nor does it dispose of its own *matériel de guerre*. 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.[40]

In the past decades, multiple 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.[41] 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 the 1990s, the appropriate response to the new tide was not immediately clear. In 2004, 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.[42]

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. Secondly, it aims to encourage harmonisation of operational needs and the adoption of effective, compatible procurement methods. Thirdly, the Agency is to propose multilateral projects so as to fulfil the objectives in terms of military capabilities and ensure coordination of Member State (cooperation) programmes. Fourthly, it is required to support, coordinate and plan (joint) defence technology research, as well as studies into technical solutions

[39]Rühl (2014), p. 22.

[40]See Article 42(1) and (3) TEU respectively.

[41]E.g. WEAG, WEAO, EDEM, OCCAR, POLARM. Some of these are still active at present.

[42]Currently governed by Council Decision 2015/1835 defining the statute, seat and operational rules of the European Defence Agency, OJ [2015] L 266/55.

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.[43]

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 outs 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 Article 45(2) TEU makes clear, Member States may decide for themselves whether or not to take part in its activities.[44]

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 marked a crucial turning point. Although the Code was voluntary and non-binding, it was faithfully 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 basis of Article 296 TEC.[45] From that moment on, all military and defence contract opportunities were published on the website of the EDA through an electronic bulletin board.[46]

As pointed out by various scholars, this new approach still lay at odds with the official rules that ought to be complied with.[47] ECJ case law makes abundantly clear that Article 346 TFEU (formerly 296 TEC) has to be interpreted restrictively, and that it by no means grants a blank cheque.[48] 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

[43]See Article 45 TEU.

[44]Currently all Member States do so (with the exception of Denmark, in accordance with its op-out).

[45]All EU Member States except Romania and Denmark participate in this scheme; so does Norway.

[46]The Code of Conduct applied to contracts worth more than EUR 1 million. It introduced distinctive award criteria based on the most economically advantageous solutions for the particular requirement. It provided for a debriefing after the contract was awarded, during which session, upon request, unsuccessful bidders were given feedback.

[47]See e.g. the Commission's *Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement*, COM (2006) 779 final.

[48]See e.g. Case C-414/97, *Commission* v *Spain*; Case C-284/05, *Commission* v *Finland*; Case C-337/05, *Commission* v *Italy*.

way when putting certain projects, services or equipment out to tender.[49] The Code of Conduct, administered by the EDA, therefore established a special regime that flew in the face of primary and secondary EU law.

The incongruity did not go unnoticed. Some years after, special efforts were taken to counter the erroneous interpretations of the applicable rules, in an attempt to raise awareness of the limited discretion for pursuing particular national preferences here. Year 2009 saw the adoption of a special Directive that established a comprehensive set of rules 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.[50] This Directive can be applied to the vast majority of defence and security procurement contracts without putting at risk Member States' essential security objectives. It therefore intends to keep most of their purchasing and commissioning within the parameters of the internal market and the TFEU; the existence of tailor-made rules limits the possibility to argue that those essential security objectives cannot be guaranteed through the Directive's competitive tendering procedures. The Code of Conduct was consequently repealed in 2014.[51]

In spite of this legal-institutional evolution, it does remain questionable whether the Member States are truly willing to alter their past practices—which they might still believe to serve their national security and defence interests best. Very telling in this respect is that correct implementation and dutiful compliance with the new Directive has not been instantaneous, inciting a raft of infringement procedures initiated by the Commission.

For sure, it remains difficult to achieve integration in the atypical defence industry, where economic interests persuade governments to privilege their national 'champions', and where market forces apply haphazardly. This mostly pertains to the selection of countries that commands a significant industrial base in the sector. In the development, adoption and allocation of new means and technologies, the EU nevertheless will have to engage collectively.[52] So long as Member States 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.

[49]See Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ [2004] 134/114.

[50]Directive 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. See also Directive 2009/43/EC.

[51]For an exhaustive study, see Trybus (2014).

[52]Heuninckx (2016) comes up with valuable concrete proposals.

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.[53] 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 one year.[54] In follow-up meetings, these still fairly broad objectives were converted into more detailed commitments.[55]

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, one year later, a novel headline goal was set for 2010.[56]

Box 3.4 The 2010 Headline Goal in Retrospect

Included in the 'indicative list of milestones' in the 2010, and successfully realised before the deadline or shortly thereafter, have inter alia been: the establishment of a civil-military cell within EUMS with the capacity rapidly to set up an operation centre for a particular operation; the establishment of the EDA; the implementation of EU strategic lift coordination, with a view to achieving necessary capacity and full efficiency there to assist anticipated operations; and an improvement of the performance of EU operations at all levels through the development of appropriate compatibility and network linkage of communication equipment and assets.

[53] In operations up to corps level—i.e. up to fifteen brigades (or 50,000–60,000 persons).

[54] Requiring an additional pool of deployable units (and supporting elements) at lower readiness, to provide replacements for the initial forces.

[55] E.g. 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.

[56] Headline 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.

As part of the package, the first of the so-called EU Battle Groups, originally planned to form part of a Rapid Reaction Force, became fully operational in 2007. Though not completely matching the grand intentions sketched in the headline goals, these rapidly deployable forces do go a long way, consisting of 1500 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.[57] 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 had to be made available with all the support functions and equipment required in a short time span and in sufficient quantity. At the expiry of the deadline in 2010, the majority of the CHG objectives were achieved on paper. That however did not necessarily mean that the EU was now up to the task of staging *any* type of crisis management operation—a fact deserving renewed attention.

At a summit in 2013, while acknowledging the persisting shortcomings, the European Council identified a number of priority actions built around three axes: increasing the effectiveness, visibility and impact of the CSDP; enhancing the development of capabilities; strengthening Europe's defence industry.[58] It committed once again to delivering key capabilities and addressing critical shortfalls through concrete projects, such as the development of Remotely Piloted Aircraft Systems (RPAS) in the 2020–2025 timeframe, and multi-role-tanker transport of air-to-air refuelling capacity. This was followed up in 2016 by European Council Conclusions containing additional proposals and an implementation plan with detailed timelines, sparking the creation of a permanent operational planning and conduct capability for EU missions, a coordinated annual review on defence, and a European Defence Fund.[59]

In sum, the gap between what is expected of the EU and what it is actually able to deliver does not yet appear completely closed. To reach the level that enables for all challenges and threats to be tackled adequately, still more needs to be done. 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.[60] At the same time, this figure provides a neat indication of the Union's grand potential.

[57] *Civilian 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.

[58] European Council Conclusions, Brussels, 19/20 December 2013, EUCO 217/13.

[59] European Council Conclusions, Brussels, 15 December 2016, EUCO 34/16.

[60] See Biscop (2008), p. 431.

3.6 The European Security Strategy and Its Progeny

The first European Security Strategy (ESS) saw the light of day in 2003. It was authored by then High Representative Javier Solana and heralded yet another new era for the EU's foreign and defence policy.[61] 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.[62] The 2003 ESS was a first stab at visualising and ordering the mid- and long-term strategic priorities of the Union. In 2008, the first report on its implementation appeared, providing for a partial revision and update.[63]

The ESS identified 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.[64] It also indicated 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'. 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.

In 2015, the European Council mandated the incumbent HR, Federica Mogherini, to overhaul the ESS and come up with a new text. After numerous exchanges with governments, parliaments and think tanks, the EU's Global Strategy (EUGS) was officially unveiled in June 2016.[65] Whereas the ESS expressed great faith in the Union's transformative power, the EUGS displays a higher dose of realism by embracing the idea of 'principled pragmatism'. Although the efforts to

[61] 'A Secure Europe in a Better World – The European Security Strategy', available at http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf.

[62] E.g. the 1948 Truman doctrine, spelling out the US's structural assistance to countries in the communist sphere of influence that risked being overwhelmed, or the 2002 Bush doctrine, stressing the US's readiness to engage in 'pre-emptive self defence'.

[63] 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.

[64] 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.

[65] 'Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy', available at https://europa.eu/globalstrategy/en.

ensure a 'rule-based global order' is still there, that notion plays a more secondary role than 'effective multilateralism' did in the ESS. The EUGS lists five priority areas of external action: the security of the Union; state and societal resilience in the East and South; an integrated approach to crises; cooperative regional orders; global governance for the twenty-first century. The Strategy stresses that the CSDP should be strengthened, enabling the Union to act autonomously while contributing to and undertaking actions in close concert with NATO. Yet its scope goes beyond that domain, by referring to issues like trade, energy and climate change, in addition to topics such as terrorism, border control and cyber-security. It moreover identifies regions as critical spaces of governance, aiming to stimulate the blossoming of cooperative regional orders and organisations.

Commendable as their content may be, the legal status of the 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 Article 13 TEU. Its 2016 successor could well have been based on Article 26 TEU, but was not either. The same went for the implementation plans that followed in the EUGS' wake. Thus, the documents were placed in a quaint legal limbo, shunning the firm status of a 'decision' that now lay so easily within reach.

Since none of the documents comprise tangible rights or obligations, in truth, they come across as even more ambiguous than the soft law documents referred to in the previous section. Scholars have dubbed the handiwork of Mr Solana an 'inspirational sketch', too full of political rhetoric to be assigned any legal meaning. The vision of Ms Mogherini can hardly be said to have eclipsed it. The tremendous symbolic value should nevertheless not be overlooked here: the mere issuing of a European security strategy illustrates the growing self-confidence of the EU as a (quasi-)unitary actor on the world stage. Indeed, the churning out of such a document could be considered a statement of identity, conveyed through the Union's 'front office'. Moreover, the importance attached to multilateralism has been hailed as a significant virtue in a time where other powerful international players are all too eager to go it alone. Seen in this light, the ESS and its progeny constitute a string of shining beacons, which exhibit the hallmarks of the 'European way' in promoting peace and justice across the world.

3.7 Conclusion

In its original form, 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. That transformation legitimised 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 got off to a new start at the turn of the 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 has grown exponentially. In the shifting international context, the geopolitical and strategic trend points cautiously towards Europeans accepting a greater responsibility for their own security, desiring resolute protection of their interests abroad.

The gamut of missions the EU is at least theoretically willing to engage in, is nothing short of impressive. Though several obstacles are yet to be overcome, through the European Defence Agency and the European Defence Fund, the Member States have been enabled to effectively pool resources, and coordinate and concentrate their R & D efforts. Even when the capabilities–expectations gap is likely to persist for some time more, over the past years, it arguably did become smaller.

So far, what has too often been lacking is the firm determination to make use of the possibilities that the CSDP has to offer. But, once countries pick up the gauntlet and further integrate their military systems and structures—as signalled by the 2017 decision to activate 'permanent structured cooperation'—there will in the long run 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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Part II

Legal Dynamics of the Middle Layers

The Common Commercial Policy

4

Contents

4.1 Introduction

Of all the external policies located in the 'middle layers' of the Union, for the greatest part embedded in Part V of the TFEU, the Common Commercial Policy (CCP) stands out most notably.

For starters, we here encounter one of the oldest fields of external competence, already present in the original EEC Treaty at the very dawn of European integration. Also, the CCP has given rise to a colourful and most dynamic jurisprudence, which in turn gave birth to many broader principles that have become of relevance for other fields of external competence as well. Moreover, from an economic perspective, the CCP carries the most weight of all, as growth of the gross national income of Member States depends to a large extent on a successful conduct of the

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Union's international trade policy.[1] The same goes for the myriad third countries that are EU trading partners, further underlining the CCP's importance.

Box 4.1 A Formidable Economic Powerhouse
As the European Commission regularly underlines, the EU constitutes an economic powerhouse that is more than a match for the likes of China, the US and Japan. For quite some time now, it has been the largest exporter and importer of goods and services in the world, the greatest dispenser of foreign direct investment, as well as the most important destination for foreign direct investment. It consequently ranks as the biggest trading partner for about 80 countries across all continents; for another 40, it qualifies as the second most important partner. In light of these statistics, the EU unquestionably deserves its place at the table of the G7, G8 and G20.

Lastly, the CCP represents one of the broadest external policies of the EU, which is capable of covering numerous types of agreements, even those that might appear to lie within a wholly different domain. This has inevitably led to turf wars, whereby the Court of Justice has had to sort out matters through the procedure of 'border surveillance', discussed earlier.[2] Unfortunately, the potential for conflicts has not diminished with the Treaty of Lisbon's realignment of that procedure, and grand refurbishing of Title V TEU.

In what follows, we will first touch upon some general aspects, among which the rationale and general objectives of the CCP (Sect. 4.2). Next, we engage in a study of its exact scope and purview (Sect. 4.3). Then, we look at the interplay between the CCP and international trade rules (Sect. 4.4). Finally, we discuss some of the trade policies enacted under the CCP, with particular emphasis on EU anti-dumping rules (Sect. 4.5).

4.2 General Aspects of the CCP

4.2.1 Rationale

As remarked above, the Common Commercial Policy was put in place in the 1950s, and it has therewith been in existence since the inception of the European Communities. For the *pères-fondateurs*, the setting up of such a policy formed part of an inescapable logic: with the launch of a customs union between the Member States, a common customs tariff was established for all goods coming

[1] Of course, the actual pursuit of trade opportunities remains their own individual responsibility; but the competence for enacting legal agreements is largely transferred to, and closely circumscribed, by European (EU) and international (GATT/WTO) trade rules.

[2] See Chap. 1, Sect. 1.6.

from third countries; a common external trade policy would then be highly beneficial for the good functioning of that customs union, as well as for the common market more generally. After all, if the Member States joined forces and would try to take a united stand on the dossiers concerned, their bargaining power would be much greater. As a result, favourable trade conditions could more easily be negotiated, with external business partners as well as in international forums.

4.2.2 Objectives and Principles

The inseverable link between the customs union and the Common Commercial Policy is repeated in the central provision that states the latter's purpose. As proclaimed in Article 206 TFEU, the main objectives of the CCP are threefold, namely to contribute to the harmonious development of world trade, to the progressive abolition of restrictions on international trade and foreign direct investment, and to the lowering of customs tariffs and the removal of other types of barriers.

In the pursuit of its objectives, the EU has to formulate uniform principles, in particular where it concerns changes in tariff rates, the conclusion of tariff and trade agreements relating to goods, services and commercial aspects of intellectual property. These principles also extend to foreign direct investment, uniform liberalisation measures, export policies and protective measures (e.g., counteracting unlawful subsidies and dumping).[3] This essentially means that the EU should adopt legal measures on all these topics, and that it subsequently has to uphold and abide by them.

The inclusion of foreign direct investment denotes a completely new feature introduced by the Lisbon Treaty.[4] The upshot is that the Member States, unlike before, can no longer conclude bilateral investment treaties without the Union's consent. Secondary law has been adopted to address the status of these treaties, as well as the possibility to maintain, conclude or amend them.[5] At the same time, the new competence was not seen to cover all types of investment.[6] To realise its regulatory ambitions, the EU may by consequence still have to resort to its earlier powers in the fields of establishment and capital.

In its 2015 'Trade for All' communication, the Commission declared that the Union attaches a special horizontal importance to sustainability in this domain: henceforth, it aims to ensure that economic growth goes hand in hand with social justice, respect for human rights, working conditions, environmental standards,

[3] See Article 207(1) TFEU.

[4] Though the EC already possessed related legislative powers as regards the freedom of establishment and free movement of capital.

[5] Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ [2012] L 351/40.

[6] Cf. Dimopoulos (2011), p. 75 et seq.

health and safety protection.[7] The EU has meanwhile been a leading advocate of integrating such broader public interests into trade policy, turning the CCP into an effective tool for promoting sustainable development worldwide.

4.2.3 Types of Measures

Over the past decades, the legal measures envisaged by Article 207 TFEU have been enacted indeed. Most of these are periodically revised, and virtually every year new ones are added. We can basically distinguish between two main categories, namely Regulations adopted on the basis of Article 207(2) TFEU, in accordance with the ordinary legislative procedure,[8] and international agreements concluded on the basis of Article 207(3) TFEU, in accordance with the general procedure but with a few modifications.[9] The agreements may be bilateral or multilateral, and can be concluded with either countries or international or regional (economic) organisations.

An example of the many Regulations adopted under the CCP is the so-called Trade Barriers Regulation (TBR).[10] This instrument is specifically geared towards removing obstacles to trade in third countries and tackling unfair foreign trade practices. In situations where European businesses experience extraordinary hardships with barriers to trade in third countries, such as restrictions on sales in export markets, discriminatory taxation systems, or difficulties in acquiring and enforcing patent rights, the TBR provides them with direct access to the European Commission. Upon receiving a complaint, the Commission can proceed to investigate the matter and eventually seek the elimination of the indicated obstacles (in consultation with the countries concerned and/or, if necessary and appropriate, within the wider framework of the World Trade Organization).

Over the years, a great number of bilateral and multilateral trade agreements have been enacted.[11] Even where the improvement and expansion of economic relations are the main underlying incentives, these agreements have often also covered aspects such as development cooperation and human rights issues. Fine examples offer the successive treaties concluded with the African, Caribbean and Pacific group of states, which have gradually become more comprehensive, from

[7] Communication from the Commission: Trade for All – Towards a More Responsible Trade and Investment Policy, COM 2015(497) final.

[8] Detailed in Articles 289 and 294 TFEU. Delegated or implementing acts may follow, on the basis of Articles 290 and 291 TFEU.

[9] Article 218 TFEU. Cf. Chap. 1, Sect. 1.5.

[10] Regulation 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ [1994] L 349/71.

[11] To mention but one mundane example, the Agreement between the European Community and Australia on trade in wine, OJ [2009] L 28/3.

the conventions of Yaoundé (1963) and Lomé (1975, 1979, 1989) to the Cotonou Agreement (2000).[12]

Box 4.2 EU Free Trade Agreements: The 'Next Generation'
The EU has concluded (or is preparing and negotiating) free trade deals with partners across all continents. As part of an impressive 'new generation' of agreements, advanced deals have been initiated with South Korea, Singapore, Vietnam, Peru, Ecuador, Georgia and Moldova, among others. In 2015, the agreements in force covered more than a third of the EU trade total. This has been envisaged to extend to two-thirds, if all the ongoing negotiations were to be successfully completed. A rising counter-current could radically undermine the anticipated progress; especially the controversies surrounding the planned 'super-regional' accords with Canada and the US, which ignited at roughly the same time, may well have cast a long shadow ahead.

4.2.4 Decision- and Treaty-Making

To the frustration of some stakeholders, the CCP used to be a special area of law where exceptional rules of decision- and treaty-making applied. The discontent was the bitterest with regard to the fact that the European Parliament was almost completely kept out of the fray. With the entry into force of the Treaty of Lisbon, much changed for the better: as already noted, the ordinary legislative procedure applies for the adoption of any internal CCP legislation, meaning that the Parliament has been granted a full say.[13] Nevertheless, certain exceptions do still apply. These pertain to the modalities of decision-making in the Council and the (successive steps in the) procedure for negotiating and concluding treaties.

As Article 22 TEU stipulates, the European Council is to identify the strategic interests and objectives of the Union and to adopt the relevant decisions. This provision pertains to the EU's external action as a whole, so it also includes the formulation of the Union's strategic objectives with regard to the Common Commercial Policy. In essence then, the European Council plots the course at macro-level here, taking its decisions by unanimity.

[12]Specific Economic and Partnership Agreements are currently being concluded with groups of ACP states, in order to replace the relevant Cotonou provisions with WTO-compatible rules on reciprocal trade liberalisation.

[13]As regards the adoption of implementing measures, trade has been brought under the umbrella of the revised comitology procedure, whereby the Commission's autonomous powers have increased considerably. As before, for the adoption of certain implementing acts, it will need a positive opinion from the relevant comitology committee, made up of national experts, but it has become relatively more difficult for the latter to block proposals.

The decisions on CCP issues with more immediate impact are to be taken by the Council acting by QMV, as confirmed by Article 207(4) TFEU.[14] However, that same section states that unanimity will be required for the negotiation and conclusion of agreements in the fields of trade in services, the commercial aspects of intellectual property, and foreign direct investment—at least where such agreements include provisions for which unanimity is required for the adoption of internal rules. Moreover, unanimity will also be required for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services where these risk prejudicing the Union's cultural and linguistic diversity. Lastly, unanimity is also in order for agreements in the field of trade in social, education and health services if they threaten to seriously disturb the national organisation of such services and prejudice the responsibility of Member States to deliver them.

As outlined before, when it comes to the opening of negotiations for new international agreements, ordinarily the Commission or the High Representative submits recommendations to the Council. The latter may then authorise the opening of negotiations, and nominate the EU negotiator or head of the negotiating team.[15] In the Common Commercial Policy, the High Representative has no role to play. Instead, the Commission is assisted by a committee of Member State representatives, appointed by the Council. This Trade Policy Committee (TPC—formerly known as the '133 Committee', after the old TEEC article on the CCP) not only provides assistance, but also serves as an agent of the Member States. Specifically, it has been installed to keep the Commission in check. After all, in the CCP, the latter is solely responsible for making recommendations to the Council on the opening of negotiations; and if the Council gives its blessing, the Commission is also entrusted with the conduct thereof. The Commission however has to report regularly to the TPC, and is required to consult it. Often, the Council will have laid down extensive guidelines and drawn some red lines. The Commission then needs to take heed of those instructions, and listen carefully to the input of the TPC.[16] The arrangement ought to ensure that the eventual outcome of the process will still be to the liking of the Member States. Additionally, the Commission is bound to regularly report on the progress of the negotiations to the Parliament's committee on international trade.

Officers at the legal services of the Council, Commission and Parliament evidently have to keep the *lex specialis* rules of Article 207(3) TFEU well in mind. Their alarm bells ought to start ringing whenever a proposed agreement concerns external trade issues, economic relations, foreign investments or e.g. commercial aspects of intellectual property since in those cases, a deviant regime

[14]When convened to discuss CCP issues, the Council will be chaired by the representative of the country holding the six-monthly rotating Presidency of the Council, pursuant to Article 2(5) of Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure, OJ [2009] L 325/35.

[15]Article 218 TFEU. Cf. Chap. 1, Sect. 1.5.

[16]On this, see also Gstöhl and Hanf (2014).

applies. Were the provisions to be disregarded in any way, the invalidity of the end product could be pronounced, due to the infringement of an essential procedural requirement.[17] Moreover, as exemplified by the fate of ACTA, failure to ensure the backing of MEPs at an early stage could incite them to eventually pull the plug.

4.3 Scope of the CCP

With regard to the scope of the Common Commercial Policy, two aspects are of relevance: firstly, whether the field is exclusive, or whether instead the Member States retain some room to enact trade measures themselves; secondly, to what extent CCP rules and instruments may stretch out to cover topics that (partially) reside in other fields of EU external competence, e.g. on the environment, development cooperation or humanitarian aid. In this section, we focus mostly on the first strand, leaving the second for further exploration in the chapters to come.

For a long time, the Treaties kept their readers in the dark as regards the exact ambit of the CCP. The EU Courts have hence more than once been requested to express themselves on the issue. Over the years, however, their answers varied, testifying to the dynamic nature of this particular policy area.

In Opinion 1/75, the ECJ defined the scope of the CCP with reference to the external policy of a state, pronouncing that it concerns a broad field which develops progressively through a combination of internal and external measures, without any one taking priority over the other.[18] The ECJ seemed, in other words, to be of the opinion that a successful CCP could only be built gradually, through the adoption of internal legislation, and through the conclusion of international agreements. Rather surprisingly then, the CCP was considered to be a principally exclusive competence: ultimately, the Court stressed that any solution that would give the Member States a concurrent power in this area would lead to disparities in the conditions of competition between enterprises on the common market or on export markets. This it saw as incompatible with the idea of a common commercial policy as such.

This line of exclusivity was subsequently adhered to with vigour,[19] albeit not always entirely rigidly.[20] Commentators attempting to uncover the true motivation of the Court usually assume that it wanted to secure a solid foundation for the EEC in the international trade arena. From 1973 to 1979, the seventh cycle of GATT negotiations took place, the 'Tokyo Round', which focused on tariff reductions, technical standards and government procurement issues. The Community could

[17] Cf. Article 263 TFEU.

[18] Opinion 1/75, *Draft Understanding on a Local Cost Standard*.

[19] See e.g. Opinion 1/78, *International Agreement on Natural Rubber*, and Case 45/86, *Commission* v *Council* (Generalised Tariff Preferences).

[20] Thus, for example, Member States were permitted to deviate from uniform import rules, as long as they had obtained specific authorisation from the EC: see Case 41/76, *Criel, née Donckerwolcke and Schou* v *Procureur de la République au tribunal de grande instance de Lille and Director General of Customs*.

especially become an influential player during these negotiations if it were able to proceed efficiently, i.e. exclusively.[21]

One decade on, international trade patterns had shifted considerably. In the mid-1980s, services increasingly accounted for a greater share of commerce flows than goods. This led the GATT contracting parties to initiate a new cycle of multilateral negotiations, the 'Uruguay Round' (1986–1994). For the first time ever, trade in services, trade-related aspects of intellectual property rights and trade-related investment measures were placed (high) on the agenda. Additionally, an old desire resurfaced, namely to set up a new comprehensive, more transparent and powerful regime to regulate world trade, replacing and succeeding the weary GATT system. These ambitions neatly came together in 1994, in the proposal to establish a world trade organisation.

At that point, a fierce difference of opinion emerged between the EU Member States on the one hand and the European Commission on the other. The dispute concerned not so much the establishment of the WTO as such, but rather the competence to conclude the related trade agreements. Some of these were new, such as the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the Agreement on Technical Barriers to Trade (TBT) and the Agreement concerning Sanitary and Phytosanitary Measures (SPS); others were revised, for example the GATT itself. Initially, the Commission had been authorised to conduct all negotiations. Yet, to the mind of the Member States, some of the resulting conventions touched upon matters that still lay squarely within their own field of competence. The ECJ was approached to settle the matter, and it duly expressed its point of view in Opinion 1/94.[22]

Opinion 1/94 marked an unexpected retreat. The ECJ proclaimed that all WTO agreements pertaining to goods fell indisputably within the exclusive scope of the Common Commercial Policy. Agreements on trade in services could not immediately, as a matter of principle, be excluded from the CCP's scope. However, the definition of trade in services included in the GATS was of relevance here, since three out of four modes of service provision (consumption abroad, commercial presence, presence of natural persons) were covered by EU internal market rules, governing trade between Member States—but not by the CCP as such—governing trade between the Member States and third countries. Only cross-border services and service provision were considered to lie within the (exclusive) scope of the CCP, with the Member States retaining their competence to regulate other modes of service supply. For that reason, competence was shared as regards the conclusion of

[21] Another popular explanation takes its cue from the stagnation resulting from the 'Luxembourg compromise' (1966), which averted a surge in qualified majority voting in the Council. Exclusivity in the CCP could then at least guarantee that the Commission would have a prominent role to play there.

[22] Opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*.

the GATS.[23] Largely the same went for the TRIPs agreement. To the mind of the Court, intellectual property rights did not relate specifically to international trade; these affect internal trade just as much (if not more). Also, the TRIPs agreement had as its aim to harmonise the protection of IP rights on a world scale. If then the EC could participate in this endeavour through its Common Commercial Policy, i.e. in exclusivity, the internal procedural constraints and requirements could be circumvented (different voting rules could apply, and the involvement of Parliament would have been negligible). Thus, the ambit of the CCP was considered to be limited to measures designed to prevent the import of counterfeit goods—meaning that the competence to conclude the TRIPs agreement was shared as well. All this came down to a drawing of some firm lines in the sand; Opinion 1/94 clearly put a stop to a prolonged external 'competence creep' to the detriment of the Member States.

With the Treaty of Amsterdam (1999), the situation was roughly consolidated, albeit that the Council was expressly empowered to extend the scope of the CCP where necessary or desirable. With the Treaty of Nice, however (2003), the ambit of the CCP was considerably expanded. At this point, the competence to conclude GATS- and TRIPs-type agreements was reserved for the European Community after all. Exceptions were however furnished for trade in cultural and audiovisual, educational, social and human health services, at least, in so far as these remained within shared competence and had not been 'swallowed up' earlier. This meant that the CCP would still not become fully exclusive, but continued to retain a shared character.[24]

The Treaty of Lisbon attested to the fact that Opinion 1/94 represented merely a temporary fallback. In the provisions that since then make up the Union's *Kompetenzkatalog*, Article 3(1)(e) TFEU lists the CCP as an area of exclusive competence. The sensitivities of the Member States that surfaced with such vigour in 1994 have nonetheless been duly taken into account: as we noted above, deviating from the main rule of qualified majority voting, the Council may only proceed with unanimity when it concerns the negotiation and conclusion of agreements in the fields of trade in services, the commercial aspects of intellectual property, trade in cultural and audiovisual services, trade in social, education and health services.[25] This way, a delicate balance has been struck: the EU can now act

[23]Transport services also rested outside the scope of the CCP, with the external competences in this field being subject to the operation of the *ERTA* (implied powers) mechanism. Thus, for the time being, competence was also shared to conclude these (parts of the) agreements.This changed with Opinion 2/15, *Competence to conclude the EU-Singapore free trade agreement*.

[24]As confirmed in Opinion 1/08, *Conclusion of agreements pursuant to Article XXI GATS*. The EU could never operate as a wholly exclusive actor within the WTO anyway, since trade agreements on transport services would have to be agreed upon by both the Union and the Member States (see the previous footnote).

[25]Trade in cultural and audiovisual services however only in those situations where the envisaged agreements risk prejudicing the Union's cultural and linguistic diversity, and trade in social, education and health services only where these agreements risk to seriously disturb the national organisation of such services and prejudice the responsibility of Member States to deliver them.

as an efficient and effective global player on all topics that lie within the scope of its Common Commercial Policy (in line with the ideology behind Opinion 1/75), while at the same time, the Member States can drag their feet once it ventures into areas where particular national traditions and interests are affected. Treaties lying entirely within the scope of the CCP however may be enacted exclusively by the EU, and the Member States only take part in those *qualitate qua*; in contrast with the situation in the mid-1990s, such trade agreements will no longer be mixed.[26] Again, this greatly benefits the CCP's efficacy, as these agreements no longer have to be signed individually and be subjected to cumbersome ratification by the Member States.

In a way, the political institutions have unhelpfully muddied the waters in coming up with the 'new generation' of trade agreements mentioned above. Importantly, the Court has held that the sustainable development elements can still be covered by the exclusive CCP power. On the other hand, the intended regulation of investment, comprising the 'portfolio' type and dispute settlement procedures, means that, even in the post-Lisbon era, such comprehensive deals would still need to be concluded jointly by both the Union and the Member States.[27] The experiences with CETA indicate that, so as to avoid getting stuck in an endless obstacle course, recourse may better be had to a leaner package.

4.4 The Interface Between EU and International Trade Law

A classic issue in EU external relations law concerns the effect of international agreements within the European and the national legal order, the interaction between norms of different origin, their hierarchy, possible frictions, overlaps and the resolution thereof. These matters will be explored more fully in a later chapter.[28] What interests us right now is the more specific issue of how international trade rules connect and blend in with the EU and the domestic legal systems. In principle, any agreements concluded by the Union bind not only the institutions, but also the Member States. This was evidently always the case for mixed agreements—to which the latter are, after all, parties themselves—but pursuant to Article 216(2) TFEU, this also holds true for any treaties that the EU has concluded under an exclusive competence. Yet, this bindingness does not automatically translate into a full absorption of the norms concerned in the respective legal orders.

[26]For the time being however, both the EU and the Member States participate individually in the WTO, if only because the Union has not yet acquired exclusivity for every topic on the agenda. Yet, as one author has observed, in the daily practice of the WTO, the mixed membership is hardly visible: at least where the dispute settlement procedures are concerned, the EU operates as a single actor, with the Commission firmly in the hot seat. See Neframi (2010), p. 358.

[27]Opinion 2/15, *Competence to conclude the EU-Singapore free trade agreement*.

[28]See Chap. 9.

In general, the EU Courts have taken a fairly obedient, monist view towards rules of an international origin.[29] Of late, there are nevertheless signs of retreat from that position.[30] For the longest time, the connection between GATT/WTO norms on the one hand and the EU legal system on the other has represented a peculiar 'outlier case', if not to say headache dossier. The stance of the ECJ never fitted in well with its general approach, and at the present day still defies a convincing legal justification. This story is quite complex but highly instructive.

The EEC was not a contracting partner to the original GATT 1947, since the Community only saw the light of day a decade after the latter agreement was established. Nevertheless, it considered itself to be informally bound by the rules enacted within the GATT framework. Also, the Commission took part in the negotiation rounds from the 1960s on, and was allowed to do so for those dossiers with a distinct relevance for an EEC competence.

Next, in the *International Fruit Company* case of 1971, the ECJ moved on to declare that the Community had assumed the powers that were previously exercised by the Member States in the areas governed by GATT rules.[31] Accordingly, the EEC de facto succeeded the Member States in most dossiers, except for the (still fairly numerous) ones where competences were shared. Therewith, the prerogatives of the Commission were more or less officially acknowledged. With regard to the possible direct effect of GATT norms, the *International Fruit Company* was appreciably less adventurous. The ECJ assessed the spirit, the general scheme and wording of the GATT 1947 in order to determine whether individuals could rely on its provisions to contest the validity of a Community measure. For various reasons, including the great flexibility of its provisions, the possibilities of derogation and the power of unilateral withdrawal from its obligations, the Court concluded that it lacked direct effect: the provisions were insufficiently precise and unconditional, in the sense that they permitted the obligations contained therein to be modified, and they allowed for a too great degree of flexibility. A similar reasoning was later applied to other (albeit bilateral) trade agreements.[32]

The ECJ softened its stance slightly in *Fediol*[33] and *Nakajima*,[34] allowing for the invocation of a GATT provision when claiming the incompatibility of an EU measure in two situations, respectively, if the challenged EU measure expressly

[29]See e.g. Case C-286/90, *Anklagemyndigheden* v *Peter Michael Poulsen and Diva Navigation Corp*; Case C-341/95, *Gianni Bettati* v *Safety Hi-Tech Srl*; Case C-162/96, *A. Racke GmbH & Co.* v *Hauptzollamt Mainz*.

[30]See e.g. Joined Cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat International Foundation* v *Council and Commission*; 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*.

[31]Joined Cases 41-44/70, *NV International Fruit Company and others* v *Commission*.

[32]See e.g. Case 181/73, *Haegeman* v *Belgium*; Case 270/80, *Polydor Limited and RSO Records Inc.* v *Harlequin Records Shops Limited and Simons Records Limited*.

[33]Case 70/87, *Fédération de l'industrie de l'huilerie de la CEE (FEDIOL)* v *Commission*.

[34]Case C-69/89, *Nakajima All Precision Co.* v *Council*.

refers to the specific GATT provision,[35] or if the EU measure was intended to implement a specific GATT obligation.[36] In all other situations, claimants would be left empty-handed; the Court displayed no willingness to give way and abandon the negative stance of *International Fruit Company* altogether.[37]

The architecture of the WTO, set up in 1994, differed in countless respects from that of the GATT 1947. For one thing, the system of (invoking) safeguards had been overhauled, and the mechanism for resolving conflicts completely reconfigured (in the guise of the new Dispute Settlement Understanding). Most commentators assumed that this would lead to the ECJ adjusting its case law, and adapting to the new reality. In 1996, the issue of the effect of WTO norms in the EU legal order arrived at the Court's docket. In the case concerned, an attempt was made to challenge the legality of a decision of the Council for breaching provisions contained in the GATT 1994 and the Agreement on Textiles and Clothing, annexed to the WTO Agreement. To the dismay of many, in its judgment in *Portugal* v *Council*, the Court stuck to its earlier position and denied the direct effect of the international trade agreements.[38] Its reasoning ran along two lines: firstly, that the agreements did not specify what their own methods of enforcement were, since compensation is permitted in certain circumstances as an alternative to direct enforcement of the rules, and since there is room for negotiation over the recommendations of the WTO Dispute Settlement Body; secondly, that the agreements continued to be founded on mutually advantageous negotiations, with a particular lack of reciprocity as regards enforcement—entailing that the EU would be placed at a disadvantage once European courts would start demanding that WTO rules are observed at all times, when in contrast, the Union's trading partners of the EU could retain a full scope for manoeuvre.

At its core, the latter argument evidenced the intrinsically political motivation of the Court: it seems as if the ECJ was well aware that e.g. the United States and Japan, in the absence of direct effect of WTO rules in their domestic legal system, could reap huge commercial advantages if they could freely follow their own preferences, while the rules at stake had to be fully implemented and effectuated in Europe.[39] Yet, from a legal-systematic point of view, the assessment of the ECJ

[35]At stake in *Nakajima* was the legality of provisions contained in the Community's Anti-Dumping Regulation, adopted in accordance with Article VI GATT 1947 and the GATT Anti-Dumping Code.

[36]In *Fediol*, this was established on a broad reading of a provision from the Trade Barriers Regulation, in conjunction with two recitals from its preamble.

[37]See e.g. Case C-280/93, *Germany* v *Council*.

[38]Case C-149/96, *Portugal* v *Council*.

[39]In absolute terms, half of the WTO members recognise the direct effect of the WTO agreements. Measured in trade volumes however, the group denying direct effect is much larger than the other, roughly representing 70% of the world trade in goods and 80% of that in services. Unsurprisingly, in its decision concluding the WTO agreements, the Council expressed its view that the accords were incapable by nature of being directly invoked in EU or Member State courts (see Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards

is plainly erroneous: the novel WTO dispute settlement regime is patently more judicial than its predecessor, and much less discretionary in practice than the Court made it out to be. The ECJ opined that the compensation and retaliation schemes provided for in the DSU are alternatives to compliance with WTO rules. The DSU, however, clearly exhibits a preference for full compliance: compensation and retaliation are merely means to *force* a WTO member to comply with WTO rules.[40] To add insult to injury, the enforcement mechanisms of most of the agreements that had so far set up 'special relationships' between the EU and third countries pale in comparison to the DSU—whereas the defects of those enforcement mechanisms were never considered a bar for awarding direct effect to the rules laid down in those agreements.[41]

In legal doctrine, *Portugal* v *Council* was greeted with an avalanche of negative feedback.[42] Once again though, academic criticism proved to be of no avail: the EU Courts have stubbornly persisted, and even hardened their negativist point of view, denying inter alia the direct effect of the TRIPs, TBT and SPS Agreements,[43] WTO Panel Reports,[44] actions for damages against the EU,[45] reliance on Article 351 TFEU,[46] on the principle of *pacta sunt servanda*,[47] or rulings of the DSB.[48]

Box 4.3 Reticence Exemplified: 'Thou Shalt Not Frustrate Negotiations'
In the *Van Parys* litigation, a notable fact appeared to be that, after a decision of the DSB, the EC had explicitly undertaken to comply with the WTO rules. Yet, in the eyes of the Court, in so doing the Community still did not intend to

(continued)

matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–1994), OJ [1994] L 336/1, final recital of the preamble).

[40]On top of this, the adoption of WTO panel reports can only be blocked by the DSB with a unanimous decision, which makes it nearly impossible for the DSB to overturn decisions of the WTO panels or the WTO Appellate Body – which thus function as genuine and competent adjudicators.

[41]E.g. the Cotonou Agreement with the ACP countries, or the agreement establishing a customs union with Turkey. See further Chap. 8, Sect. 8.2.4, and Chap. 9, Sect. 9.2.2.

[42]See e.g. Griller (2000); Zonnekeyn (2000); van den Broek (2001). Among the supporters of the Court's position are Kuijper and Bronckers (2005); Mendez (2010).

[43]See respectively Case C-337/95, *Parfums Christian Dior SA* v *Evora BV*; Joined Cases C-27/00 & C-122/00, *The Queen* v *Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd and Omega Air Ltd, Aero Engines Ireland Ltd and Omega Aviation Services Ltd* v *Irish Aviation Authority*; Case C-93/02 P, *Biret International SA* v *Council*.

[44]Case T-18/99, *Cordis Obst und Gemüse Großhandel* v *Commission*.

[45]Joined Cases C-120/06 P & C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others* v *Council and Commission*.

[46]Case T-2/99, *T. Port GmbH & Co. KG* v *Council*.

[47]Case T-383/00, *Beamglow Ltd* v *European Parliament and Others*.

[48]Case C-377/02, *Léon van Parys NV* v *Belgisch Interventie- en Restitutiebureau*.

Box 4.3 (continued)
assume a particular obligation capable of justifying a direct reliance on WTO law. The ECJ argued that, even where a DSB decision holds that a measure adopted by a member is incompatible with the WTO rules, the dispute settlement system attaches considerable importance to negotiations between the parties. Allowing for direct effect would therefore hinder contracting parties attempting to reach a negotiated settlement, however temporary.

Prima facie, the picture is not exactly cheerful. Apart from the rare occasions where a successful appeal to the *Fediol* or *Nakajima* exceptions proves possible, no (national or third country) trader can challenge EU measures head-on with any chance of success—even if it is certain that they clash with international trade rules. Even when a report from a WTO panel or the WTO Appellate Body establishes that an EU act conflicts with WTO obligations, neither those reports nor the WTO rules can be pleaded before EU or national courts in proceedings brought against the measure in question.[49]

A remedy that does bring salvation, albeit in smaller doses, was handed out in the *Hermès* case.[50] In this judgment, the ECJ did admit the existence of a duty of indirect effect or harmonious interpretation, conceding that EU rules have to be interpreted in the light of international law and binding international agreements. This doctrine, well-known to EC law since the judgment in *Von Colson*,[51] was explicitly declared to extend to the GATT and other WTO treaties (e.g. the TRIPs Agreement).[52] This had the consequence of enhancing their effectiveness under certain circumstances. Indeed, in a growing number of cases, harmonious interpretation has emerged as a viable alternative, nearly obviating the need for direct effect there.[53] At the same time, the remedy forms no panacea, since the doctrine cannot be applied *contra legem*, and is limited by general principles of law, among which that of legal certainty.[54] Notwithstanding its basic utility, when it comes to legality review, it is unable to offer a complete substitute. Thus, when EU legal measures are challenged for violating international trade rules, one may ask (at a European or

[49]It should be noted that this holds too for any national rules adopted pursuant to EU measures, which thus also become unassailable. However, national rules that lie outside the scope of EU competence can freely be attributed effects in the domestic legal order in accordance with the particular national (monist or dualist) tradition: see Case C-431/05, *Merck Genéricos – Produtos Farmacêuticos Lda* v *Merck & Co. Inc. and Merck Sharp & Dohme Lda*.

[50]Case C-53/96, *Hermès International* v *FHT Marketing Choice BV*.

[51]Case 14/83, *Von Colson and Kamann* v *Land Nordrhein-Westfalen*.

[52]See Case C-337/95, *Parfumes Christian Dior SA* v *Evora BV*.

[53]See e.g. Joined Cases C-320/11, C-330/11, C-382/11, and C-383/11, *Digitalnet OOD, Tsifrova kompania OOD and M SAT CABLE AD v Nachalnik na Mitnicheski punkt - Varna Zapad pri Mitnitsa Varna*; Joined cases C-288/09 and C-289/09, *British Sky Broadcasting Group plc and Pace plc v The Commissioners for Her Majesty's Revenue & Customs*.

[54]See e.g. Case C-105/03, *Criminal proceedings against Maria Pupino*.

national court) that the former are interpreted in accordance with the latter, but should that prove impossible, the measures survive unscathed and will continue to apply all the same.

It should be stressed that with the aid of conform interpretation, the Court has been willing to give due regard to international trade law, despite the negation of direct effect. By consequence, it cannot be accused of a categorical 'WTO unfriendly' posture.[55] Yet, at the end of the day, the interface between international trade rules and the European legal order does remain rather one-sided. The EU is a party to the WTO agreement, bound by the various non-discrimination principles (in particular the Most-Favoured Nation clause[56] and the principle of National Treatment[57]) and any specific provisions it has agreed to observe. Of themselves though, these norms rarely sting or bite, as the EU Courts have given priority to the interest of assuring a maximum scope for manoeuvre for the EU at the negotiating table—to the detriment of all importers or exporters negatively affected by EU rules contravening WTO rules and principles. Save for the *Fediol* or *Nakajima* devices and the palliative of indirect effect, the remedy they are left with is the administrative route of lodging a complaint with the competent institutions. While some might contemplate resorting to the mechanism contained in the Trade Barriers Regulation,[58] it should be realised that the Commission is not held to respond if the experienced obstacles derive from EU rules themselves.[59]

Ultimately then, it is left to the political, not the judicial, institutions to ensure full compliance with international trade rules, which includes implementing adverse WTO rulings.[60] It deserves mentioning that the political institutions can in fact lay claim to a generally positive record, and that considerations concerning the compliance of (prospective) European rules with WTO norms have received an increasingly prominent role in the legislative process.[61] The conclusion to this tale is thus not entirely gloomy.

[55]See Bronckers (2008).

[56]Prohibiting discrimination between third countries who are members of the WTO: any favours extended to one member country should automatically be extended to all other member countries.

[57]Prohibiting discrimination against imported products originating from third countries that are WTO members: if no reservations have been made, these should principally be treated as being similar to domestic products.

[58]See supra, footnote 10.

[59]This option might nonetheless seem feasible when third countries have set up trade barriers in response to illegal conduct from the side of the EU; but instead of an instant solution, an endless game of shifting the blame might ensue. See also Perišin (2015).

[60]The EU can decide on its possible follow-up to adverse rulings of the DSB on the basis of Regulation 1515/2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters, OJ [2001] L 201/10.

[61]See respectively Wilson (2007) and Bourgeois and Lynskey (2008).

4.5 Substantive Trade Policies: A Taste

Now that the constitutional underpinnings of the CCP have been demystified, let us briefly look into some of the trade policies that have actually been enacted by the EU.

As mentioned earlier, the establishment of a customs union between the Member States brought with it the establishment of a common customs tariff (CCT). It is left to national customs authorities to apply the CCT, in conjunction with any other relevant provisions of European law. Those provisions consist of a sweeping array of technical rules, mostly laid down in Regulations, the most important of which is the Union Customs Code (UCC).[62] The UCC contains detailed schemes and pointers for the classification of goods, value assessment, and provisions that help to establish the origin of products. The interpretation of the Code can be less than clear-cut, and the corresponding difficulties have given rise to an extensive body of case law from the EU Courts.[63]

The current rules on tariff preferences can be found in the Regulation on Generalised Tariff Preferences.[64] Also known as the 'GSP Regulation', it aims at lowering the barriers for particular third country trade as much as possible, facilitating the import of certain products from countries in need. Its prime objective is to contribute to the reduction of poverty and the promotion of sustainable development and good governance, the idea being that preferential rates enable developing countries to participate more fully in international trade and generate additional export revenue, which supports them in developing industry and jobs. Therefore, the GSP Regulation ensures a full or partial reduction or suspension of CCT customs duties. It eliminates all quotas and duties on all products from the world's least-developed countries.[65] There is no expectation or requirement that this access be reciprocated. The latest instalment in this series of instruments was adopted in 2012, and has applied since 2014.

Box 4.4 Revising the GSP Scheme: The New Approach

Compared to its predecessors, the current GSP Regulation is an advanced, much more flexible tool. As a welcome and very efficient innovation, it allows countries to potentially come in and out of the 'target group'. This entails that the lists of beneficiaries identified in the document, as well as the

(continued)

[62]Regulation 952/2013 laying down the Union Customs Code, OJ [2013] L 269/1.

[63]See e.g. Case C-395/93, *Neckermann Versand AG* v *Hauptzollamt Frankfurt/Main-Ost*; Case T-243/01, *Sony Computer Entertainment Europe Ltd v Commission*; Case C-56/08, *Pärlitigu OÜ* v *Maksu- ja Tolliameti Põhja maksu- ja tollikeskus*.

[64]Regulation 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation 732/2008, OJ [2012] L 303/1.

[65]Excluding weaponry and military equipment (the 'Everything But Arms' arrangement).

Box 4.4 (continued)
different thresholds that are linked to the beneficiary pool, have been made susceptible to swift amendment. The text of the new GSP foresees that these elements, included in different annexes, can be adapted via delegated acts enacted by the European Commission—bypassing the ordinary legislative procedure that would probably prove too cumbersome for these limited purposes.

Next, there is the so-called General Import Regulation.[66] This Regulation applies to imports into the EU in general, and enshrines the basic principle that these are free, meaning that they must not be subjected to any quantitative restrictions. At the same time, the Regulation allows for the adoption of safeguard measures, and specifies under which conditions these can be taken (in line with the WTO Agreement on Safeguards). Apart from the above-mentioned GSP scheme that aims to benefit the developing countries, specific Regulations may be adopted that set up special arrangements for products from particular countries or regions.[67]

A great number of measures have also been adopted that regulate exports from the EU. An example is the Regulation that establishes a special regime for the control of dual-use items and technology.[68] It lists certain types of materials, equipment and technology that may not be sent abroad freely, but for the export of which a special administrative procedure has to be followed. Under this regime, controlled items may not leave the EU customs territory without an export authorisation. Additional restrictions have also been put in place concerning the provision of brokering services with regard to dual-use items and concerning the transit of such items through Union space.

To counteract dumping, the EU has adopted its own Anti-Dumping Regulation.[69] Although the academic debate is still ongoing whether anti-dumping actions are truly fair and justified from an economic perspective,[70] the legal view has been

[66]Regulation 3285/94 on the common rules for imports, OJ [1994] L 349/53.

[67]E.g. Regulation 570/2010/EU making imports of wireless wide area networking (WWAN) modems originating in the People's Republic of China subject to registration, OJ [2010] L 163/34.

[68]Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ [2009] L 134/1.

[69]Currently Regulation 2016/1036 on protection against dumped imports from countries not members of the European Community, OJ [2016] L 176/21. The EU may impose countervailing duties to neutralise the benefit of subsidies granted by third countries on the basis of Regulation 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ [2016] L 176/55.

[70]Some commentators maintain that if certain products are sold at an extremely low price, this is still the outcome of the interplay between ordinary market processes; the fact that the receiving market attributes more economic value to the goods concerned ought not *ipso facto* to lead to any extra duties being slapped onto them. For an in-depth discussion, see Bentley and Silberston (2007).

solidly anchored: Article VI of the GATT 1994 and the related WTO Anti-Dumping Agreement have authorised the practice,[71] as long as one stays within the specified bandwith. In the wake thereof, the EU and the US have adopted their own anti-dumping rules, providing further details on concepts such as 'normal value', 'like product' and 'injury'. The application of the EU Anti-dumping Regulation poses wicked challenges, requiring a sharp insight into principles of econometrics, financial business administration and sales and pricing practices. The Commission investigates whether dumping (or subsidies) is involved, together with the question of injury, and may impose a provisional duty where this is in the overall EU interest. Definitive duties may subsequently be imposed within a specific time limit.[72]

Disputes on the (non-)imposition of anti-dumping duties generate much litigation at both EU and national courts.[73] The challenges come from the firms that lodged the original complaint, the producers of the products subjected to the duty imposed, or the traders importing them. Unfortunately, the lack of direct effect attributed to GATT/WTO rules renders it difficult to proceed against EU anti-dumping measures that go against the rules and margins established in the applicable international trade rules.[74] Surprisingly though, the EU Courts have taken a rather lenient stance with regard to the admissibility of such annulment actions. Due to the strict reading of the *locus standi* conditions for natural and legal persons spelled out in Article 263 TFEU, the hurdles for proving that one is directly and individually concerned often prove insurmountable. In contrast, the EU Courts have taken a conspicuously more liberal position in anti-dumping cases.[75] This stance is all the more remarkable considering the fact that the subsequent substantive review of the disputed measures leads infrequently to an establishment of invalidity. Commonly, the Courts display great deference towards the assessments made by the Commission and the Council at the imposition of the duties, refusing to scrutinise these to great lengths. In addition, the procedural rights involved (e.g. the right to a fair hearing) are often interpreted with considerable rigour.[76] As a result, the EU's system of

[71]With Article VI GATT 1994 defining dumping as 'the practice by which products of one country are introduced into the commerce of another country at less than the normal value of the products'.

[72]Where previously this power lie with the Council, the Commission has since 2014 been made responsible for adopting both provisional and definitive measures (subject to Member State control through comitology).

[73]See e.g. Case 264/82, *Timex Corporation* v *Council and Commission*; Case C-358/89, *Extramet Industrie SA* v *Council*; Case C-239/99, *Nachi Europe GmbH* v *Hauptzollamt Krefeld*; Case T-1/07, *Apache Footwear Ltd and Apache II Footwear Ltd* v *Council*; Case T-122/09, *Zhejiang Xinshiji Foods Co. Ltd and Hubei Xinshiji Foods Co. Ltd* v *Council*; Case T-157/14, *JingAo Solar and Others* v *Council*.

[74]Save for possible reliance on the *Fediol* or *Nakajima* doctrines.

[75]Facilitated post-Lisbon by the inclusion of the 'regulatory act' category in Article 263 TFEU, which merely requires direct concern.

[76]For further illustrations and criticism, see Koutrakos (2015), pp. 367–377.

protection against unfair trade practices appears to suffer from a certain degree of unfairness itself.

4.6 Conclusion

On that mildly depressing note, we conclude this tour of the Common Commercial Policy. Indisputably, the CCP remains one of the mainstays of the EU's relations with the rest of the world. Its position as one of the oldest external competences, and as an exclusive one at that, merited discussing it as the first of the policy areas located in the 'middle layers' of the Union. A few other salient aspects deserve to be rehearsed one last time.

As remarked, the quirky methods of decision- and treaty-making in the CCP require that EU officials pay close attention to the proper 'centre of gravity' of a proposed act. Should the intended measure have a predominant CCP dimension, its adoption will have to conform to various *lex specialis* provisions, outlined above, at the risk of invalidity. At the Commission's DG Trade, this caveat is usually taken to heart. National departments keep a close watch, and notwithstanding the principal exclusivity of the Policy, do not hesitate to insist on mixity when a prospective agreement would otherwise undercut the 'vertical' division of competence.

We also saw that the common CCP implies a uniform conduct of trade relations with third countries, in particular by means of the common customs tariff and common import and export regimes. In line with its official objectives, the EU aims to support harmonious, liberalised global trade that serves the interests of all international players. The Union equally supports the abolition of trade restrictions and customs barriers, while simultaneously paying special regard to the most disadvantaged countries. In this spirit, it has granted, and continues to grant, general and specific preferences. Coupled with the attention for sustainability, in the modern understanding covering not just environmental goals, but also social standards and human rights, laudable steps have been taken to enhance the CCP's ethical dimension.

To defend the EU market, the Union has slightly more dubious tools at its disposal, such as the Trade Barriers Regulation, sophisticated safeguard clauses and an anti-dumping instrument; but in their day-to-day application, there is room for improvement. Moreover, the constricted possibilities for judicial review strengthen the case for a reconfiguration of the interface between EU and WTO law, if only for the sake of consistency. Of course, the EU Courts find themselves in a decidedly unenviable position, considering the hazardous economic and political ramifications of a different, more open attitude. Yet, if the Union's commitment of contributing to a harmonious development of world trade is to be taken seriously, a change may have to be made here sooner rather than later.

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The External Environmental Policy

5

Contents

5.1 Introduction

After the CCP, the second most important area of EU international relations law is arguably the External Environmental Policy (EEP). For, whereas the largest part of the environmental legislation currently in force in the Member States stems from the supranational level,[1] most of the treaties and international regulations they subscribe to have involved Union action as well.

Ever since its inception in the 1970s, environmental policy in general has been the subject of acerbic criticism. A perennial complaint concerns the fiendish amount of bureaucracy that it allegedly entails, in order to counter problems that seem very remote and insufficiently evidenced. As regards the environmental policy of the EU—an organisation already lambasted for its excessive intrusion

[1]Countless myths surround the exact figure, with eurosceptics usually claiming a too high, and their opponents much a too low percentage. An excellent attempt at debunking the myths and arriving at an accurate estimation is made by Raunio and Wiberg (2017); see also Bertoncini (2009).

H. de Waele, *Legal Dynamics of EU External Relations*,
DOI 10.1007/978-3-662-54817-2_5

into national affairs—the administrative burdens placed on public and private authorities stir up additional adverse reactions, leading to increased popular discontent with the Union's overall performance. Even in times such as the present, where the deteriorating ecological conditions loom large in the public mind and figure prominently on the agendas of most policy-makers, the rationality and efficiency of many protective measures continue to be questioned. Especially at an economic ebb, an oft-repeated argument is that the cost of complying with environmental rules hampers the competitiveness of EU businesses, especially when they have to face up to competitors from countries that do not uphold similarly strict standards.

With opposition bearing down from different sides at once, arduous struggles precede the resolution of virtually every issue that the EEP seeks to address. Evidently, arriving at tangible results to ensure the future of the planet requires a lasting political commitment, determination and resilience from the Union, the Member States, as well as their international partners.

In the sections that follow, we will shine a light on the EEP's most important elements, sketching some further tensions in the process. As before, we first discuss some general aspects of the policy, among which its rationale, objectives and guiding principles (Sect. 5.2). We then proceed to look into its purview, both in theory and in practice (Sect. 5.3). Our investigations are concluded with a reflection on the ambitions and achievements of the EEP in a global context, with special attention for the efforts of the EU and its Member States in formulating and upholding global emission standards (Sect. 5.4).

5.2 General Aspects of the EEP

5.2.1 Rationale

Even when the urgency of a particular environmental dossier may not be readily apparent yet, it nonetheless makes sense for countries to tackle the issue in a joint effort. After all, many of the pertinent problems that call for a regulatory response feature a transnational dimension by their very nature. Regardless of whether one thinks of large-scale emissions of harmful elements and substances, surface water pollution, abuse or overconsumption of physical resources—the detrimental consequences of unregulated behaviour in one country may also easily affect human beings in a neighbouring state or region.[2] An environmental policy limited to a single country is therefore bound to be much less effective. As remarked, businesses could then actually reap large commercial advantages from a low standard of environmental protection in certain countries, and decide to relocate

[2]Cf. the *'Principles concerning trans-frontier pollution'*, adopted on 14 November 1974 by the OECD.

their activities. Subsequently, the increase of economic prosperity that ensues in the receiving countries could induce the latter to lower their standards even further.

Precisely to prevent such races to the bottom from becoming a too regular occurrence, interstate dialogues have been initiated, and common attempts made at forging a synchronised environmental policy. Yet, from the very moment that a group of states, however large, manages to agree upon the establishment of such common rules, the problem is bound to re-emerge: for what may then be dubbed the 'internal' policy of the group needs to be complemented by an external equivalent, so as to tackle large-scale environmental issues more efficiently with other countries and organisations.

Once the idea has landed that the contemporary environmental problems are intrinsically global, it becomes equally clear that the challenges can no longer be met by a group of states alone, let alone by a single state. Among the European countries, the awareness of this fact only emerged long after the Second World War, followed by a protracted period where a one-sided emphasis was placed on societal restoration, raising welfare levels and economic integration. It is useful to go into the genesis of the EEP in a bit more detail, so as to better understand the ideas behind the rules that the EU countries have ultimately managed to agree upon.

5.2.2 Historical Background

The environment is a relatively recent EU field of competence. Initially, environmental protection was not mentioned in the EEC Treaty, and it was not until 1973 that a European Environmental Action Plan (EAP) was launched, the first of what would become a series.[3]

As a specific legal basis was lacking, in order to enact the desired substantive rules, refuge had to be sought in the general competence clause of what was then Article 235 TEEC.[4] Multiple specific measures were adopted on this legal basis, in conjunction with Article 2 TEEC, which listed 'the improvement of living and working conditions' as one of the objectives of the European Economic Community. This slightly oblique approach survived a critical mustering by the Court of Justice.[5]

Box 5.1 Environmental Action Programmes

The multi-annual Environmental Action Programmes set out the key priorities and vision for the policy activities in the designated period. The

(continued)

[3]For a more detailed account, see Somsen (1996).

[4]Currently Article 352 TFEU.

[5]See e.g. Case 91/79, *Commission* v *Italy*, and Case 240/83, *Procureur de la République* v *Association de défense des brûleurs d'huile usagées*.

Box 5.1 (continued)
status and significance of these documents has massively increased since the first EAP was drawn up in the early 1970s. Nowadays, they are adopted in the form of a decision of the Parliament and the Council, following the ordinary legislative procedure. The seventh programme (2013–2020) identifies nine core objectives, ranging from the very general (e.g. to safeguard citizens from environment-related pressures and risks to health and well-being) to the fairly specific (e.g. making the Union's cities more sustainable).

The Single European Act, which entered into force in 1987, marked the beginning of a new era. At a time when the serious nature of the issues concerned was finally getting through to the public at large, environmental action became a central point of attention in EU policymaking. With the SEA, a separate title on the environment was inserted into the TEEC, as well as a so-called policy-linking clause, demanding that environmental concerns would be duly taken into account at the drafting of new laws and policies.[6] At Maastricht and Amsterdam, the environmental policy of the EU was expanded further, inter alia by adding sustainable development as one of the Union's main objectives.

Immediately when the environmental title was added to the TEEC in 1987, the internal competence was supplied with an external counterpart.[7] As with the CCP, the exact scope of the EEP was left to be decided in practice, with the EU Courts once again offering all due assistance; the main threads of their jurisprudence will be unweaved further below. First however, we will take a closer look at the key objectives and principles of the environmental policy in general.

5.2.3 Central Objectives and Guiding Principles

The central objectives of the Union's environmental policy, currently laid down in Article 191(1) TFEU, are four in number: first, the preservation, protection and improvement of the environment; second, the protection of human health; third, the stimulation and advancement of a prudent and rational utilisation of natural resources; fourth, the promotion of measures at the international level to deal with regional or worldwide environmental problems, in particular the problem of climate change. Ever since a title on the environment was inserted into the Treaties, the ambition has been to realise 'a high level of protection', a phrase that has gone on to lead a life of its own in scholarly writings.[8]

[6]Currently Article 6 TFEU. For an extensive analysis of the clause's meaning and effectiveness, see Dhont (2003).

[7]Currently Article 191(4) and Article 192 TFEU.

[8]Article 191(2) TFEU; see e.g. the various contributions in Macrory (2005).

Article 191(2) TFEU lists the three guiding principles, which have gradually also obtained a classic status. The *precautionary principle* dictates that if the (side-) effects of an object, technique, rule or behaviour are uncertain, one should in principle abstain from using, promulgating or promoting them. The *proximity principle* states that attempts at resolving a problem should always move as closely as possible to the root and source of a problem, so as to apply and implement solutions at the hard core. Finally, the *polluter pays principle* means exactly what one would think that it means: it entails that those that are responsible for any environmental harm should bear the full costs thereof as well.[9]

These objectives and principles originally had quite a soft status, but acquired more solid legal form with impressive velocity; at present, they appear to have become wholly justiciable. This means that any legal measures believed not to comply with those objectives and principles can be challenged before the competent EU or national courts, provided one can avail oneself of the necessary remedy.[10] Of course, such claims will not always be automatically successful, as an intense scrutiny of the relevant measure and a weighing of all the interests involved still has to take place.

5.3 Scope of the EEP

5.3.1 Tensions with the CCP: Theoretical Aspects

As already hinted at above, there exists a notable tension between the pursuit of economic interests on the one hand and the attainment of environmental objectives on the other. In EU law, this tension is reflected in the friction between the Common Commercial Policy and the External Environmental Policy, respectively.[11] Consequently, legal measures that have a clear environmental dimension yet also extend into CCP domain have become a regular subject of litigation.

In fact, often even the most basic of policy choices can give rise to controversy here. For example, under the CCP, if tariff preferences are granted to a third country, these risk stimulating the mass production and export of commodities when that suddenly becomes profitable. Those same commodities may however be identifiably harmful to the local environment as well.[12] The same applies to exports. For example, goods and substances outlawed in the EU for their detrimental

[9]For further reflections on the guiding principles, see Jans and Vedder (2012), pp. 41–51.

[10]See e.g. Case C-377/98, *Netherlands* v *Council and Parliament*; Case T-429/05, *Artegodan* v *Commission*; Case C-343/09, *Afton Chemical Limited* v *Secretary of State for Transport*.

[11]For a more general overview, see Wiers (2002).

[12]A recent example are the alternatives to fossil fuel (e.g. ethanol on the basis of maize or sugar), all too eagerly produced in large quantities in developing countries, but simultaneously proving to impact extremely negatively on their domestic agricultural resources.

environmental impact may well be allowed to be shipped to other continents without further consideration.[13]

The need to resolve the tension between the CCP and the EEP would be less pressing for lawyers if legally both policies were of the same nature. Unfortunately, this is not the case, as the CCP constitutes a field of exclusive competence, whereas in the EEP, the Union shares competence with the Member States.[14] Through the *ERTA* mechanism, the EU may widen its competences in the EEP, yet the problems are compounded by virtue of the fact that internal environmental rules are normally enacted in the form of minimum harmonisation.[15] This means that even if the dossiers concerned appear, from a certain point in time on, to reside within the ambit of the EU competence, the Member States remain entitled to agree on more stringent standards on those topics with external partners or organisations.[16] There thus remains considerably more room for the Member States to act on the global scene and exercise their powers than one prima facie might think. This contrasts with the CCP, where the Member States have been gradually squeezed out (albeit with a brief interlude in the 1990s), and where the EU at present pulls (almost) every chord.

Box 5.2 The EU, the Member States and Multilateral Environmental Agreements

Within the sphere of multilateral environmental agreements, matters can reach an additional level of complexity. In Summer 2015, Sweden proposed to include a new category of substances in the Stockholm Convention on persistent organic pollutants (a treaty to which both the EU and the Member States are parties). In the run-up to that moment, discussions had taken place within the Council and with the Commission, but no definite agreement could be reached to place the substances on the provisional list. In a subsequent infringement case (C-246/07), the ECJ ultimately condemned Sweden for violating the duty of sincere cooperation with its unilateral act. The Court also clarified the effect of minimum standards, ruling that Member States are not free to propose or adopt stricter measures if those were liable to bind the EU itself.

[13]For the same reason, commercial undertakings with regard to rare plants and animals also deserve further thought. This has led to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), covering more than 35,000 animal species and plants. The Union became a party to CITES in July 2015; on the earlier interaction, see e.g. Case C-370/07, *Commission* v *Council*.

[14]See Article 191(4) TFEU.

[15]Cf. Article 193 TFEU.

[16]Cf. Opinion 2/91, *Conclusion of ILO Convention No. 170 concerning safety in the use of chemicals at work*.

A final factor exacerbating the aforementioned tension resides in the fact that different procedural arrangements apply, depending on whether a (proposed) EU measure has a predominant CCP or a predominant EEP focus. Admittedly, in the post-Lisbon era, qualified majority voting and full involvement of the Parliament are the rule in both the CCP and the EEP, wherewith the problems are indeed less acute than before.[17] However, as we have seen in the previous chapter, unanimity in the Council is still required for the adoption of CCP measures on certain subjects, whereas QMV might well apply to the measure if it has a predominant environmental focus. Conversely, pursuant to Article 192(2) TFEU, a special legislative procedure applies in the EEP for the adoption of certain types of measures (with unanimity in the Council and mere consultation of Parliament), whereas the ordinary legislative procedure could well apply in case the subject matter lies, for the largest part, within the scope of the CCP.[18]

In sum, the EEP may still regularly come into conflict with the CCP, not just for basic political reasons and in light of the goals they wish to attain, but also because of potentially overlapping legal bases, frictions between an exclusive and an (intricately) shared external competence, and clashing procedural regimes for the adoption of the relevant rules. Thus, in the actual, day-to-day conduct of the EEP and the CCP, tough choices have to be made. Many of these verge on the arbitrary, as frequently no inferences as to their correctness or incorrectness can be made with absolute certainty. Unsurprisingly then, legal disputes on the exercise of the respective competences have cropped up with great regularity.

5.3.2 Tensions with the CCP: Some Illustrations

In 2000, at Cartagena, an additional protocol was adopted under the International Convention on Biological Diversity (also known as the 'Rio Convention' of 1992). This Protocol had as its central objective the protection of biological diversity from the potential risks caused by living modified organisms (LMOs), developed with the aid of modern biotechnology. Especially the transboundary movement of these organisms formed a major cause for concern. The Protocol of Cartagena (or Biosafety Protocol, BSP) makes clear that any products stemming from new technologies had to be approached with the precautionary principle in mind. The BSP allows countries to balance public health interests against potential economic benefits, for example by entitling states to restrict imports of (goods containing) genetically modified organisms, if there is insufficient evidence that the products in question are really safe.

[17] See Article 207(2) and (4) TFEU and Article 192(1) TFEU.

[18] The tension could be greatly alleviated if the Council, in line with the final sentence of Article 192(2), were one day to decide by unanimity to let the ordinary legislative procedure apply for the adoption of those types of measures.

The legal question soon haunting the EU was whether the Protocol had to be concluded under CCP or the EEP competence: did it fall within an exclusive field or belong to a shared domain? The Commission opted for the former, yet the Council chose to conclude the agreement on the basis of the latter. Subsequently, the ECJ was approached.[19]

The Union's judiciary saw itself confronted with the choice to qualify the BSP either as an environmental treaty that had incidental effects on trade (in LMOs), or as an international trade agreement that took account of certain environmental standards. In its Opinion 2/00, the Court decided that the main purpose or component of the BSP was the protection of biological diversity against the harmful effects of transboundary movement of LMOs.[20] It thus had to be adopted as a mixed agreement, on the basis of (what is now) Article 192 TFEU.

This decision did much to raise the EEP's profile, and dealt a great blow to the Commission. The latter's lawyers had hoped to procure a judgment stating that even peripheral CCP elements necessitated a choice for the corresponding legal basis; therewith, many more measures would start to fall under that (exclusive) competence.

Scarcely one year later, matters seemed to take a turn in a rather different direction with the Court's judgment in the *Energy Star Agreement* case.[21] At stake was a treaty between the EU and the US concerning the coordination of energy-efficient labelling schemes, and the use of the 'Energy Star' logo for European office equipment.[22] Again, the Commission had advocated the use of the CCP competence, yet the Council once again preferred to resort to the EEP. This time around, the ECJ sided with the Commission. It asserted that the Agreement had a direct and immediate impact on trade in office equipment, whereas the environmental impact was indirect and would only manifest itself in the long term; moreover, the Agreement did not in itself prescribe new energy-efficiency requirements. For these reasons, the trade objective had to be accorded the most weight, so that the Agreement had to be enacted under the CCP. With the ruling in the *Energy Star* case, it became clear that no decisive battle had been fought in Opinion 2/00, for apparently, environmental aspects could at times still be outflanked by trade interests; neither field of competence would kowtow automatically to the other, and the scales were now largely back in balance.

[19]As mentioned in Chap. 1, Sect. 1.6, in principle, the ECJ can be approached at all times before, but not after the conclusion of an international agreement; if rescission were to prove necessary then, international liability may ensue. The Commission was well aware of this, and did not argue for termination or renegotiation. It claimed to seek a ruling to obtain clarity for the future, also as regards the management of the BSP.

[20]Opinion 2/00, *Cartagena Protocol*.

[21]Case C-281/02, *Commission* v *Council* (Energy Star Agreement).

[22]Named after a programme for energy efficient office equipment originally developed by the American Environmental Protection Agency, which had quickly become the world standard.

The enduring nature of the difficulties in overcoming the tension between the EEP and the CCP is exemplified by the *Rotterdam Convention* case.[23] The conclusion of this Convention posed a particular challenge, as it pertained to international trade in hazardous chemicals. One could be forgiven for thinking that, in this case, a choice for either Article 192 or Article 207 TFEU would have been wholly arbitrary. At the same time, in light of the *Cartagena Protocol* and *Energy Star* precedents, the heat was on to establish the predominant purpose or component of the treaty concerned. While the Commission posited that the Rotterdam Convention had to be approved on the CCP legal basis, the Council decided to resort to the external environmental competence instead. When the ECJ was approached to rule on the matter, the Court remarkably found the agreement to be hybrid, regarding its substance to fall between the poles of a predominant environmental objective and a predominant trade objective. It did acknowledge that the protection of human health and the environment was clearly the most important concern in the mind of the Convention's signatories; yet, the document also contained rules governing trade in hazardous chemicals that have a direct and immediate effect on such trade. For that reason, it needed to be concluded on a dual legal basis, meaning that the erroneous decision of the Council had to be annulled.[24]

This could be interpreted as largely downplaying the problems indicated earlier. After all, with the position taken in the *Rotterdam Convention* case, the ECJ seemed to confirm that the CCP and EEP are not irreconcilable. Judging from *Cartagena* and *Energy Star* however, a categorical choice between the two can ordinarily not so easily be avoided.[25]

Even when the tension between an exclusive and a shared competence can indeed sometimes be overcome through the use of a dual legal basis, this does not take away the potential incompatibilities between differing procedural regimes. In case of a dual legal basis, the procedure has to be followed that ensures a maximum of democratic legitimacy (i.e. unanimity in the Council, and co-decision or the assent of Parliament).[26] While some might consider this an attractive standard approach for the future, a too frequent use should be avoided, as it flies in the face of the *lex specialis* rule, the attribution of powers principle, and arguably the prohibition of *dé*

[23]Case C-94/03, *Commission* v *Council* (Conclusion of the Rotterdam Convention).

[24]Correspondingly, in the judgment in Case C-178/03, *Commission* v *Council*, delivered on the same day, the Court ruled that this also held true for the Regulation incorporating the Rotterdam Convention in EU law.

[25]As confirmed in Case C-411/06, *Commission* v *Parliament and Council*, where the Court, despite serious doubts with regard to the choice of legal basis, refrained from broadening the application of the *Rotterdam Convention* judgment, and saw the measure concerned as falling squarely within the environmental competence.

[26]See e.g. Case C-166/07, *Commission* v *Council* (International Fund for Ireland), paragraph 69. In case two procedures would have to be combined in which the one prescribes co-decision (the ordinary legislative procedure) and the other a right of assent for the Parliament, the former procedure would have to be preferred, since it guarantees the most intense democratic involvement (after all, when the latter is applied, Parliament can only accept or reject the proposal, and not try to amend it).

tournement de pouvoir. Moreover, the authors of the Treaties deliberately chose to install separate regimes and not to amalgamate the two. From this one ought to infer that a combined approach should only be followed in the most exceptional of circumstances.[27]

Overall then, the EEP and CCP are external competences of equal import and gravity. Whereas the bandwidth of both policies can be stretched rather far, in theory as well as in practice, neither should be rendered nugatory by an excessively wide reading of the one over the other. Admittedly, in recent years, the tensions between the two have abated, but the Solomon-like verdicts of the ECJ, as well as the rules resulting from the entry into force of the Lisbon Treaty, have fallen short in eradicating them altogether.

5.4 Ambitions and Achievements of the EEP in a Global Context

As remarked above, the largest part of the environmental legislation currently in force in the Member States stems from the supranational level, and the dimensions of the pertinent EU rules are little short of astounding. Legislation has inter alia been passed aiming to improve the quality of water, tackling air and noise pollution, assuring the safety of chemicals, setting standards for waste disposal, protecting European native wildlife, plants and habitats. As mentioned, seven EAPs have been adopted since 1972, with the current one running until 2020.[28] It includes an enabling framework that sees the EU attaining its goals through a better implementation of legislation, better information by improving the knowledge base, more and wiser 'green' investments, and full integration of environmental requirements and considerations into other policies.

Although the Union's internal ambitions are incontestably praiseworthy, in order to tackle the problems that are nowadays intrinsically global, much depends on the success of its external environmental policy as well. It is therefore to be applauded that in the past decades, the EU has taken a leading role in the negotiations on international frameworks for the protection of the earth's environment.

At the 1997 UN Conference on Climate Change in Kyoto, attempting to lead by example, the Union committed its Member States to reduce greenhouse gas emissions by 8% by 2012, in comparison to 1990 levels. This was followed up by

[27]To be sure, situations in which a dual legal basis is employed crop up with a certain regularity, and the Court does not mind giving its blessing to the practice. Overall though, the 'combination approach' does remain the exception rather than the rule.

[28]Some of the targets set in earlier secondary legislation already extended that far: see e.g. Directive 1999/31/EC on the landfill of waste, OJ [1999] L 182/1 (requiring Member States to reduce landfill waste by 65 % by 2020).

the EU Climate Change Package in 2008, sent out as a specific pledge to the Intergovernmental Commission on Climate Change.[29]

On the road to a comprehensive follow-up to the Kyoto Protocol, the EU also played a major role. Initially, it proved incapable of preventing a premature collapse of negotiations, due to unbridgeable divisions between developed and developing nations. Consequently, the 'Copenhagen Accord' of 2009 wound up an overly minimalist deal. The UN regime talks were reinvigorated at the 2011 summit in Durban, following successful agenda setting from the EU in cooperation with developing countries. The novel objective became to adopt a binding outcome with the widest possible support base, which was accomplished with the Paris Agreement in December 2015. The latter constitutes the first-ever universal deal on climate change, aiming to keep the increase in global average temperature to well below 2°C above pre-industrial levels in the long term, and actually endeavour to limit the increase to 1.5°C. Governments have agreed to come together every 5 years to set more ambitious targets as required by science, report on how they are doing, and track progress towards the long-term goal through a robust transparency and accountability system.

Box 5.3 The EU and the Paris Agreement

Not only were the efforts of the EU crucial in building the coalition that endorsed the eventual Paris text, the Union was equally instrumental in its speedy ratification. The treaty opened for signature in 22 April 2016. To enter into force, at least 55 countries representing at least 55% of the cumulative worldwide emissions had to deposit their acts of approval, something that was expected to take about a year. A number of countries immediately decided to move much faster, triggering a veritable 'ratification race'. The EU rushed to ratify on 5 October 2016, with its deposit leading to the crossing of the magic threshold, enabling the Agreement's entry into force the next month.

One of the Union's most advanced instruments for meeting its global commitments is the Emissions Trading System (ETS), created in 2003.[30] The ETS binds key industries on the territory of the Member States with regard to

[29]The Package established the '20:20:20 plan', spelling out that by 2020, 20% of the energy consumed in the EU is to come from renewable sources; by that same year, energy efficiency is to be improved by 20%, and greenhouse gas emissions are to be reduced by 20% compared to 1990s levels. Meanwhile, the Union has pledged to raise these targets, bringing the latter down by 40% in 2030. See further Kulovesi (2012).

[30]Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, OJ [2003] L 275/32, amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ [2009] L 140/63.

the amounts of carbon dioxide that may be emitted.[31] The sophisticated 'cap-and-trade' system has introduced a ceiling of maximum quantities, whereby undertakings need to buy permits in order to cover transgressions of the fixed limitations. Such allowances can be traded, so that reductions may be made where they are most cost-effective.[32] Over time, the number of permits available under the ETS is set to decrease, which should lead to scarcity and consequently to higher prices—rendering it more attractive for polluters to opt for and invest in eco-friendly alternatives.

In its life cycle so far, the ETS has had to cope with many childhood sicknesses: tax fraud (carbon credits being bought in one country without VAT charges and sold in another with VAT included), unfair commercial practices (end users footing the bill for permits that companies had received earlier at no cost) and cybercrime (large-scale theft of allowances by hacking into Member States' digital registries). In addition, the scheme met with various legal challenges, leading to two CFI judgments that temporarily compromised further progress in controlling emission levels. In *Poland* v *Commission* and *Estonia* v *Commission*,[33] the Court ruled that the Commission was not allowed to apply a single method for assessing all the national allocation plans of all the Member States, and could not replace data included in the various national plans with its own data, acquired on the basis of a single method of assessment for all Member States. In so doing, the Commission was said to have exceeded the margin for manoeuvre that had been conferred by the ETS Directive, breaching the distribution of powers between the Member States and the Commission, and encroaching upon the exclusive competence of the Member States in determining the total quantity of allowances they could allocate in respect of each trading period. The rulings were confirmed on appeal.[34] It is important to note however that they related to the 'second phase' of the system under the legal framework, established in 2003, and that a new agreement on the national allocation plan for the two countries was reached in the interim. In 2009, as part of the 'third phase', it was decided to replace all national allocation plans by a harmonised system of auctioning or free allocation through single Union-wide rules.

Aircraft emissions were meant to be included in the scheme from 2012 onwards. This however sparked a backlash from the industry and countries like China and India, refusing *en bloc* to comply with the scheme and threatening to launch commercial retaliation measures. In response, it was decided to 'stop the clock'—giving an exemption to flights coming to and from airports outside of the EEA, so that the scheme only covered those taking place within the territory of the

[31]Participation in the EU ETS is mandatory for companies in these sectors, but in some of these, only plants above a certain size are included; and certain small installations can be excluded if governments put fiscal or other measures in place that cut their emissions by an equivalent amount.

[32]Financial sanctions can be imposed on those that do not dispose of sufficient allowances to cover their emissions.

[33]Case T-183/07, *Poland* v *Commission* and Case T-263/07 *Estonia* v *Commission*.

[34]Case C-504/09 P, *Commission* v *Poland* and Case C-505/09 P, *Commission* v *Estonia*.

Member States (plus Iceland, Liechtenstein and Norway). This concession has been tied to the commitment by the International Civil Aviation Organisation to come up with an alternative that requires all airlines to compensate for their share. In 2016, the ICAO approved a fine-grained carbon offsetting and reduction scheme, which is yet to be implemented in full.

Environmental NGOs are divided as regards the merits of the ETS. Some continue to believe that the scheme distracts from more effective actions, ambitious energy taxation schemes, a funding of special incentives, and improved governance/enforcement structures. Environmentalists have also slammed the abundance of allowances allocated during the 'first phase', which was said to have resulted in ludicrously low prices. The economic crisis, coupled with high imports of international credits, exacerbated the surplus. That in turn led to a weaker incentive to reduce emissions. The Commission responded by postponing foreseen auctions of allowances, so as to rebalance the supply/demand ratio in the short term and decrease price volatility. A linear reduction factor was fixed and a market stability reserve established to absorb the excesses. As even under its 'third phase', the EU appeared unlikely to deliver the emission cuts that scientists say are needed, structural reform is foreseen for the 'fourth phase', spanning the 2021–2030 period. A modernisation fund will help to upgrade infrastructures in lower-income Member States, and an innovation fund means to provide financial support for renewable energy, capture and storage, and low-carbon innovation projects.

From a global perspective, the ETS is anyhow bound to remain a limited success if non-EU countries do not follow suit.[35] Importantly, China has moved to implement a national carbon-market mechanism, after piloting a series of regional emission trading schemes. Until recently, India rejected calls to quantify its targets on the ground that this would jeopardise its quest for alleviating domestic poverty, yet it is becoming ever more forthcoming in tying itself to serious reductions. The UN has developed an active system to assist the developing countries in cutting their emissions (the Clean Development Mechanism), but to arrive at substantial results, determined contributions from the world's largest polluters remain essential. Unfortunately, the US Congress has repeatedly failed to pass 'cap-and-trade' legislation. Evidently, if major international partners do not abide by their 'Paris promises' and engage in similar initiatives, the EU scheme will never succeed in averting or reversing climate change. Without a broad, lasting momentum, even in Europe the sentiment could ultimately prevail that the costly and bureaucratic exercise ought to be shelved.

[35]Norway, Iceland, Liechtenstein and Switzerland have aligned themselves with the system. Similar plans have been mooted to connect the ETS with its Californian counterpart.

5.5 Conclusion

In light of the fact that most of the efforts made by the EU and the Member States in the field of the EEP have borne at least some fruit, most of the critique on the excessive costs and meagre results of the regulation concerned appears terribly misguided. As the previous sections have showcased, agreement has been reached on countless specific objectives in a plethora of laws, and the Union's active global presence has resulted in manifold conventions with third states and international organisations. In Europe, the area seems nowadays more depoliticised than before, especially when contrasted with the ongoing debates in the US. This makes it somewhat easier to engage in structural reforms, and take up new, more ambitious commitments every few years.

From a legal perspective, the EEP is alas not without its qualms. For one thing, as we have seen, the inextricable linkages between several EEP and CCP dossiers can lead to quasi-endless litigation. While the insight is hardly comforting, the complexity of this interrelation might be the price to pay for being the second most important domain of EU external competences.[36]

Since environmental policy is a shared domain, a 'competence creep' may take place that eventually squeezes the Member States out of the game altogether. For that reason, we see the latter keeping a close watch at the negotiation stage of international agreements. They concentrate on the issues lying within their own domain, and via the Council, try to minimise the Commission's discretion through strict negotiation directives.[37] The vigilance of special committees, made up of civil servants from the Member State's environmental ministries, also prevents the Commission from going *ultra vires* and exceeding the specified scope of manoeuvre.[38] Nevertheless, it does strike one as rather outmoded that the actors engage in such power play in this field. As remarked, we are dealing here with a domain that is so clearly of overriding common interest that clinging to remaining vestiges of national sovereignty borders on the ridiculous. The EU appears very well suited to take on the principal role and establish regulatory frameworks across the board—even when this anything but quells the resistance of those who complain of obnoxious intrusions into their sovereignty. It has, strikingly, still not become common wisdom that a dogged insistence on the preservation of residual competences only leads to disappointing results, and forms one of the quickest ways to convert grand ambitions into empty rhetoric. As inconvenient as the truth may be, the EEP's targets are perhaps better pursued through a conscious and wholeheartedly supported supranational approach, which has so far nearly always succeeded in delivering the goods.

[36]Cf. Cremona (2012).

[37]Within the parameters of the Court's ruling in Case C-425/13, *Commission* v *Council* (EU-Australia ETS negotiations).

[38]For illustrations, see Thieme (2001).

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The External Human Rights Policy

6

Contents

6.1 Introduction

The fact that the EU, when formally still the EEC, consciously developed an external environmental policy highlights that it never sought to advance economic interests only. Consequently, at least some of the Union's external policies can claim to possess a certain moral calibre. Such an assertion is boosted by the fact that, already quite a few years ago, the EU decided to craft an external human rights policy (EHRP). This policy could only come about once the decision was made to internally cross the Rubicon as well, i.e., when a system of fundamental rights protection was set up to also keep the Union's institutions and Member States in check. For an organisation that focused for years on breathing life into an internal market, this might seem rather odd. Yet, the 'spill-over' to fields adjacent to the internal market, such as social policy, consumer protection and the environment, led to an expansion of the EU's powers, which in turn necessitated the installation of ever greater checks and balances on those powers.

For ardent supporters of European integration, almost every expansion and transfer of competence from the Member State to the EU level constitutes a positive development. For sceptics, such transfers give rise to concerns about the protection

H. de Waele, *Legal Dynamics of EU External Relations*,
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of the fundamental rights of natural and legal persons.[1] Many of these rights are guaranteed by Member State constitutions, and in most countries, individuals can enforce them in national courts. Yet, national mechanisms to control the manner in which the authorities use their powers apply with less vigour to rules made at a higher level. At that higher level, there may well be other mechanisms available, but these will always be decidedly less 'native' and practically less accessible. Paradoxically, once an organisation such as the EU crafts an external human rights policy, similar concerns make themselves felt. After all, the third countries that choose to enter into legal relationships with the EU, predicated on the Union's fundamental rights standards, succumb at least partly to powers from abroad; they agree to tone down their internal means of control, and allow their domestic legal order to be penetrated by norms from the outside.[2] Resistance is especially futile against those rules the EU claims to be elementary and indisputable—even when the constitution and cultural traditions of the third country do not recognise the norms as such. Apart from severing the links with the EU, there will be no way to control the manner in which the external authorities use their powers, and halt the process of 'normative imperialism'.

Of course, what the Union's external human rights policy aims to achieve is at its core wholly laudable. Moreover, the aforementioned 'cultural traditions' frequently serve as a sham justification for non-democratically governed countries unwilling to switch over to civilised, nearly universally recognised forms of conduct. At the same time, one cannot be too surprised of the repugnance of the Union's international partners at the assumption that western values and conceptions are the right ones, and that these cannot convincingly be called into question. The question remains, however, where the balance should be struck.

The foregoing touches on just one of the issues that will be explored further in this chapter. For a good understanding of the workings of the EHRP, we will first provide a brief overview of the general place of fundamental rights in the European legal order (Sect. 6.2). We hereafter zoom in on the EHRP's leading principles (Sect. 6.3). Next, attention is given to some specific external fundamental rights initiatives (Sect. 6.4). In that same section, we return to the discussion above and investigate the recurring complaint that the EU exhibits a disturbing 'Janus-face' in the standards for fundamental rights protection it claims to adhere to.

[1] In the classic sense, the concept denotes those rules that, for starters, guarantee individuals a 'private' sphere in which public authorities cannot intervene (for example, the right to freedom of expression), and in addition, limit the ways in which authorities can use their powers in other fields (for example, the right to a fair trial).

[2] Even if, at the negotiation stage, they will of course still have a say on which norms will exert such influence.

6.2 The EU and Fundamental Rights: A Concise Overview

The founding treaties of the European Union originally did not contain any provision with regard to the protection of fundamental rights.[3] A common explanation for this is that the *pères-fondateurs* expected them to be a matter for the Council of Europe, and that the process of economic integration set forth in the EC Treaties would not come close to treading upon the subject at all. For that reason, in the early case law, the ECJ chose to dodge or repudiate questions on possible fundamental rights violations. In two cases brought under the TECSC, *Stork* and *Geitling*,[4] the Court refused to go along with the applicants' reasoning that the decisions challenged violated fundamental rights guaranteed by the German constitution. Subsequent events, however, forced the Court to alter its position.

First of all, the 1960s and 1970s arrived, two decades that witnessed great advances in international human rights development. With the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, it became evident that fundamental rights extended to the political as well as the socio-economic sphere. Unsurprisingly then, the substance of several of the rights laid down in these conventions drew very near to the European Communities' sphere of activities.

Secondly, with *Van Gend & Loos*, the ECJ had placed the individual at the centre of the European legal order.[5] Furthermore, pursuant to the principle of supremacy, Member State courts were bound to give precedence to Community rules over conflicting national rules and even over national constitutions.[6] The question subsequently arose who would then protect fundamental rights as expressly provided for in those constitutions: if national courts could not override Community law, and if the ECJ could not apply national law, where were individuals to turn if, in the course of the application of EC law, their constitutionally guaranteed rights were violated? High courts in France and Germany assumed that they had to qualify the supremacy of EU law, as long as the issue was not satisfactorily settled at the European level.

Cornered from two sides, the ECJ was left with no choice but to change course. Thus, in *Stauder*,[7] *Nold*,[8] and *Internationale Handelsgesellschaft*,[9] it took on the

[3]This is all the more remarkable if one recalls that the initial proposals for a European Political Community and a European Defence Community, drawn up in the early 1950s, did contain ample references to fundamental rights. In fact, the EPC Treaty proposed to incorporate in full Section I and the First Protocol of the ECHR. On this context, see further de Búrca (2011).

[4]Case 1/58, *Stork* v *High Authority*; Case 36/59, *Geitling* v *High Authority*.

[5]Case 26/62, *NV Internationale Transportonderneming Van Gend & Loos* v *Nederlandse Administratie der Belastingen*.

[6]Case 6/64, *Costa* v *ENEL*; Case 106/77, *Amministrazione delle Finanze dello Stato* v *Simmenthal SpA*.

[7]Case 29/69, *Stauder* v *Stadt Ulm*.

[8]Case 4/73, *Nold Kohlen- und Baustoffgrosshandlung* v *Commission*.

[9]Case 11/70, *Internationale Handelsgesellschaft GmbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

role of a court willing to engage in the protection of fundamental rights at long last. Taking its cue from constitutional traditions common to the Member States, as well as from international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (with particular attention for the ECHR[10]), the Court was willing to craft an autonomous catalogue of rights that the EU institutions would henceforth have to observe.

Box 6.1 The Status of External Human Rights Within the EU: Inspiration, Not Invocation

It deserves stressing that the articles of the ECHR and all other international instruments referred to the case law of the ECJ are not, as such, materially incorporated in EU law: from the very beginning, the Court has made clear that these documents serve as sources of inspiration. This entails that individuals can never directly invoke the ECHR, ECtHR jurisprudence or any other international fundamental rights convention before the EU Courts—unless the Union has itself acceded to the treaty in question, implemented the contentious provisions, or otherwise allowed for a reliance on those norms.

Even though the scope of protection of certain fundamental rights may differ among Member States, the Court often considers itself able to identify a minimum level of protection that should be afforded throughout the Union.[11] Thus, it has throughout time been happy to fill perceived gaps in the Treaties, seeking to add credibility and legitimacy to the European legal order by taking the rights of individuals seriously. In so doing, it eventually managed to dispose of the threat of national judicial opposition to the principle of supremacy of EC law.

This development did not go unnoticed at the political level, even though legislative progress in this context was very slow. After many soft law recognitions of the substance of the Court's decisions, with the Maastricht Treaty, a provision was finally inserted (then Article F(2) TEU), emphasising that the Union would respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States. At the Amsterdam Treaty, this provision was rendered justiciable, which meant that the ECJ was now officially allowed to engage in a review of (most) EU rules for compliance with human rights standards.

The ultimate recognition of the central importance of fundamental rights in the Union arrived with the Lisbon Treaty. The restyled Article 6 TEU not only created a

[10]See e.g. Case 36/75, *Roland Rutili* v *Minister for the Interior*.

[11]For example, with regard to the right to strike (see Case C-341/05, *Laval un Partneri Ltd.* v *Svenska Byggnadsarbetareförbundet and Others),* or the right to be protected against age discrimination (see Case C-144/04, *Werner Mangold* v *Rüdiger Helm*).

legal basis for accession to the ECHR,[12] but also awarded binding force to the Charter of Fundamental Rights,[13] which had before only been solemnly proclaimed. The revised Article 2 TEU put beyond doubt that the Union nowadays truly 'means business', proclaiming that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and human rights, including the rights of persons belonging to minorities.

Already in 2007, in order to contribute to the realisation of these objectives, the EU Monitoring Centre for Racism and Xenophobia was recast into a dedicated Fundamental Rights Agency.[14] Importantly though, this agency is charged with providing expertise, formulating appropriate courses of action and supporting the adoption and implementation of the relevant rules; it is not empowered to examine individual complaints or to exercise regulatory decision-making powers.

After years of negotiation on the Union joining the ECHR, that process unexpectedly ground to halt in December 2014. In a lengthy opinion that reverberated like a bombshell, the Court declared the draft accession agreement incompatible with EU law, mainly out of fear that the autonomy and the special characteristics of the European legal order would be compromised.[15] Considering the arguments employed to support that conclusion, and the magnitude of the problems flagged by the ECJ, the stagnation caused appears difficult to overcome.[16]

6.3 Leading Principles of the EHRP

6.3.1 Legal Basis and Relation with Other External Competences

Contrary to the CCP and EEP, which were officially included in the Treaties at identifiable points in time, the EHRP has no precise 'birth date'. In the early 1990s, numerous political statements proclaiming the importance of respecting and safeguarding human rights in international relations saw the light of day.[17] The desire for a common and consistent approach was strongly evident, but what persisted nevertheless was a piecemeal approach. As a result, in the current legal framework, a separate title or chapter on the Union's external human rights policy still cannot be found.

[12] A basis the ECJ earlier considered to be lacking in its Opinion 2/94, *Accession of the Community to the European Convention on Human Rights*.

[13] *Charter of Fundamental Rights of the European Union*, OJ [2010] C 83/389.

[14] *Council Regulation 168/2007 establishing a European Union Agency for Fundamental Rights*, OJ [2007] L 53/1.

[15] Opinion 2/13, *Accession of the European Union to the European Convention on Human Rights*.

[16] Cf. Halberstam (2015).

[17] See e.g. Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development, Bull. EC 1991, p. 122.

In Article 21(1) TEU, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity and equality and solidarity are listed among the principles that guide the Union's action on the international scene. Also, in the second section of that provision, consolidation and support for democracy, the rule of law, human rights and the principles of international law are listed as objectives of EU external action. Yet there is, as said, no distinct set of provisions on this subject: the substance of the EHRP is integrated in the Union's substantive external policies—figuratively, a silver thread running through it all.

Box 6.2 Human Rights 'Mainstreaming'
Scholars have referred to the idea encapsulated in Article 21 TEU as 'horizontalisation' of human rights, or with an even catchier term: human rights 'mainstreaming'. Consequently, due attention and continuous respect for human rights form an objective of, and condition for, the conduct of every type of external action. This inter alia stretches out to the Common Commercial Policy and the EU's Development Cooperation Policy. After all, Article 207 TFEU states that the CCP shall be conducted in the context of the principles and objectives of the Union's external action, which itself refers back to Article 21 TEU. The same goes for the EDCP, pursuant to Article 208 (1) TFEU.

The foregoing should not be taken to mean that the Union is incapable of taking targeted autonomous action with regard to the protection of human rights at the international level. Indeed, for quite some time, such a manoeuvre was outlawed by virtue of the Court's Opinion 2/94, so that the EU could only enter into agreements that did not have a principal fundamental rights objective.[18] With the Treaty of Amsterdam, an explicit legal basis was created for adopting internal measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, proffering an implied competence for external action.[19] The Lisbon Treaty solidified the possibility to become party to other international human rights agreements: at the present day and time, a power to that effect may be inferred from the inclusion of respect for fundamental rights in the EU's official objectives.[20]

[18]With the Court positing that there existed neither an explicit, nor anything on which to base an implied external competence, in light of the fact that no general power was conferred to enact rules in this field.

[19]See e.g. Council Decision 2010/48 concerning the conclusion by the European Community of the UN Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35.

[20]Article 2 TEU.

6.3.2 Human Rights Conditionality

A particular way in which the integration of the EHRP in other fields of EU external competence manifests itself is through the concept of 'human rights conditionality'. This concept denotes that bilateral and multilateral agreements with third countries and international organisations of whatever type (partnership, association, cooperation, etcetera) are predicated upon a full respect for human rights; once the treaty partners fail to live up to that commitment, the agreement will be suspended or terminated. To this end, special 'human rights clauses' are inserted. Essentially, these clauses state that the agreement is based on (an assumption of) respect for democratic principles and fundamental rights.[21]

In the first generation of human rights clauses, the basic provision was coupled with a non-compliance clause, which stipulated that parties reserved the right to suspend the agreement, in whole or in part, with immediate effect, in case of a serious breach.[22] In the second generation, the system was refined further.[23] In this more advanced rendition, which presently constitutes the standard clause, the non-compliance clause gives a contracting party the right to take 'appropriate measures' if another party fails to fulfil an obligation under the agreement. Therewith, the aggrieved party is granted more room for deciding on the specific form of its reaction (e.g. qualified suspension or termination, giving an ultimatum for redress, imposition of sanctions, taking of countervailing actions). The modern provisions ordinarily specify that consultations should, in any case, always precede an invocation of the non-compliance clause; moreover, whatever measures may eventually be adopted, preference should always be given to those that are least onerous to the functioning of the main agreement and the fulfilment of its objectives. It is occasionally also stipulated that the measures must be revoked as soon as the reason for their adoption has disappeared.

For many years now, the EU has been actively implementing human rights conditionality in its international relationships. Human rights clauses even crop up in complex multilateral conventions like the Cotonou Agreement.[24] The more sophisticated version of the non-compliance clause has proven to be a potent instrument, allowing for targeted action against fundamental rights violations by individual countries without placing other treaty partners at a disadvantage,

[21] A pioneering study offers Hoffmeister (1998); see also Bartels (2005).

[22] Dubbed the 'Baltic clause', as this model was first employed in agreements with Estonia, Latvia and Lithuania. Precursors can be found in trade agreements with Argentina, Chile and Uruguay, but these displayed considerably more ambiguity.

[23] Commonly referred to as the 'Bulgaria clause', after the agreement with that country, in which the refined provisions were included for the first time.

[24] See Article 9(2), Article 96 and Article 97 of the Partnership agreement between the Members of the African, Carribean and Pacific Group of States and the European Community and its Member States signed in Cotonou on 23 June 2000, OJ [2000] L 317/3.

compromising the operation of the treaty or (needlessly) collapsing it in its entirety.[25]

To date, while agreements containing human rights clauses have not established specific organs for monitoring their implementation, subcommittees have been established on an ad hoc basis with that purpose. Even in their absence, it is possible (or even mandatory) to bring the pertinent issues to the table of other joint institutions such as the cooperation/association council or parliamentary bodies.[26] In contrast, conceived as they are for the political realm, the clauses do not mean to create legally enforceable obligations for private parties.

6.4 EHRP Practices and Their Discontents

6.4.1 Initiatives for Promoting Fundamental Rights in the Wider World

As indicated above, for the longest time, the EU did not dispose of a general competence in the field of human rights, and therewith, it also lacked the power to formulate a coherent external policy and conclude dedicated international treaties in this field. The resistance against the attribution of such a general competence stemmed from the idea that it would upset the balance between the EU and its Member States: from a constitutional perspective, the Union is not a federation, and thus, it should not be wrapped in such garments. Additionally, it had to be avoided that the EU or its predecessors would go and duplicate the role of other international organisations, e.g. the OSCE and the Council of Europe.[27]

Over time, though, the antagonism declined, and the cautious seeping in of a human rights dimension in various external policies was first condoned, and later actively supported by the Member States. Since the early 1990s, fundamental rights have been steadfastly anchored in the provisions governing the internal and external dimensions of EU law, a development that blazed a trail for the adoption of laws and policies aiming exclusively at encouraging the observance of a high standard of protection.

In 2001, the Commission issued a Communication that outlined three ways in which the EU could forge ahead on the global scene: by promoting coherent and consistent policies in support of human rights and democratisation; by placing a higher priority on human rights and democratisation in relations with third countries and taking a more pro-active approach; and by adopting a more strategic approach to the European Initiative for Democracy and Human Rights,[28] matching projects in the field with firm EU commitments on human rights and democracy.

[25] As corroborated by e.g. Portela (2010).

[26] See also Chap. 8, Sect. 8.2.3.

[27] Cf. von Bogdandy (2000).

[28] In existence from 2000 through 2006.

Herewith, the requirement of 'mainstreaming' across all external policy areas became solidly entrenched.

A decade later, a Joint Communication of the Commission and the High Representative fuelled the adoption of a Strategic Framework and Action Plan for Human Rights and Democracy in 2012.[29] The Plan explicitly referred to a number of thematic priorities, among which the abolition of the death penalty, the eradication of torture, freedom of expression, and support for international courts and tribunals. That same year, the EU appointed its first Special Representative for Human Rights.[30]

Box 6.3 European Human Rights Promotion at the United Nations

For a long time, the EU has been energetically promoting respect for human rights in the various organs and bodies of the United Nations, inter alia through statements and debates in the General Assembly and the prominent 'Third Committee'. In its 2012 Action Plan, the Union equally underlined the leading role of the UN Human Rights Council (HRC) in addressing urgent cases of human rights violations, and pledged to contribute vigorously to its effective functioning. The HRC was also singled out in that document as a suitable forum for the EU to encourage awareness and protection of economic, social and cultural rights, as well as the freedom of religion and belief.

Whereas the basis for a coherent EHRP is at present broader than ever, human rights objectives have been pursued with the greatest zeal in relationships with selected countries or regions (premised on conditionality), or in the specific context of other external policies. Concrete examples of the latter approach can e.g. be found in myriad ad hoc decisions in the CFSP, or in trade instruments such as the GSP Regulation. The EU has also implemented different types of human-rights-focused bilateral dialogues (both ad hoc and structured).

The European Instrument for Democracy and Human Rights (EIDHR) may possibly be regarded the most uniform instrument to date.[31] Launched in 2006, it replaced the earlier European Initiative for Democracy and Human Rights and builds on its achievements. The first 'pillar' of the EIDHR consists of supporting, developing and consolidating democracy in third countries by enhancing participatory and representative democracy, in particular by reinforcing an active role for civil society, and by improving the reliability of electoral processes, in particular by

[29]Joint Communication by the European Commission and EU High Representative, Human Rights and Democracy at the Heart of EU External Action—Towards a more Effective Approach, COM (2011) 886 final; Human Rights and Democracy: EU Strategic Framework and EU Action Plan, Council Doc. No. 11855/12, 25 June 2012. The latter was reaffirmed and extended in July 2015.

[30]Decision 2012/440/CFSP appointing the European Union Special Representative for Human Rights, OJ [2012] L 200/21.

[31]Regulation 235/2014 establishing a financing instrument for the promotion of democracy and human rights worldwide, OJ [2014] L 77/85.

dispatching EU observation missions. The second 'pillar' aims at enhancing respect for human rights and fundamental freedoms, strengthening their protection, implementation and monitoring, mainly through support for relevant civil society organisations, human rights defenders, and victims of repression and abuse. The Instrument was adjusted in 2014 to cope with new demands and realities. The idea was also to make it more user-friendly in procedural terms (tendering and funding applications). Simultaneously, a stronger emphasis was placed on vulnerable groups (national, ethnic, religious and linguistic minorities, women, LGBTI, indigenous peoples), reticent countries and emergency situations (where human rights are excessively endangered).

Useful as political statements, human rights dialogues, clauses and sanctioning decisions may be, perhaps in everyday practice, the EIDHR makes the most tangible difference of all. Primarily, it is a financial instrument through which aid can be disbursed where it is maximally effective, even where no established (development cooperation or other type of) relationship exists.[32] The EIDHR has so far given support to groups and individuals on every continent. Importantly, it can be (and has been) deployed without the consent of the governments of the countries concerned. In so doing, the EU has extended generous assistance to NGOs and civil society actors standing up for democracy and human rights around the world.

6.4.2 An Exercise in Hypocrisy?

On the basis of these samples, one might be inclined to think that the EHRP showcases the benign intentions of the Member States and Union institutions, and that it testifies to the thick moral fibre of the EU's external action. As a number of commentators have pointed out however, there is a rather distressing shadow-side to the EHRP which politicians and civil servants usually choose to downplay or ignore.

At the heart of the matter lies the accusation that the Union pursues respect for human rights in a much more energetic and rigorous way externally than internally; that it turns a blind eye to gross violations of fundamental rights that take place within the Member States themselves, but ordinarily accepts nothing of the kind from its treaty partners. Cases in point have been the appalling treatment of minorities like the Roma in countries like France and Italy, or the facilitation of CIA 'black sites' in the war on terror by countries like Poland and Romania—all left unaddressed by the Union's institutions, bodies and agencies at the domestic

[32]For the 2014–2020 period the EIDHR has a budget of € 1.3 million. The selection of projects funded under the EIDHR takes place in several ways: global calls for proposals (touching on any of the instrument's objectives); country calls for proposals (specific to one country, covering local projects); or direct support to human rights defenders through ad hoc grants (when quick intervention through small and targeted actions is needed).

and supranational levels. The EU, in other words, displays a 'Janus-face', professing to adhere to a standard that it does not live up to itself.[33]

Box 6.4 True Colours? Human Rights in the Asylum and Refugee Crisis
The asylum and refugee crisis that erupted in the mid-2010s added a number of undignified episodes to this series. While the majority of Member States did try to find solutions in all sincerity, human rights of third country nationals were repeatedly, and sometimes entirely consciously, trampled upon—with incidents ranging from the unilateral closure of borders and denial of rights of passage, forced returns in violation of the 'Dublin' rules, detention under atrocious conditions in numerous patently unsuitable locations, or shady deals with international partners with an eye to radically stemming the flows. Journalists, NGOs, dissenting politicians and other activists rightly condemned what they considered an utter betrayal of European values.

Vivid examples of double standards can also be found in the run-up to EU enlargement. Officially, the admittance of new members is conditional upon an unqualified respect for fundamental rights, as the Copenhagen Criteria make clear. Yet, in 2004 as well as 2007, the EU consciously eroded its own precepts, contenting itself instead with empty promises and paper realities, so as to avoid political feuds and humiliation when the timetables for accession would prove impossible to meet.[34]

When looking at the situation within the Union, certainly the means are available to ensure a high level of protection, with Article 7 TEU figuring as an iconic tool. However, a prevailing sense of comity seems to prevent it from being put into action. The upshot is a tragic spinelessness vis-à-vis countries such as Hungary and Poland, actively eroding the rule of law, but let off the hook for much too long, after repeated threats and warnings.

The EU Courts manage to disappoint with a certain regularity too. Although as indicated above, they have been engaging in judicial review for compliance with fundamental rights for decades now, such review often seems artificially numb, as it still only relatively rarely leads to an annulment of the acts concerned.[35] The ECJ's sudden blocking of the road towards ECHR accession has been equally confounding.[36] Whereas the stressing of autonomy might serve to justify a deviant

[33]See Williams (2004), Fierro (2003), Bulterman (2001). Contrast however the early assessment of Alston and Weiler (1998), who regarded the external human rights policy as much more meaningful than the internal one.

[34]This aspect is discussed further in Chap. 8. For extensive analyses, see Williams (2000) and Kochenov (2008).

[35]But cf. Joined Cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat International Foundation* v *Council and Commission*.

[36]Opinion 2/13, *Accession of the European Union to the European Convention on Human Rights*.

level of protection, the preferences of the Union judiciary cannot easily be glossed over either when non-EU courts reach contrary conclusions in identical cases and see good reason to find for the claimants.[37]

Another criticism levelled at the EHRP concerns the overt bias in regarding western conceptions of fundamental rights as 'the best in the business', which leads to the forms of normative imperialism referred to earlier. While the Union feigns to have embraced a universal model, especially the much-trumpeted social and cultural rights evidence that in reality, an interior and particular standard is being promoted. In the long run, it is uncertain how long such patronising strategies can be upheld when the EU's treaty partners may well choose to explode the linkages and divert their attention to other, less-demanding, non-western countries and organisations.

To add insult to injury, there is ample proof that the Union does not deal with its treaty partners in the same manner, and that some countries are unfairly treated as more equal than others. Quite frequently, such inconsistencies can be explained by overriding commercial interests, which 'necessitate' turning a blind eye to a partner's fundamental rights record. In the past, this has particularly held true for relations with a host of Asian, African and Middle Eastern nations. By consequence, human rights clauses are not invoked as strictly and structurally as one might expect.

Incontestably, the efficacy of any sort of rule is undermined when it is not applied consistently. Moreover, as mentioned in the introduction to this chapter, countries cannot always be expected to subscribe to foreign benchmarks, especially if it entails that seized national courts have to forfeit their jurisdiction to deal with the matter. Both aspects are problematic in the context of the relations between the EU and the wider world. In essence, it amounts to an exercise in hypocrisy when treaty partners are held to account while internally, one is reluctant to let barking be followed by biting, or even abstains from barking at all. Put differently, if fundamental rights are not taken seriously in one's own backyard, one's credibility in the wider neighbourhood is bound to diminish as well. Vice versa, it can then not reasonably be expected either that the Union's treaty partners bow to its authority at every junction, for they too would seem entitled to an own dose of sanctimoniousness. This results in an unfortunate vicious circle, giving cause for embarrassment to all those concerned.

6.5 Conclusion

Disheartening criticisms notwithstanding, there is no denying that fundamental rights in the Union did come a long way. As remarked, in the early beginning, none of the Treaties made any reference to the concept, let alone outline a system

[37] Compare e.g. ECtHR, *Tillack* v *Belgium*, Application No. 20477/05, and Case T-193/04, *Tillack* v *Commission*.

for their protection. The present could not be more different, with the EU finally disposing of its own 'Bill of Rights' in the form of a Fundamental Rights Charter that applies categorically to its institutions, bodies and agencies, as well as to the Member States when implementing Union law.[38] Moreover, should a Union accession to the ECHR be realised after all, an exceedingly high internal level of protection could be established, in stark contrast with the earlier minimalism.

In 2001 already, the Commission signalled its intention to utilise the Charter as a yardstick for external policies as well. Yet, when attempting to deploy it for such less-obvious purposes, its defects should not be overlooked. Although some have qualified the document as the most advanced of its kind, one of its most prominent shortcomings is the absence of the notion of collective or group rights. For sure, through the EIDHR, groups and minorities in third countries can continue to count on generous support, enabling them to strengthen or consolidate their position even in endemically hostile environments. Yet, the EU does not simply suffer from a lack of standards here, for in these cases, no unequivocal standards have been enshrined in primary law at all.

This again goes to show that the Union has to align its internal and external human rights policies more closely, preferably along the lines of the highest common denominator, in order to counter accusations of insincerity. The European External Action Service, once it has fully come of age, might go on to play a pivotal part here.[39] One way or the other, the EU has to become more aware of how it is being perceived as a global actor when it makes a mockery of its own policies, and realise that at the end of the day, good intentions alone do not suffice. In order to stake any credible claim to morality, one needs to act accordingly, speak out against any violations, and make good on every principle or aspiration expressed.

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[38] See Article 51(1) of the Charter.

[39] At the EEAS's inception, focal points were established in all relevant EU delegations, tasked with monitoring and advancing the Union's human rights policy goals. In 2015, a human rights division was created within the Service itself.

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The Development Cooperation and Humanitarian Aid Policy

7

Contents

7.1 Introduction

Adjacent to the external human rights policy of the EU, discussed in the previous chapter, lie its policies on development cooperation and humanitarian aid. As outlined earlier, for the establishment and maintenance of legal linkages with international partners, the observance of a high level of fundamental rights protection represents a crucial requirement, permeating most of the Union's relationships with third countries. The policies discussed in this chapter are prime outlets for setting up detailed schemes and frameworks in which that particular objective of the EHRP can be anchored. This of course serves as a typical 'carrot and stick' mechanism, whereby decent behaviour and civilised standards are encouraged by financial incentives, subjected to stringent qualifications.

From a global perspective, the EU can be seen as *the* major player in the fields of development cooperation and humanitarian aid. Yet, it operates in close collaboration with the Member States here; and most of the projects are launched, and most of the funds provided, in a joint effort. On an annual basis, the EU and its Member States dish out more than half of all assistance provided to countries in need

H. de Waele, *Legal Dynamics of EU External Relations*,
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worldwide. This means that, in combination, they constitute the largest international donor on the planet.[1]

The Treaty regime for cooperation with third countries and humanitarian aid, present in Part V, Title III of the TFEU, is three-pronged: separate rules have been put in place for, respectively, development cooperation *sensu stricto;* for economic, financial and technical cooperation with third countries; and for humanitarian aid. The second of these, the batch of provisions on economic, financial and technical cooperation with third countries, is somewhat uncomfortably sandwiched between the other two. Moreover, at first glance, the distinction between the three may not be readily apparent. All this warrants a more extensive elaboration in this chapter.

For a good understanding, we shall first look into some general aspects, investigating the origin and evolution of the policies, the legal foundations and the institutional framework (Sect. 7.2). At the same time, we will also take stock of some of their most tangible products. We then move on to discuss some of the doubts, questions and challenges currently facing the EU's development cooperation and humanitarian aid policy, especially with regard to a perceived lack of efficacy (Sect. 7.3). This discussion incorporates perspectives from the EU institutions, the Member States and third countries in equal measure.

7.2 General Aspects of the Policies

7.2.1 Origin and Evolution

In the early years of the EEC, development cooperation, financial support and humanitarian aid were largely provided on an ad hoc basis. Any concrete goals and ambitions were included in secondary law, and in international treaties adopted within individual (bilateral or multilateral) partnerships. No specific competences existed, and no coherent policies were drawn up for quite some time. Thus, development cooperation and humanitarian aid essentially started off as 'by-products' of other external policies.[2]

On the one hand, the policies took root and form in and through rules enacted under the Common Commercial Policy. For example, the GSP Regulation, discussed previously, guarantees an increase of export revenue for a number of third countries. Right from the start, this scheme enabled selected beneficiaries of

[1]Together, the EU and its Member States account for roughly 55% of the world's official development assistance. The EU's budget amounted to € 16.3 billion in 2015, which pales in comparison to the $ 32 billion handed out by the US that same year. However, cumulatively, the EU and the Member States allocated funds to the worth of € 69 billion. Furthermore, as a percentage of the gross national income, the EU Member States (both individually and on a combined average) exceed the 0.16 figure of the US by significant margins (see the data and statistics provided by the Development Assistance Committee of the OECD, available on http://www.oecd.org/dac/stats).

[2]Colourful sketches offer Schütze (2013) and Van Elsuwege et al. (2016).

tariff preferences to trade with the EEC countries on more favourable terms.[3] On the other hand, not before long, multiple association relationships came into being, covering a broad array of interests. The first agreements that created a framework for relations between the European Community and the African, Caribbean and Pacific states touched on not only on commercial issues, but also sought to improve the economic and social development of the ACP countries more generally.[4] In both ways, a European development cooperation policy was de facto taking shape, albeit in an unassuming and highly fragmented manner.

Box 7.1 The Post-colonial Legacy of the Early Aid and Assistance Schemes
The early assistance and aid carried a distinct post-colonial signature, in that all beneficiaries formerly found themselves under the tutelage of the EEC countries dispensing the means. Breaking with this past, in 1971, the European Parliament initiated a separate budget line for humanitarian assistance. These funds were made available for all developing countries, including those that had never been colonies of the Member States. Additional instruments were created for inter alia refugees, displaced persons, and emergency food rations. Still, in the next decades, the 'usual suspects' from the ACP group would continue to profit most from these schemes.

Over time, it became ever more questionable to what extent such aims could be pursued in this fashion, and to which limits the existing competences for the advancement of the CCP and association agreements could be taken. Development cooperation, financial and humanitarian aid traditionally belonged to an area of exclusive Member State competence. To be sure, some of the goals could be partially (but not primarily) promoted through supranational means. Nevertheless, the common assumption was that the supranational action could only be supportive, and that for measures with such *predominant* components or objectives, not even a shared legal basis was available on the European plane.

As to be expected, this all-important question eventually arrived at the docket of the Court of Justice. In its Opinion 1/78,[5] the ECJ initially condoned the practice of including rules in CCP measures that sought to promote other interests. In the Court's opinion, the conclusion of commodities agreements within the scope of UNCTAD, which envisaged helping the least-advantaged countries, could definitely fall within the scope of the Common Commercial Policy. On the other hand, despite the fact that the field covered by the agreement resided (at that point in time) within

[3] See Chap. 4, Sect. 4.5. For a critical review of the impact of this approach on the development of third countries, see Dickson (2004).

[4] The Yaoundé and Lomé Conventions, which were adapted in respectively 1963, 1975, 1979 and 1989. Their successor is the Cotonou Agreement, signed on 23 June 2000 in the largest city of Benin. It has been modified in 2005 and 2010, but is to expire in 2020.

[5] Opinion 1/78, *International agreement on natural rubber*.

the exclusive competence of the EEC, the Court ruled that the financing of the schemes concerned stayed within the competence of the Member States, in case the sums were charged directly to their budgets. Thus, notwithstanding the exclusivity of the CCP, to the extent that the participation of the Member States was required, the competence for adopting measures that touched upon development cooperation matters had to be a shared one.[6] This basically meant that in this area, the autonomy of the Member States had to be respected, and that the Community was to be involved in development cooperation issues only to the extent that the measure lay (partially) within the scope of the CCP. In 1994, the Court reiterated the non-exclusive character of the competence, by virtue of which the Member States enjoyed considerable freedom to enter into commitments themselves vis-à-vis third countries, collectively, individually, or together with the Community.[7]

In its *Bangladesh* judgment of 1993, the Court appeared to express even greater reticence with regard to a supranational humanitarian aid competence.[8] In this case, the European Parliament challenged a decision on emergency aid for Bangladesh, claiming that its budgetary prerogatives had been violated. The disputed decision had been taken by the representatives of the Member States meeting in the Council. The ECJ ruled that the measure could not be challenged, as there was no (exclusive) Community competence in the field concerned. In the Court's view, it made no difference that the decision referred to a proposal from the Commission, or that the latter was to administer the aid. Consequently, the Member States retained an autonomous power to adopt decisions in this area, collectively or individually, within the Council or outside it. Although the judgment was equivocal on this, and primary law lent no explicit support to the inference, the *Bangladesh* ruling was ultimately viewed as signalling a shared competence. This reading was confirmed by progressive Treaty amendments, so that the humanitarian aid policy retains that status up to this day.

7.2.2 Legal Foundations and Objectives

As mentioned above, with the entry into force of the Maastricht Treaty (1993), development cooperation received an official place in EU primary law for the very first time. In contrast, humanitarian aid had to wait for an official legal basis until the entry into force of the Treaty of Lisbon (2009).

Meanwhile, with the Treaty of Nice (2003), provisions were inserted to streamline economic, financial and technical cooperation with third countries. This could seem a surprising, strange and superfluous move. Yet, it becomes more easily understandable when one looks at the rationale of these rules: they aimed to create

[6]The pungency of this shared competence, at least vis-à-vis the CFSP, was underlined in Case C-91/05, *Commission* v *Council* (ECOWAS).

[7]Case C-316/91, *Parliament* v *Council* (Lomé IV).

[8]Joined Cases C-181/91 & C-248/91, *Parliament* v *Commission and Council* (Bangladesh).

legal bedrock for forms of cooperation with countries *other* than developing countries. There is therefore, at least on paper, no question of overlap of the latter regime with the rules on development cooperation. In contrast, EU humanitarian aid may be granted in *all* types of situations where that would be helpful—irrespective of whether developing or developed third countries are the beneficiaries.

Nowadays, the three policies are neatly tucked away in separate chapters, contained in Title III, Part V of the TFEU, spanning respectively Articles 208–211, Articles 212–213 and Article 214. Evidently, as with e.g. the EEP and EHRP, all three policies have to be conducted within the overall framework of the principles and objectives of the Union's external action, included in Chapter 1, Title V of the TEU.[9]

As Article 208(1) TFEU spells out, the main objective of EU development cooperation is the reduction of poverty in the world. However praiseworthy this may be, it only qualifies as a short- or medium-term objective; for the same provision states that the wholesale eradication of poverty constitutes the EDCP's long-term goal. In the *Philippines Framework Agreement* case, the ECJ connected this with the European Consensus on Development (a prominent piece of soft law) to underscore that poverty eradication is a multifaceted concept. A successful achievement will require taking into account economic, social and environmental dimensions, within a broader context of sustainability.[10]

Box 7.2 The European Consensus on Development

The European Consensus on Development was produced jointly by the Commission, Parliament and Council in 2005. It quickly established itself as the leading soft law document in the field, committing the Union to building a fairer and more stable world, identifying shared values, principles and commitments that are to be implemented at both the national and the supranational levels. A revamped Consensus was approved in mid-2017, offering a blueprint for aligning the EDCP with the 2030 Sustainability Agenda of the United Nations (in particular the Sustainable Development Goals, which also aim for a wholesale eradication of poverty). It envisages an ambitious collective policy that addresses the Agenda's main orientations in an integrated fashion (the five catchwords being people, planet, prosperity, peace, partnership), placing a keen emphasis on the role of the private sector as a vital link in the chain.

[9]As the second sentence of Article 208 TFEU informs, in all the EU policies likely to affect developing countries, the Union has to take account of the objectives of development cooperation. This closely resembles a 'policy linking clause' (cf. Articles 7–14 TFEU). Article 212 TFEU extends this requirement *expressis verbis* to all forms of economic, financial and technical cooperation with third countries. On balance then, Chapter 1, Title III, Part V TFEU seems the more important, outweighing its sibling Chaps. 2 and 3.

[10]Case C-377/12, *Commission* v *Council* (Philippines Framework Agreement), paragraph 49.

As remarked earlier, alongside the main focus on poverty reduction, the EDCP features secondary targets too. Most importantly, it purports to contribute towards the development and consolidation of democracy and the rule of law, and also serves as an overarching condominium to improve the respect for fundamental rights.

The EU engages in economic, financial and technical cooperation without any grander objective than those principles and aims that govern EU external action in general; at least, this is the only conclusion that can be drawn on the basis of the black-letter text, since the Treaty lists no other goals or ambitions. Generally, the legal basis for this type of cooperation is used for concluding agreements with countries that are prospective EU members.[11]

In contrast, according to Article 214(1) TFEU, EU humanitarian aid operations aim to provide ad hoc assistance, relief and protection for people in third countries that are victims of natural or man-made disasters. The operations undertaken within this sphere attempt to relieve the greatest plight, and as far as possible, address humanitarian needs arising in the wake of unexpected calamities.

7.2.3 Types of Measures

The binding measures on development cooperation, economic, financial and technical cooperation, and humanitarian aid are adopted on the basis of, respectively, Article 209, Article 212(2), and Article 214(3) TFEU. In all these cases, the ordinary legislative procedure applies. Measures can take the form of either multi-annual programmes, programmes with a thematic approach, or targeted (regional) action and support schemes. Examples are the Regulation on food aid,[12] the Regulation on aid for uprooted people,[13] or the Regulation concerning rehabilitation and reconstruction operations.[14] Consonant with Article 214 (5) TFEU, the Parliament and the Council adopted a Regulation to establish the European Voluntary Humanitarian Aid Corps.[15]

As remarked, the policies can also be pursued through bilateral or multilateral international agreements: Articles 209(2), 212(3) and 214(4) TFEU render the EU competent to conclude treaties and conventions with either third states or international organisations. Yet, these provisions also state that all three competences have

[11]Cf. Article 212(8) TFEU. The Partnership and Cooperation Agreements with former USSR states have however also been concluded on this legal basis, as well as the UN Convention against Corruption.

[12]Regulation 1292/96 on food-aid policy and food-aid management and special operations in support of food security, OJ [1996] L 166/1.

[13]Regulation 2130/2001/EC on operations to aid uprooted people in Asian and Latin American countries, OJ [2001] L 248/1.

[14]Regulation 2258/96/EC on rehabilitation and reconstruction operations in developing countries, OJ [1996] L 306/1.

[15]Regulation 375/2014 establishing the European Voluntary Humanitarian Aid Corps, OJ [2014] L 122/1.

to be exercised without prejudice to the competence of the Member States to negotiate and conclude such agreements themselves.

We have just seen how even soft law can acquire significant authority in this domain. Alongside the European Consensus on Development, there has been a European Consensus on Humanitarian Aid since 2008. The latter has equally succeeded in becoming a major reference point, reaffirming the EU's attachment to key principles like humanity, neutrality and independence.[16]

7.2.4 Division of Competence and Necessary Coordination

The aforementioned sections already shed some light on the nature of the policies concerned. The founding Treaties seemed to suggest a supporting or complementary status at most, keeping the Member States in the driving seat. The Court progressed to categorise the powers as concurrent between them and the EC.[17] At present, measures on development cooperation, economic, financial and technical cooperation, as well as those on humanitarian aid, unequivocally reside within a domain of shared competence. True, Articles 208(1), 212(3) and 214(1) TFEU do state that the Union's policies in these fields and those of the Member States are meant to complement and reinforce each other. Yet, they have all been consciously included in Article 4 TFEU, the central provision that lists the areas of shared competence.

As a matter of fact, the nature of the powers is slightly more complex, as we are here stumbling upon 'shared parallel' competences. This entails that, in the fields concerned, the EU may conduct an autonomous policy, which does not prevent the Member States from enacting policies of their own: the respective powers coexist, and are not meant to clash or overlap. As a direct corollary, the occurrence of pre-emption is ruled out. We thus encounter no real rupture with the past here: as indicated above, in its earlier pronouncements, the Court never regarded these policies as anything other than non-exclusive.

At the same time, the fact that the policies are referred to in a separate subparagraph of Article 4 TFEU, instead of the general list of shared competences, may lead some to doubt the correctness of this assertion. Indeed admittedly, the key provisions could have been rather more straightforward, as provisions such as Article 209(2), Article 210 and Article 211 TFEU convey the impression that the competences are merely supporting and supplementary. Perhaps the shared and coexistent nature of the competences was more clearly more visible in the past; Article 181 TEC, for instance, used to stress that the Community and the Member States were to cooperate 'within their respective spheres of competence'.

In any case, one must not be tempted to conclude that, pursuant to the 'parallel' character of the policies, the Member States are free to go at it in whatever way they

[16]European Consensus on Humanitarian Aid, OJ [2008] C 25/1.

[17]See e.g. Case C-316/91, *Parliament* v *Council* (Lomé IV).

please. As discussed, post-Lisbon, the requirements of coherence and consistency crop up abundantly throughout the Treaties, signalling that there are definite limits to the Member States' discretion. Also, all three Chapters of Title III, Title V TFEU presume that only a close coordination between the EU and the Member States ensures that the actions undertaken are truly efficient—and that the European and the national policies in the respective fields are truly reinforcing, instead of overlapping, counteracting, or cancelling out one another.

At the supranational level, next to Articles 3(5), 7 and 21(3) TEU, a self-standing requirement of coherence is visible in Article 208(1) TFEU. It provides that the Union shall take account of the objectives of development cooperation in the policies it implements which are likely to affect developing countries. This obliges the EU to pursue coherence between EDCP and its other policy objectives. We see here a continuation of a requirement that was before the entry into force of the Lisbon Treaty encapsulated in Article 178 TEC.

In order to attune the individual national efforts, the Council regularly provides a fruitful forum for consultation (as evidenced by the *Bangladesh* case), as well as an excellent podium for the crafting of common actions. Furthermore, Articles 210 (2) and 214(6) TFEU enable the Commission to take initiatives to promote a smooth coordination. In reality, the Member States have every reason to stay involved and take note of the EU's schemes and projects: since they supply the Union with the bulk of its financial resources, they (indirectly) finance most of its aid programmes themselves.[18]

In all then, despite the peaceful coexistence of national and the supranational powers, and the closely related idea of reciprocal non-intervention, the Treaties enjoin that a great deal of synchronisation takes place. With an eye to guaranteeing an optimal equilibrium in practice, the division of labour is spelled out in closer detail in a Code of Conduct.[19]

7.2.5 Institutional Embedding

That the Member States retain considerable manoeuvring space in the fields of development cooperation, economic, financial, technical support, as well as humanitarian aid, means that they can decide for themselves through which institutional channels, and in accordance with which administrative formalities, the allocated funds should be distributed. In every EU country, there exists a governmental department or cabinet office dedicated to international financial assistance.[20] The

[18] A glimpse of how Union delegations facilitate joint programming can be found in Estrada-Cañamares (2014).

[19] Conclusions of the Council and Representatives of the Governments of the Member States meeting within the Council, 'EU Code of Conduct on Complementarity and Division of Labour in Development Policy', Brussels, 15 May 2007, Doc. No. 9558/07.

[20] For insight into the linkages set up by local and regional authorities, and the effective channelling of means via decentralised offices, see Bidugaren (2010).

portfolio is normally subjected to parliamentary scrutiny, the expenditure will be charged to the general budget, and the principle means buttressing the policies are derived from tax revenues. Additional funds are collected through NGOs at the national level, which have set up subsidiaries and points of contact in each of the Member States.

At the European level, as said, treaties and conventions can be adopted in the usual manner, in accordance with Article 218 TFEU. Other measures (mostly Regulations and Decisions) are adopted through the ordinary legislative procedure, whereby the Commission submits proposals, the Council decides by QMV,[21] and the consent of a majority of the Members of the Parliament is required.

The expenditure involved with development cooperation, economic, financial and technical support and humanitarian aid is partly charged to the EU budget.[22] The results are annually verified by the Court of Auditors, and the Parliament will have to grant its discharge. As remarked above however, the bulk of the means stems (indirectly) from the Member States, with a lesser part coming from EU's own resources. Another part of the funding comes from the European Investment Bank.[23] These funds are combined and streamlined in the so-called Development Cooperation Instrument (DCI).[24] In addition, there exists a European Development Fund (EDF), which serves as the main vessel for providing financial development assistance to the African, Caribbean and Pacific countries and the overseas countries and territories. Although the EDF is central to the Union's development cooperation policy, it has so far remained external to the EU's general budget. It is financed by the Member States, but subject to its own financial rules, and managed by a specific committee. Alongside the DCI and the EDF, there is the European Humanitarian Aid Instrument (EHAI).[25]

On a day-to-day basis, the EU's development cooperation programmes are implemented and administered by a specific Directorate-General within the Commission. The DG is designated Development and Cooperation—EuropeAid (DEVCO), and functions under the auspices of the Commissioner that has development cooperation in his portfolio.[26]

The full name hiding behind the DEVCO label is quite a mouthful that deserves clarification. Created in 2001, EuropeAid used to be a separate DG (officially the 'EuropeAid Cooperation Office') entrusted with the management of the Union's aid

[21]Yet, unanimity is the rule for concluding agreements on economic, financial and technical cooperation with states that are candidates for accession: see Article 218(8) TFEU.

[22]To the extent that the Member States have not consented to ensure part of the funding directly: compare Article 210 TFEU *in fine*.

[23]Cf. Article 209(3) TFEU.

[24]Regulation 1905/2006 establishing a financing instrument for development cooperation, OJ [2006] L 378/41.

[25]Regulation 1257/96/EC concerning humanitarian aid, OJ [1996] L 163/1.

[26]Tagged 'International Cooperation & Development' in the Juncker Commission. The Directorate-General also holds the ACP dossier, which makes sense since the majority of developing countries is located in Africa, the Caribbean and the Pacific.

programmes, serving to implement the Commission's external aid instruments and ensure coherence, complementarity and coordination. In 2011, the latter purpose was thought to be more easily attainable by merging it with the Development Directorate-General.

DG DEVCO initiates all development policy initiatives, coordinates the political and financial relations with the individual countries, with regional communities (e.g. the African Union, Mercosur) and the OCT.[27] It supervises and manages all the Union's development assistance schemes (i.e. those funded from the general EU budget and the EDF). It should be mentioned however that the actual implementation of development aid takes place through a devolved management system, which amounts to a delegation of tasks to the offices in the respective partner countries, making the latter responsible for the identification, formulation and execution of concrete projects.

In contrast, economic, financial and technical aid is not dispensed through DG DEVCO, but in alternation via either DG Trade or DG European Neighbourhood Policy and Enlargement Negotiations, dependent on the country or region concerned. The tasking of these particular DGs is unsurprising here: after all, as explained above, this policy means to facilitate cooperation with countries *other* than developing countries.

The dispensing of humanitarian aid is assigned to a DG known as ECHO.[28] At present, it is entrusted to a Commissioner with the portfolio 'Humanitarian Aid and Crisis Management'.[29] Through ECHO, the EU deals with situations that call for immediate financial assistance and urgent humanitarian aid. It provides assistance and relief to the victims of natural disasters or armed conflicts, whereby the support is intended to go directly and quickly to those in distress, covering emergency aid, food aid and aid to refugees and displaced persons. The support not only comprises financial means, but may extend to goods and services as well. ECHO is equally concerned with ensuring the protection of citizens in a third country in the event of a major catastrophe or imminent threat thereof; if a stricken country's preparedness for disaster is insufficient for providing an adequate response, ECHO may step in and supply the necessary resources. It interacts with CSDP structures such as the EUMC and EUMS to be able to invoke military assets when necessary. As part of the Union's Civil Protection Mechanism, it operates a special monitoring and information centre.

[27]But only in those areas that have a bearing on the DG's tasks and objectives. For the complete list of OCT, see Annex II to the TFEU.

[28]An acronym of its former name, the 'European Community Humanitarian Aid Office'. DG ECHO is now taken to stand for 'European Civil Protection and Humanitarian Aid Operations'.

[29]Previously, one single Commissioner was entrusted with a portfolio that encompassed development cooperation, humanitarian aid, as well as all other forms of external financial assistance.

Box 7.3 The European Voluntary Humanitarian Aid Corps
The EU offers citizens the opportunity to engage via the Humanitarian Aid Corps, launched in 2014, designed to supplement the efforts of professionals. Under this umbrella, 4000 individuals are to be deployed in the 2016–2020 period to support selected projects, strengthen the (re)building capacities of communities vulnerable to or affected by disaster, and boost their resilience. A simultaneous recruitment of volunteers takes place that are to provide assistance in a remote capacity. An intense European training programme ensures that the participants possess the right skills and prior knowledge before their deployment. The initiative also grants funding to projects submitted by consortia of EU-based and non-EU-based organisations.

In the original proposal for setting up the EU External Action Service, the EEAS was envisaged to also play a part in controlling the various external cooperation programmes. In the final decision that established the Service in 2010, its role has remained limited, with strenuous attempts at transferring the DGs EuropeAid or ECHO leading to naught.[30] Nevertheless, proposals for alterations and amendments to the three policies (also with regard to the DCI and EDF) are prepared jointly by EEAS and the Commission, under the responsibility of the competent Commissioner. This mainly involves identifying the funding priorities.[31] At least with regard to this aspect then, DEVCO and ECHO need to be receptive to possible input from the EEAS. The responsibility for the management of the programmes ultimately does continue to lie with the Commission.

7.3 Criticisms and Challenges

A multitude of factors determines the success of the EU's development cooperation, economic, financial, technical, and humanitarian aid policies. Yet, in scholarly writings, political forums and public debate, repeated doubts have been expressed with regard to the progress and the methods that have been employed so far. If these sceptical voices were to gain the upper hand, they could spur a drive towards a grand overhaul—or wholesale abandonment of the policies.

To begin with, the EU's 'power base' in the fields concerned is fairly weak, with the wisdom of handing the EU a shared parallel competence being questioned on more than one occasion.[32] Notwithstanding the relatively smooth interplay between

[30]Cf. article 9 of Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service, OJ [2010] L 201/30.

[31]Specifically, it involves the shared responsibility of preparing 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.

[32]See e.g. Pusterla and Pusterla (2015).

the national and the European levels, depicted above, calls are frequently made for full repatriation of a competence that was siphoned off to the EU too rashly. Additionally, several countries hold the view that poverty eradication should indeed be structurally pursued at the international level, but that any aid not provided by individual countries themselves should be channelled through the UN, the World Bank or the IMF.[33]

The increasing variations in the level of aid granted present a further cause for alarm. In 2006, the Commission had set targets for aid spending of 0.39% of the GNI. With the intent of catching up with the pledges made in the Millennium Development Goals, this percentage was to shift to 0.56% in 2010, and to 0.70% in 2015. From 2002 to 2010, the ODA figure displayed an upward pattern; after decreases in 2011 and 2012, a positive trend resumed in 2013. However, in 2014 the ratio was still stuck at 0.42%.

Following the inauguration of the Sustainable Development Goals in 2015, the EU and the Member States renewed the pledge to increase their collective ODA, and now agreed to achieve the 0.70% figure within the time frame of the UN's 2030 Agenda. This resembled a kicking of the can down the road (albeit understandable in view of the gaping differences between the Member States, with just four meeting the original objectives and the rest lagging behind). In response, the Commission has considered including non-official, innovative sources of financing (e.g. remittances, foreign investment, technology transfer, private charity organisations). This approach has some potential, but may also serve to cloak a lack of political will. In the face of the persistent foot-dragging of some EU countries, the latter are perhaps better left to pursue their individual preferences.

Apart from the problems of vacillating support for the European competences as such, the effectiveness of Union aid has been questioned as well. The general debate on this issue has raged on incessantly for the past 20 years.[34] Policy-makers agree that it is not just the quantity but also the quality of the aid granted that determines its efficacy. Unfortunately, the relationship between the objectives that donor countries set and the results that are eventually obtained is tenuous and highly unpredictable. Decades of generous support notwithstanding, countless developing countries have made disappointingly little progress. Whereas most donor countries have over the years reconfigured and refined their schemes on numerous occasions, much of the aid continues to be patently ineffective, ending up in the wrong pockets, or turning out to be counterproductive in the mid- or long term. Meanwhile, despite a vibrant community of scholars, and the availability of an impressive, ever-expanding body of research, the key factors that determine success or failure are yet to be unravelled. Until public administration experts and social

[33]The leading donors in the EU in terms of their GNI (Sweden, Denmark and Luxembourg) indeed channel the majority of their aid through the UN (according to the statistics drawn up by the Development Assistance Committee of the OECD; see http://www.oecd.org/dac/stats).

[34]The literature on the topic is voluminous. Some hallmark contributions are Easterly (2006), Calderisi (2006), and Moyo (2008).

scientists manage to draw up a list of all dependent variables, and can indicate which are the most crucial, the malcontents are free to persist in their opposition. Moreover, if national aid already yields so disappointingly little, critics cannot be prevented from also wielding their axe at the root of the EU's competence.[35]

Box 7.4 The (In)efficiencies of EU Humanitarian Aid

EU humanitarian aid has caught similar flak for its (allegedly intrinsic) inefficiencies. While no crisis is exactly the same and situations always differ to some degree, in many respects the actors follows a one-size-fits-all approach here. Worse, at the Union level, there exist no objective, reliable and comparable assessments of what is required in a typical scenario; the general practices proceed from multiple data collections and disparate analyses, leading to inchoate assessments and unhelpful competition between the (scarce) available funds. Civil society organisations, as well as representatives from the Commission itself, have repeatedly called for the construction of common tools to measure whether the aid given truly addresses the needs and has the expected impact.

The EU, together with other developed countries, has often been encouraged to seek refuge in debt relief. Yet, this comes down to 'virtual' aid: essentially, it is nothing more than a transfer of financial resources from the ministry of development in the donor country to the treasury of the receiving country. For the latter, the donation does free up resources, but one cannot be certain where these end up—and excess spending or other malpractices could soon resume. Moreover, even if this strategy were to present the best way forward, for engaging in debt relief the Member States do not necessarily need the EU.

Lastly, official statistics point out that, even though poverty reduction or eradication is the Union's official aim, a lot of its support does not go to low-income countries but to middle-income countries. To add insult to injury, individual Member States actually favour those countries that are geographically closest to the EU.[36] Basically then, at present, only a small part of the allocated funds are spent on those that need it the most, dealing a death blow to the credibility of the whole business.

The EU, in sum, faces some tremendous challenges, as its competences in the areas concerned meet with relatively little acclaim. Over the coming years, the Union will have to demonstrate that it is truly driven by results, and not merely a

[35]In this respect, the emphasis in the European Consensus on Development of 2005 that developing countries are mainly responsible for their own development could be qualified as a first sign of retreat.

[36]The top three net recipients of bilateral development aid are Turkey, Morocco and Serbia (see the official figures of the Development Assistance Committee of the OECD, available at http://www.oecd.org/dac/stats).

'bodybuilder'.[37] Effective implementation and coordination of European aid on the ground remains pivotal to convince the sceptics, among which several Member States, of its added value. The incentives for making the plans work are alas less strong, since those who craft and implement the policies are not in one and the same political entity as those who profit from the latter (the recipients of the funds do not live and vote in the EU). At the same time, a Union that fails to achieve its objectives here, coupled with the limited successes of individual Member States, attracts an even greater amount of criticism from its citizens.

7.4 Conclusion

Due to their special nature as shared parallel competences, the Union's policies in the field of development, economic, financial and technical cooperation and humanitarian aid lie in the periphery of its middle layer. This periphery is close to the 'hard core', made up of the Member States themselves, and the domains that are still predominantly within national competence.

The powers of the EU in development cooperation and humanitarian aid stand in marked contrast to those in the overarching frameworks of the CFSP and CCP, which can be regarded as main vehicles of EU external action. In fact, even today, development cooperation and humanitarian aid aspects can be part and parcel of CFSP and CCP measures, at least to the extent that a symbiosis is attainable. From an abstract perspective, outright conflicts between these policies might seem inevitable: after all, through the CCP, trade relations are maintained, streamlined and improved. The reduction or eradication of poverty is, however, not an objective of the CCP, whereas the contrary is true as regards the EU policy on development cooperation. Thus, despite the behest of alignment contained in Article 21 TEU, the primary objectives of the two appear to be at odds with one another.[38] Since the CCP is the exclusive and more encompassing policy, the inhabitants of third countries who do not participate in the trade chain are potentially put in jeopardy; if this legal basis is selected, they are in any case not the main focus or the most favoured, since other interests have been singled out as more important. Consequently, a right balance needs to be struck every time.[39] In the post-Lisbon era, this also flows from the overriding requirement of consistency, and the need to observe all external action goals in close harmony. Nevertheless, the current law does offer a viable template on which basis the proper choices can be made.[40]

[37] In the sense that its visible strengths—being the biggest donor and having its own institutional machinery to conduct policy—are the priority, and that efficacy aspects are only secondary.

[38] From an institutional perspective, an associated problem could be the overly powerful position of DG Trade, which regularly outflanks the other Commission Directorates.

[39] Cf. Case C-91/05, *Commission* v *Council* (ECOWAS).

[40] Similarly Broberg and Holdgaard (2014).

As far as the actual output of the policies is concerned, the figures are not entirely bleak. The vaunted picture remains that of the EU and its Member States making up the largest international donor on the planet. Moreover, their good intentions stand beyond doubt, for the EU has in the past acted decisively to alleviate deteriorating humanitarian situations, and responded swiftly to numerous major disasters. Also, it has managed to mitigate the costs of prolonged crises situations on multiple occasions and various different continents. When the asylum crisis spiked, it went so far as to extend emergency assistance to refugees inside and outside the Union. There is, however, definitely scope for improvement. Better coordination of EU efforts between the Member States and the Commission looks feasible and desirable, and further steps are needed to ensure the donors' long-term commitment. Aid budgets are under increasing pressure across the Union, which creates a double quandary—first, to ensure the efficient use of limited resources, and second, to secure adequate funding for growing humanitarian needs. Reaching these objectives would allow the Commission and the Member States to keep their promise of solidarity, and fulfil their responsibility to those in need. Yet, at a time when the morality of providing assistance has never been more evident, and the gap between the haves and the have-nots widens disconcertingly, the effectiveness of the sums disbursed has never been more questioned. This feeds into the daunting challenge facing the EU, possibly more formidable than those facing any other global actor: to enhance its legitimacy both 'at home' and 'abroad'.

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Part III

Legal Dynamics of the Inner Layer

Special Relationships in the European Neighbourhood and Beyond

8

Contents

8.1 Introduction

The majority of the rules governing the special relationships with third countries reside in the innermost sphere of the layered global player. They manifest themselves at the conclusion of association agreements, at the establishment of more comprehensive frameworks such as the European Neighbourhood Policy, and in the ongoing process of EU enlargement. In the fields concerned, the Member States are, to a large extent, free to act in an autonomous capacity; while the EU does have some role to play here *qualitate qua*, this does not forestall the exercise of their sovereign prerogatives. Notwithstanding the fact that the Union is tasked with the adoption of certain specific rules, and that it formulates and implements

H. de Waele, *Legal Dynamics of EU External Relations*,
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overarching policies, here more than anywhere else, it are actually the Member States calling the shots. When they undertake to rubber stamp concerted actions in an EU setting, this usually amounts to the approval of measures already voluntarily agreed upon before. At the end of the day, the creation of special linkages with a particular third country or group of countries, the severance of any existing ties, or the invitation of new countries to accede are all dependent on discretionary choices of the Member States.[1] For these reasons, the rules that govern the special relationships with the countries surrounding the Union belong to the EU's 'hard core'. In contrast, the Member States are enveloped and tied down much more definitively by the other external EU policies, as described in the previous chapters.

In the sections that follow, we first devote attention to the theory and practice of association agreements (Sect. 8.2), highlighting their legal basis, the procedure for concluding them, the institutional apparatus, and the effect of the rules laid down. Next, we take a look at a number of more comprehensive frameworks for entertaining relations with groups of third countries (Sect. 8.3), scrutinising in subsequent order the European Neighbourhood Policy, the Union for the Mediterranean and the Eastern Partnership. Finally, the topic of EU accession is brought to the fore (Sect. 8.5), with an analysis of the relevant criteria, a discussion of the applicable procedure, and some reflections on the contradictory positions that have been—and still are—taken with regard to the eligibility for membership.

8.2 Association Agreements

8.2.1 Legal Basis and Definition

As observed before, third countries or international organisations may be granted all sorts of favours or privileges, either through EU secondary law (e.g. the GSP Regulation), or through an international treaty or convention based on Article 216 TFEU. By law, the EU is not *obliged* to offer such favours or privileges to any particular state or region (apart from the possible kicking in of the MFN clause under international trade rules). Conversely, as the ECJ has asserted, under the Treaties there exists no general principle either that obliges the Union to accord equal treatment to third countries in each and every respect.[2]

If the Union prefers to draw a third country, group of countries or international organisation even closer, Article 218 TFEU allows for the creation of a special arrangement in the form of an association agreement. In the post-Lisbon era, there is also Article 8 TEU, which proffers an additional legal basis for associations with

[1] As will be outlined below, during the (pre-)accession process, the Commission functions essentially in an advisory capacity when negotiating with third countries, monitoring developments and drawing up and submitting progress reports. The restraint expressed by the Court is exemplified by Case 93/78, *Mattheus* v *Doego*.

[2] See e.g. Case 55/75, *Balkan-Import Export GmbH* v *Hauptzollamt Berlin-Packhof*, paragraph 14.

the countries located in the Union's direct neighbourhood, even *demanding* that such relationships are set up. Neither provision, however, defines what an association actually is, and both are unhelpfully vague as regards the content of the agreement. Associations are said to involve 'reciprocal rights and obligations', the 'possibility of undertaking activities jointly', 'common action' and 'special procedure'. Of course, this absence of a strict definition brings considerable freedom and allows for a great variety in structure, composition and substance. The Court of Justice has only been a tiny bit more outspoken when it pronounced that 'an association agreement creates special, privileged links with non-member country which must, at least to a certain extent, take part in the Community system'.[3]

By now, it will already have become clear that the underlying idea of an association is to establish a more intense nexus between the EU and the country or organisation concerned. Inter alia, this will entail structural access to the internal market and other resources of the Union under (more) favourable conditions than before, and but also the joint shouldering of burdens, and the resolution of difficulties in good faith (i.e. without resorting to classic countermeasures, retorsions or reprisals). Another recurring feature of association relationships is that nowadays they are all predicated on human rights conditionality.

8.2.2 Creation

Association relationships are created through the conclusion of an association agreement. To be lawful, this conclusion has to take place in accordance with the procedure of Article 218 TFEU, which was extensively discussed earlier.[4] For the present purposes, we need to take special note of Article 218(2) TFEU, which spells out that in a number of cases, the Council may adopt the decision concluding an agreement only after having obtained the consent of (a majority of the members of) the European Parliament. One of these cases is, following section (2)(a)(i), the setting up of an association agreement. This ensures that the arrangement can stake a claim to democratic legitimacy, at least from the side of the EU.[5]

A second point to note concerns the voting modalities in the Council. Whereas the first sentence of Article 218(8) TFEU states that ordinarily, the Council acts by QMV at every step of the procedure for concluding an international agreement, the second sentence spells out the exceptions to that rule. One of these exceptions pertains to association agreements, stipulating that, for the successful adoption of those types of treaties, the representatives of the Member States have to act by unanimity throughout. Again, this strengthens the legitimacy of the arrangement, ensuring that no Member State will be bound to participate in a special relationship

[3] Case 12/86, *Demirel* v *Stadt Schwäbisch Gmünd*, paragraph 9.

[4] See Chap. 1, Sect. 1.5.

[5] After all, the consent of a democratically elected, representative organ of the other contracting party or parties will not always be guaranteed.

against its will; if it opposes the scheme, it may simply vote against, and a single veto will mean that the proposed arrangement cannot be (lawfully) carried through.

A final thing to keep in mind is that association agreements usually cover policy fields in which the Member States have transferred at least some of their competences to the supranational plane. Thus, they are almost always concluded as a mixed agreement.[6] For the procedure of Article 218 TFEU, this means that, after the signing, once the Parliament has consented and the representatives of the Member States in the Council have concluded the envisaged agreement, it will have to be subjected to ratification in all the countries of the EU. It will only officially enter into force once it has been ratified by every state in accordance with the applicable domestic constitutional requirements.[7] Although once again one may say that this bolsters the level of support for the arrangement in question, it does carry the risk that the whole deal is derailed all too easily: a single *accident de parcours* in any of the Member States (e.g. a negative outcome of a popular referendum) suffices.

8.2.3 Institutional Make-Up

Whenever the decision has been made to engage in an association relationship, a specific institutional framework is established. The exact details will be laid down in the agreement concluded. Although the actual design may vary, depending on where the preferences lie in the particular case (and accordingly, on what has been put on paper), the associations that have been established so far display a number of common features.

Firstly, there usually is an organ known as the 'association council', a joint body composed of representatives of the Council and the Commission on the one hand, and representatives of the government of the third country on the other.[8] The association council will take decisions that further implement the (terms of the) association agreement. It always proceeds by unanimity.

Next, there ordinarily exists an 'association committee', which is entrusted with the daily administration, and to which preparatory and executive powers may be delegated by either the association council or the terms of the agreement.[9] The association committee is normally made up of representatives of the parties at senior civil servant level.

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[6]Even when this is not legally necessary, Member States often decide for political reasons that an association treaty will be a mixed agreement. In so doing, they are able to 'stay in the picture' more emphatically.

[7]Albeit that Article 218(5) TFEU allows for provisional application of a treaty, but where it concerns association agreements this is not a fixed practice. Provisional application can be terminated by a party to the agreement without further notice and without giving reasons (Article 25(2) VCLT). This renders it a weak position to be in for too many years.

[8]Or of the governing body of the international organisation.

[9]Sub-committees may be designated where useful.

Box 8.1 Association Agreements – What's in a Name?
While countless treaties are already by their official name identifiable as setting up an association, a number of alternative terms and labels have been used as well, most prominently 'partnership', 'cooperation', or 'stabilisation' agreements. Ultimately, all that matters for the proper Union law qualification is adoption on the basis of Article 217 TFEU. The name of the organs that are established may vary accordingly, depending on the designation chosen for the relationship. If the official name of the treaty is for instance a 'partnership and cooperation agreement', it will have a 'partnership and cooperation council', as well as a 'partnership and cooperation committee'.

Most associations also set up an advisory parliamentary body. This body consists of MEPs on the one hand, and members of the parliament of the associated country on the other.[10] It is kept informed, may request relevant information, and make recommendations to the association council.

A modern innovation are platforms that enable regular meetings of civil society organisations.[11] These may offer recommendations to the association council and may be consulted by the association committee and the parliamentary body.

As a rule, no separate judicial body is created. In case of a dispute between the contracting parties on the interpretation or application of the agreement, or on any decisions adopted on the basis of the agreement, traditionally the association council functions as the central mediator, and will attempt to resolve the issue. Increasingly, however, for differences of opinion *inter partes*, resort is taken to special arbitration mechanisms.[12] If disputes on the interpretation or application of the association agreement arise instead before a national court within an EU Member State, the latter may initiate a preliminary reference to the European Court of Justice in accordance with Article 267 TFEU.[13]

8.2.4 Legal Effect

Once they are formally concluded, association agreements find themselves incorporated into EU law and the law of the Member States. The ECJ views them

[10]Or of the representative body (if any) of the international organisation.

[11]On the EU side, the platform can consist of members of the European Economic and Social Committee.

[12]Cf. Semertzi (2014).

[13]See Case 181/73, *Haegeman* v *Belgium*. This also includes referring questions on the interpretation, application or validity of any decisions adopted by the association council; see Case C-192/89, *Sevince* v *Staatssecretaris van Justitie*.

as acts of the institutions that form an integral part of the European legal system.[14] Consequently, they can be the subject of litigation at the EU Courts, and as remarked, national judges are also competent to refer any related preliminary questions.

In addition, the ECJ has held that provisions in association agreements may be directly effective, which means that they may be invoked and relied upon in any disputes in the courts of the Member States. The Court employs fairly 'modern' criteria for this: a provision is capable of enjoying such direct effect if, with regard to its wording and the purpose and nature of the agreement itself, it contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[15]

The decisions of association councils may be directly effective in Member State courts as well. According to the ECJ, for determining whether the provisions of such a decision enjoy direct effect, the same criteria apply as for the determination of the direct effect of provisions of the underlying agreements.[16]

Nevertheless, in the grant of direct effect to association agreements, the ECJ is known to vacillate and sometimes contradict itself, by awarding it to provisions of one type of association agreement, and denying it to provisions of another, even if their wording is highly similar.[17] The Court professes to take into account the overall purpose and nature of the agreement in question, but therewith, it basically feigns consistency, and in practice gives itself a free hand. This has led to rather dubious outcomes in more than one case.[18]

The effect of an association agreement in the legal order of the third country concerned will depend on the relevant national constitutional rules. Naturally, in a monist system, provisions from the agreement can be enforced more stringently than in a dualist system. This may influence the decision of the ECJ, especially when an award of direct effect within the EU legal order may lead to an unbalanced, asymmetrical outcome, and produce significant economic or political disadvantages.[19] Conversely, when an association is set up with more than one

[14]See Case 181/73, *Haegeman* v *Belgium*.

[15]See e.g. Case 12/86, *Demirel* v *Stadt Schwäbisch Gmünd*; Case C-63/99, *The Queen v Secretary of State for the Home Department, ex parte Gloszczuk*; Case C-171/01, *Birlikte* v *Wählergruppe Gemeinsam*; Case C-265/03, *Simutenkov* v *Ministerio de Educación y Cultura and Real Federación Española de Fútbol*.

[16]See Case 30/88, *Greece* v *Commission*; Case C-192/89, *Sevince* v *Staatssecretaris van Justitie*; Case C-188/91, *Deutsche Shell AG* v *Hauptzollamt Hamburg*.

[17]Contrast e.g. the outcome in Case 270/80, *Polydor Limited and RSO Records Inc*. v *Harlequin Records Shops Limited and Simons Records Limited* with that of Case 104/81, *Hauptzollamt Mainz* v *C.A. Kupferberg & Cie KG*.

[18]Compare the cases mentioned in the previous footnote with Joined Cases 41-44/70, *NV International Fruit Company and others* v *Commission* and Case C-149/96, *Portugal* v *Council* (discussed in Chap. 4).

[19]Which has so far served as a main motive for the denial of direct effect in the GATT/WTO case law.

third country (i.e. a multilateral framework), it is possible that the rules of the agreement enjoy an unequal status across the partner states; in some of them, it may be more easily enforceable than in others, due to the former being monist while the latter are dualist.

8.2.5 Functioning Associations: A Sample

In 1963, Greece and Turkey were the first two countries to be singled out for special treatment, when the EEC decided to use its competence to engage in association relationships for the very first time. Since then, agreements have been concluded with a great number of states across the globe.

On the European continent, association agreements have figured as a crucial first step towards EU membership, e.g., in the cases of Portugal and Spain in the 1980s. In the 1990s, the so-called Europe Agreements went a long way in preparing the Central and Eastern European countries for accession. With three of the four countries participating in the European Free Trade Association (Norway, Liechtenstein and Iceland), a special association framework has been created in the form of the European Economic Area agreement.[20]

Further away, partnership and cooperation agreements have been agreed with most of the former Soviet republics (e.g. Kazakhstan, Azerbaijan, Kyrgyzstan). There are newly updated versions of these accords (e.g., with Moldova, Georgia and Ukraine) that lay the groundwork for a deep and comprehensive free trade area.

In North Africa and the Middle East, associations have been established with most of the Maghreb and Mashreq countries, the Palestinian authority and Israel. Currently, the EU is also in an association with 79 African, Caribbean and Pacific states in the form of the Cotonou Agreement.[21]

Framework cooperation agreements have been concluded with Mercosur and the Andean Community in South America, and in Asia with ASEAN. There are trade and economic cooperation agreements with, inter alia Macao and Mongolia, and cooperation agreements on partnership and development with India and Sri Lanka.

The foregoing is merely a brief sample, and by no means provides an exhaustive overview. The illustrations serve to indicate what is out there, showcasing the huge variety of functioning association relationships.

As regards their substantive content, all the above agreements simplify access to the EU market for the goods that come from the third countries. This usually occurs in the form of tariff reductions, abolition of fiscal discrimination, or award of MFN status. The agreements also commit the contracting parties to economic

[20]The EEA has an unusual institutional make-up, different to what has been described in Sect. 8.2.4, starring e.g. the EFTA Surveillance Authority instead of an AA committee. Switzerland participates in the EFTA but not in the European Economic Area; at present, the EU entertains a web of bilateral accords with that country, which provide for a high degree of cooperation.

[21]In force since 2003; historically preceded by the Conventions of Yaoundé (1963) and Lomé (1975).

cooperation. As said however, there is virtually no limit to what can be stipulated in AAs. For example, the agreements with Russia and Turkey have led to increased equal treatment between workers from those countries and nationals of EU Member States.[22]

8.3 Comprehensive Frameworks

In the past years, the European Commission has endeavoured to create several comprehensive frameworks through which the various association relations may be ordered and streamlined. Among these are the European Neighbourhood Policy, the Union for the Mediterranean and the Eastern Partnership. These initiatives have received the principal go-ahead and substantial political backing from the Member States. At the same time, the precise legal status of the schemes, as well as their interrelation, remains rather fuzzy.

8.3.1 The European Neighbourhood Policy

As remarked earlier, Article 8 TEU contains specific instructions with regard to the countries neighbouring the EU, and actually orders the creation of a comprehensive framework. According to this provision, the central aim should be the establishment of an area of prosperity and good neighbourliness, founded on the values of the EU, characterised by close and peaceful relations based on cooperation. To that end, the second section mandates the Union to conclude specific agreements with the countries concerned. The implementation of those agreements must be subjected to periodic consultations.

In fact, the European Neighbourhood Policy has already been up and running since 2004, pursuant to a Commission strategy paper.[23] It was launched on the eve of the 'big bang' enlargement of the Union with 10 Member States, as a sort of follow-up, with the aim of avoiding the emergence of new dividing lines between the enlarged EU and its new neighbours.[24] Simultaneously however, it created an opaque twilight zone for third countries hovering between association and accession.

The ENP focuses on the 16 closest neighbours of the Union, namely Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya,

[22] See e.g. Case C-265/03, *Simutenkov* v *Ministerio de Educación y Cultura and Real Federación Española de Fútbol*; Case C-242/06, *Minister voor Vreemdelingenzaken en Integratie* v *Sahin*.

[23] *Communication from the Commission: European Neighbourhood Policy Strategy Paper*, COM (2004) 373 final. In embryonic form, it was already outlined in the *Communication from the Commission: Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM(2003) 104 final.

[24] A detailed analysis of its origin and development offers Cremona (2008).

Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine.[25] The first ENP strategy paper set out in concrete terms how the EU thought to collaborate more closely with these countries. The ENP builds upon the existing agreements between the EU and the partners in question, whereby selected neighbours are singled out for deeper economic integration and political association with the EU.

As indicated earlier, the Member States call the shots in this domain, so that in general the Union's institutions are expected to kowtow to their bidding. By consequence, the ENP operates mainly through soft law.[26]

The central vehicles of the ENP are the action plans between the EU and each ENP partner. These set out an agenda of political and economic reform, with short- and medium-term goals. The plans do not seek to replace the existing association agreements. Rather, they identify key actions in a limited number of fields that need to be addressed with high priority, and also set up a time horizon for addressing them. The action plans are decided upon by the association council, with the association committees monitoring the implementation. Where necessary, existing AAs may be revised and amended accordingly. Since 2009, the task of overseeing the development of the ENP has been included in the portfolio of a Commission member. Regular thematic reports are published that track cross-cutting developments in the neighbourhood, e.g. on fundamental rights and gender equality.

Box 8.2 Being Included in the ENP: *Quo Vadis*?

The ENP policy documents leave participating countries that aspire to join the EU between hope and fear. The Commission has proclaimed that the ENP is not an enlargement policy, and that it does not automatically open up the prospect of Union membership. At the same time, being included in the ENP does not prejudice the prospects of those countries either. At some point in the future, they might wish to apply, whereby that application cannot be dismissed out of hand simply because of their status as an ENP partner. Of course, within the parameters of law and reason, other impediments can be legitimately brought to the fore—so whether the applications of such countries will eventually turn out successful is another thing entirely.

Following strategic reviews in 2011 and in 2015, the ENP's overall objectives were brought in novel focus, with stabilisation, strengthening of democracy and the rule of law rising in prominence. Moving away from a 'one size fits all' approach, differentiation between partners also became a main leitmotiv. Initially, the level of ambition of the relationships was made dependent on the extent to which EU values

[25] In the absence of concrete action plans, the ENP has not become fully operational yet with regard to Algeria, Belarus, Libya and Syria.

[26] A choice that is further queried in Van Vooren (2009).

are shared with the specific neighbour.[27] That normative language has now been heavily toned down, the emphasis shifting to the partner's genuine potential and willingness to adapt and reform.

In 2007, the ENP was equipped with special financial means, an asset renamed to European Neighbourhood Instrument (ENI) in 2014.[28] The ENI is managed by the Commission, funded via the EU's budget and the European Investment Bank.

8.3.2 The Union for the Mediterranean

Although a number of Mediterranean, African and Middle Eastern countries have been included in the European Neighbourhood Policy arrangement, to complicate matters a comprehensive framework for the Mediterranean region was put in place as long ago as 1995. In that year, the so-called Barcelona Process was launched, in which all existing cooperation agreements were transformed into newly styled 'Euromed Agreements' (EMAs). These EMAs covered much more ground than their predecessors, sporting robust human rights clauses, providing for a free trade area in industrial goods, liberalising trade in agricultural goods, services and capital. Periodic Euromed conferences were convened, whereby government representatives would meet and discuss topical affairs and dossiers. With greater frequency, sectoral meetings were staged, whereby resident experts and civil society organisations could exchange views and intensify their contacts. The grand objective of the Barcelona Process was the establishment of a free trade area between the EU and all the Euromed countries. Yet, the advancement towards that goal proved extremely sluggish.

In 2008, the French EU Presidency launched the idea to refurbish the franchise and rebrand it into a 'Union for the Mediterranean'. As the original setup of the UfM amounted to the creation of a separate entity that partially overlapped with traditional EU competences and policies, the French proposal met with heavy resistance from both the Member States and the Commission. Unsurprisingly, the plans were watered down quickly. By consequence, the UfM that was launched at the end of 2008 represented a more modest improvement upon the Barcelona Process, not an abandonment or wholesale reconfiguration.[29] While the periodic Euromed meetings continued as before, the idea was to beef up the level of cooperation, and accelerate the march towards a free trade area.

Ideally, the work of the UfM is driven forward through concrete initiatives. Six priority areas for cooperation have been identified, namely business development,

[27]For critical and empirical investigations of this approach, see Ghazaryan (2014) and Poli (2016).

[28]Respectively Regulation 638/2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, OJ [2006] L 310/1, and Regulation 232/2014 establishing a European Neighbourhood Instrument, OJ [2014] L 77/27.

[29]See the *Communication from the Commission: Barcelona Process – Union for the Mediterranean*, COM(2008) 319 final, as well as the approving *Joint Declaration of the Paris Summit for the Mediterranean*, Paris, 13 July 2008.

social and civil affairs, higher education and research, transport and urban development, waste and environment, and energy and climate action. Over 40 projects received the label of UfM support so far, covering actions for the de-pollution of surface waters, establishment and renovation of maritime and land highways, as well as various programmes for the empowerment of women.

Presently, the UfM comprises over 40 countries. Alongside the EU Member States, these are Albania, Algeria, Bosnia and Herzegovina, Egypt, Israel, Jordan, Lebanon, Mauritania, Monaco, Montenegro, Morocco, Palestine, Syria, Tunisia and Turkey.[30] The UfM secretariat, located in Barcelona, has been entrusted with ensuring continuity. Senior officials meet several times a year at the Secretariat or in one of the partner countries. At ministerial level, sectoral gatherings take place at regular intervals. The proceedings are monitored and guided by the EEAS, as part of the portfolio 'Middle East & North Africa'.

Despite the UfM's broad-ranching objectives, and the renewed enthusiasm for continuing the Barcelona Process, the first signs of stagnation already came to the fore shortly after its inception. While the Union's success depends on the goodwill of all contracting parties, the organisation has been bogged down by controversies from the very beginning. Countries engaged in public jostling while attempting to align their positions, summits were cancelled due to acrimonious Arab–Israeli disagreements, and at the astounding upheavals in North Africa and the Middle East in the early 2010s, the UfM was nowhere to be seen, failing in its function as an agora for negotiation or debate. That at roughly the same time, the first two secretaries-general resigned in quick succession did not aid the cause much either.

One may wonder indeed whether the respective UfM partners have sufficient interests in common, and whether they are truly willing to work together, structurally and peacefully, in the pursuit of those interests.[31] The progress of the past years has been underwhelming, conveying the impression of an organisation that struggles to make a mark. Experiences so far lead one to suspect that the project that was originally overloaded with ambition performs disappointingly in its current shape—with tailor-made approaches likely to be more productive in the long run.

8.3.3 The Eastern Partnership

As described, the ENP encompasses on the one hand third countries that are also involved in the UfM. To complicate matters further still, the ENP involves on the other hand countries that take part in the 'Eastern Partnership' (EaP) arrangement.

[30] Libya is an observer; the Arab League holds an associated status.

[31] Two dossiers are bound to keep sowing discord: the Western Sahara conflict and the Middle East peace process.

Whereas the UfM is an exercise in looking south, the EaP, as its name suggests, is all about looking east. The Eastern Partnership is geared towards Armenia, Azerbaijan, Georgia, Moldova, Ukraine and Belarus. It was chiefly born out of the need to lend these countries a helping hand economically and financially, to provide clarity as regards their accession perspectives, and to alleviate military and political tensions.[32]

On the basis of a proposal drawn up by the Commission, the Eastern Partnership was officially launched in mid-2009.[33] The overall goal of the EaP is declared to be the promotion of stability, better governance and economic development on the eastern borders of the EU. Similar to the Barcelona Process, the approach of the EaP is to revamp, update and modernise the existing AAs, most of which were signed and concluded in the 1990s. Strikingly, none of the EaP documents issued so far have addressed *expressis verbis* the issue of possible EU accession.

Unlike the UfM, the EaP does not set up an own institutional apparatus; it functions predominantly as an overarching policy framework. Nevertheless, panels have been set up for promoting and monitoring progress, and periodic meetings take place at governmental level. Hereby four priorities have been identified: (1) economic development and market opportunities; (2) strengthening institutions and good governance; (3) connectivity, energy efficiency, environment and climate change; (4) mobility and people-to-people contacts. A comprehensive programme for improving the quality of society and public governance forms part of the EaP. For obvious reasons, migration, security and border management issues also sit high on the agenda. The necessary funds are made available through (supplements to) the European Neighbourhood Instrument.

Like the ENP and the UfM, political turmoil has had a marked impact on the evolution of the EaP. The Vilnius Summit of November 2013 marked the beginning of a crisis era, caused by external destabilisation efforts. The enhanced association agreements proposed by the EU, foreseeing the creation of a deep and comprehensive free trade area, led to a rift. Ukraine, Moldova and Georgia were happy to accept, while Azerbaijan held back. Armenia elected to join the customs union set up by Russia instead (of which Belarus was already a member), but signed up to an Enhanced and Comprehensive Partnership Agreement later. Simultaneously, Moldova opted for an observer status at the Russian-led customs union. This curious sequence of events placed dents in the viability of the EaP as such, arguably underscoring the need to develop individual approaches towards each of the partners.[34]

[32]Especially the military and political strife on the Caucasus in the late 2000s brought a sense of urgency to the setting-up of a new comprehensive arrangement. On its origins and intentions, see also Korosteleva (2011).

[33]See *Communication from the Commission: Eastern Partnership*, COM(2008) 823 final, as approved in the *Joint Declaration of the Prague Eastern Partnership Summit*, Prague, 7 May 2009.

[34]Cf. Nielsen and Vilson (2014).

8.4 Accession to the EU

8.4.1 The General Requirements

Those countries in special relationships that have the right vocation may eventually end up as full-blown EU Members. While in theory, the process of EU enlargement can go on endlessly, as the Treaties do not specify a maximum number of Member States, the prospects of accession are only truly realistic for those countries that qualify for it under Article 49 TEU. Unfortunately, this vital provision is not generous in details.

The common view is that Article 49 TEU lays down a 'political criterion' and a 'general policy criterion'. The 'political criterion' relates to the words 'any European state': countries that are non-European are thus manifestly ineligible for membership. It is open to debate however whether the adjective 'European' should here be taken in a (limited) geographical sense or in a (potentially broader) cultural sense.[35]

The 'general policy criterion' refers to the phrase that the state wishing to accede has to respect the values listed in Article 2 TEU, i.e. respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. The country concerned must also be committed to promoting these values. In the so-called Copenhagen Criteria, the general requirements for being admitted to the EU have been worked out further.[36]

8.4.2 The Copenhagen Criteria

The Treaties originally made no mention of any more specific conditions, but after the fall of the Berlin Wall, at the prospect of numerous Central and Eastern European countries acceding in due time, a need arose for a more extensive elaboration. In response, in June 1993, the (then 12) Member States outlined the criteria for joining the EU in greater detail at the European Council Summit in the capital of Denmark, after which city they have taken their name.[37]

[35]The Commission has not brought much clarity by proclaiming that geographic, historic as well as cultural elements are of relevance: see the report *Europe and the Challenge of Enlargement*, Bull. EC [1993] Supplement 3.

[36]Covertly referred to in Article 49 TEU as "the conditions of eligibility agreed upon by the European Council".

[37]Presidency Conclusions, Copenhagen European Council, 21–22 June 1993, paragraph 7.

Box 8.3 The Official Copenhagen Criteria
The official Copenhagen Criteria, rehearsed on countless occasions by the European Council since their debut in 1993, are threefold: to qualify for EU membership, a candidate country must, firstly, have achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; secondly, the candidate country should dispose of a functioning market economy, the capacity to cope with competitive pressure and market forces within the Union; thirdly, the candidate country must have the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union (with the exact moment of accession to the EMU kept in abeyance, left to be decided at a later date—the single currency, in other words, does not need to be introduced upon entry).

Essentially, the Copenhagen Criteria require that any country bent on acceding to the EU possesses the necessary institutions to preserve democratic governance and protect fundamental rights, that it has a market economy operating within normal parameters, and that it understands and accepts all of the Union's obligations and aspirations.[38] The Madrid European Council of December 1995 added that EU membership also requires that the candidate country must have created the conditions for its integration in the Union through the adjustment of its administrative structures.[39] It was also stressed that, while it is imperative that European legislation is transposed into national legislation, it is even more important that the legislation is implemented effectively, i.e. through appropriate administrative and judicial structures. Finally, the Helsinki European Council of December 1999 added a requirement of 'good neighbourliness', emphasising that the prospective Member State should take every care to resolve any outstanding disputes or conflicts relating to its borders with other countries.[40]

8.4.3 The Accession Procedure

If a European country has applied for membership and is deemed to meet the first of the Copenhagen criteria, it is normally granted official candidate status.[41] This is an

[38]The requirements are worked out further in the Commission Report *Agenda 2000: For a Stronger and Wider Union*, Bull. EU [1997] Supplement 5, encompassing inter alia a modern constitution guaranteeing basic democratic rights, independent judicial and constitutional authorities, respect for human rights, protection of the rights of minorities, and a liberalised market governed by supply and demand, with no barriers to exit or entry.

[39]*Presidency Conclusions, Madrid European Council,* 15-16 December 1995, part III-A.

[40]For a further analysis of these additions, see Hillion (2004).

[41]While Article 49 TEU makes no mention of this, it are ordinarily the Member States meeting in the framework of the European Council that decide to confer that status. A practice has developed

important symbolic moment, and means that the country can start preparing itself for going through the various stages of the accession process proper. Receiving official candidate status does not mean however that the accession process takes off straight away. Rather, from that moment on, the Commission undertakes preliminary screenings in order to decide the right moment for opening negotiations. Although in reality the order of proceeding can vary, depending on which particular country is applying, this moment usually arrives when the second of the Copenhagen Criteria is deemed to be fulfilled. At that point, on the advice of the Commission, the Council will decide by unanimity on the opening of accession negotiations.[42] In practice, the Commission does not deliver its opinion before the Council has first requested it do so, which enables any Member State to block the initiation of the procedure.[43] The same cannot be said of the Commission, since Article 49 TEU does not require its opinion to be positive for the Council to proceed.

Once the accession negotiations have started, every effort is taken to verify that the potential member fulfils especially the third Copenhagen criterion. The Commission has a pivotal role here, producing annual and strategic reports on the candidate's progress on the road to membership. Gradually, an elaborate 'pre-accession strategy' has been developed, with the competent DG in Brussels providing recommendations and advice to the state(s) in question, staging monitoring missions and on-the-spot investigations in order to check and double-check compliance with EU requirements. In fact then, the term 'accession negotiations' is a bit of a misnomer, since there is not that much to negotiate about: the acceding country needs to take on the *acquis communautaire*, and import it integrally into its domestic legal system.

For the sake of efficiency, transparency and manageability, the *acquis* is split up and arranged in several chapters. These chapters mark distinct stages in the accession process.[44] Every chapter will have to be 'ticked off' prior to the opening of a new one. Overall, a multitude of assessments takes place, so as to make sure that the EU exports stability rather than imports instability.[45]

Commentators have noted that the accession criteria have of late been applied with greater rigour than ever before.[46] At present, the EU package has to be adopted

whereby countries with an EU vocation that not yet fulfil the first of the Copenhagen Criteria are tagged as 'potential candidate members'.

[42]The opinion of the Commission is quite lengthy, and will have reflected on the possibility of the applicant to meet all the requirements in due time.

[43]Or delay it. For instance, in 2009, the request for an opinion on the application of Albania was postponed on the insistence of the German government.

[44]Chapters can e.g. pertain to the EU rules on competition, the environment, consumer protection or the media. The number and content of the chapters may vary; for example, during the accession process of Bulgaria and Romania, the *acquis* was divided into thirty-one chapters, whereas Turkey and Croatia have been confronted with a line-up of 35 chapters.

[45]As Mr Frits Bolkestein, a former Internal Market Commissioner, once quipped.

[46]See e.g. Smith (2003); Gateva (2015).

in full, whereas in the 1970s and 1980s, much more room was given for transitory regimes; parts of the *acquis* could even be taken up after accession. Nowadays, the entire body of EU law has to be implemented in a satisfactory manner (including 'Schengen' and EMU commitments). As a rule, no preliminary opt-outs are permitted. In addition, the scope of the obligations flowing from the Copenhagen Criteria has broadened considerably. Great demands are placed on the adjustment and reform of administrative and judicial structures, and the EU Charter of Fundamental Rights is ever more frequently employed as a measuring rod.[47]

Once the candidate country has met all the imposed requirements, all the chapters are closed and the Commission has expressed its satisfaction in a final opinion, the accession agreement can be drawn up.

Box 8.4 The Legal Status of an Accession Agreement
As Article 49 TEU prescribes, it are the Member States of the EU that conclude the accession agreement with the applicant country. The agreement then has to be submitted for ratification by all the contracting parties, in accordance with their pertinent constitutional rules. The Union itself is not a party to this treaty, delivering additional testimony that we find ourselves at the 'hard core' of the franchise where national sovereign powers hold sway. Nonetheless, Article 49 does stipulate that the European Parliament also needs to give its consent, acting by a majority of its component members. During this period, the prospective new member holds the status of observer in the EU institutions.

The accession agreement will specify the date of entry, the exact terms of admission, and include any necessary adjustments to the Treaties on which the Union is founded. Since the Union is itself not a party to this treaty, the Court's opinion ex Article 218(11) TFEU cannot be procured.

8.4.4 The Question of Eligibility

Judging by the discussion above, the practical application of the Copenhagen Criteria may appear to be rather straightforward. The EU has nevertheless repeatedly been accused of double-heartedness, and these charges cannot be dismissed out of hand.

For starters, it is surprising that the detailed requirements for qualifying for membership have been largely left to practice, and were never codified in the

[47] As pointed out by Williams (2000), these aspects have not always been taken sufficiently seriously.

Treaties.[48] Even the Copenhagen Criteria themselves are only set down in soft law documents. No attempts have been made to pour these into the firmer cement of the Treaties, although Article 49 TEU could accommodate them quite easily.

The foregoing is hardly surprising though, when looking at the actual handling of said criteria. Multiple third countries are vying to qualify for membership, and seem capable of qualifying in the mid- or long term. Moldova, Ukraine and Georgia are notable examples. Yet, precisely these countries are kept at bay and fobbed off with association and neighbourhood policy arrangements. Equally telling has been the relabelling of the Commission's DG 'Enlargement' to 'Enlargement Negotiations', coupled with the somewhat callous announcement that there would be no accessions between 2014 and 2019, period.

While the EU does not pretend to have definitive borders, it has no innate cognisance either of where its limits ought to lie. In that light, it would be fair if any country that meets the Copenhagen Criteria could be considered eligible for membership per se. After all, the other conditions are non-descript and flexible: a country like Turkey may for instance have no lesser claim to being 'European' than Russia, and possibly stand on a par with Israel or Armenia.[49] Yet, once the EU is ready to admit a relatively remote country like Turkey, it has no reason to bar other such countries (e.g. the former Soviet republics) for geographic reasons.

Occasionally, the 'strategic position' of a country is referred to as a decisive argument, but the exact content of that concept remains misty even to those that use it.[50] If this criterion indeed plays a crucial (underhand) role, it is not immediately clear why e.g. the countries on the Caucasus may be denied such an invaluable status.

Finally, there are countries that have been pulled in at a reckless pace, a bizarre effort corroding the official accession requirements. The hallmark cases are Romania and Bulgaria, whose shortcomings have been deliberately downplayed or overlooked, under the pretext of their manifest destiny of becoming EU members. This capital blunder rendered it necessary to install an unprecedented 'Cooperation and Verification Mechanism', in order to monitor the countries' post-accession behaviour. Here in particular, the double-dealing was hardly concealed,

[48]With Article 49 TEU merely stating that "[t]he conditions of eligibility agreed upon by the European Council shall be taken into account", which leaves the latter some flexibility to mould them. Scholars have wondered whether the provision itself is actually that important; see e.g. Avery and Cameron (1998), p. 23.

[49]By the same standard, one could question the genuine 'European' character of Malta and its inhabitants.

[50]It has often voiced in debates on Turkish accession. A common additional argument for admitting that country is that it was promised membership in the 1960s already. However, one could reply that at that time, the prospect was given of joining an economic community, and that the Member States made good on their promise when they established a customs union with Turkey at the end of the 1990s.

with neither smoke nor mirrors succeeding to convince the public at large of the need to haul in these countries so quickly.[51]

In response, Croatia was subjected to a tortuous trajectory that signalled a break with the past.[52] The restyled modus operandi puts the rule of law and democratic governance at the heart of the process. Henceforth, negotiations open and close with the chapters on fundamental rights, justice, freedom and security, and progress on these issues is tested through interim benchmarks. Pre-accession screening is intensified, with enforcement being monitored through implementation track records. All this might or might not be enough to secure a lasting credibility for the Union's approach towards (potential) new members.

8.5 Conclusion

In this chapter, several special regimes for organising the relations between the EU and third countries were highlighted and discussed. Unfortunately, the dividing lines between the various regimes are hardly sharp and sturdy. Legally, association agreements are the most tangible creatures, and they are founded on solid textual bedrock in the Treaties. Policies and structures such as the ENP, the UfM and the EaP have been zealously propelled by the Commission and its interlocutors, but operate in a legal limbo or normative no man's land. Whereas these frameworks may in theory span the whole gamut of accession relationships, their confusing interrelation and troublesome questions of overlap put paid to any attempts at classification. One cannot escape the impression that neither politicians nor officials have been able to make up their minds as to which programme, tactic, scheme or strategy should be preferred, and that they did not shy away from launching new initiatives even before the earlier ones had matured properly.[53]

One day, third countries might jointly voice their discontent, and demand a change of tack. At present, it is unhelpfully obscure which of them will end up inside the EU, which of them should remain in a special (association) relationship, and which of them are entitled to be woven into a more comprehensive framework. The countries in the Western Balkans are covered by the ENP, but clearly enjoy an accession prospect. Other ENP countries, even those in close proximity to the EU, momentarily have to make do without it. Ukraine takes part in the EaP, with perennial ambiguity surrounding its potential Union membership. There is however no convincing geographic or cultural reason for keeping it at a distance, so long as Turkey remains en route to joining the EU. Also, it makes little sense to

[51] See further e.g. Kochenov (2008); Albi (2009).

[52] *Communication from the Commission: Enlargement Strategy and Main Challenges 2012–2013*, COM(2012) 600 final.

[53] In the preceding sections, we have consciously left aside kindred projects such as the 'Northern Dimension' (1999), the 'Black Sea Synergy' (2008), and the 'Strategy for the Ionian and Adriatic Region' (2014).

have a UfM for upholding special ties with the Mediterranean countries, while categorically ruling out accession for all participants. If relatively remote nations like Malta, Cyprus and Turkey are fit for (candidate) membership, there are several in North Africa and the Middle East that can plead a strong case as well. Of course no one will admit to the use of ethnic criteria, yet countries like Morocco or Russia cannot so easily be rejected on geographic grounds alone. The real reasons may or may not have everything to do with manageability and absorption capacity (frequently heard, sadly underdetermined concepts).[54] Then, indeed, Ukraine ought never to become an EU member—but probably neither should Turkey.

Meanwhile, the Union and the Member States carry on with envisioning, concluding and implementing new and existing association relationships. At the end of the day though, it might be apt to rearrange some of these, and unambiguously underline the primary and secondary objectives of the more comprehensive frameworks. As regards accession, perhaps the Member States should come round to applying the Copenhagen Criteria as a single, unequivocal yardstick. At the very least, one may expect the Commission to act as an honest broker. One way or another, the wantonness and *double entendre* that continue to haunt the engagements with its neighbouring countries deserve to be curbed.

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[54]Already alluded to in the 1993 Presidency Conclusions outlining the Copenhagen Criteria, worked out further in the *Communication from the Commission: Enlargement Strategy and the Main Challenges*, COM(2006) 649 final, Annex 1, *Special Report on the EU's Capacity to Integrate New Members*, and the Presidency Conclusions, *Brussels European Council,* 14–-15 December 2006, part I.

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The EU, the Member States and International Law

9

Contents

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 the rules of international law enter into the picture 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 products of the

H. de Waele, *Legal Dynamics of EU External Relations*,
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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 sections that follow, we will investigate some of the (potential) fracture lines, and analyse the legal provisions that seek to iron them out.

The present 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 (Sect. 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 (Sect. 9.3). Thereby, a special focus is placed on the intricacies surrounding the management of mixed agreements, as well as on 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. It has concluded a great many agreements that now number well over a thousand.[1] It takes part in the work of numerous international organisations such as the WHO and UNESCO.[2] The participation can take the form of either full membership or observer status. The Union is, for instance, a full member of the WTO and the FAO, but it holds an observer status in the ILO.[3]

The eager and diligent approach of the Union chimes 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 Article 220 TFEU contains the legal imperative to establish appropriate forms of cooperation with the UN, specialised UN agencies, the Council of Europe, the OSCE and the OECD. A similar obligation was already around in the days of the Communities, and duly followed up on.[4]

[1] See the Treaties Office database at http://ec.europa.eu/world/agreements/default.home.do.

[2] The ability of the Community to join (other) international organisations was confirmed by the ECJ in Opinion 1/76, *Draft agreement establishing a European laying-up fund for inland waterway vessels*.

[3] 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.

[4] See e.g. Serrano de Haro (2012), p. 12.

Box 9.1 The EU and the UN General Assembly
After a failed attempt in 2010, the EU finally acquired an enhanced observer status in the UN General Assembly one year later. Resolution A/RES/65/276 of 3 May 2011 has inter alia enabled it to be inscribed on the list of speakers, and have its communications circulated as UNGA documents. So far though, in light of the diplomatic humiliation that came with the earlier rejection of the status, and despite the high hopes that were initially pinned on it, the upgrade has turned out to be of relatively limited value, and mainly a symbolic instead of a substantial advance. As a possible consequence, the voting pattern of EU Member States in the UNGA did in the past years become a bit more coherent.

The EU makes itself out to be distinct from the organisations with which it has entered into relations, by claiming to constitute an 'autonomous legal order'.[5] The ECJ has thereby taken up a central filtering role, deciding by which external norms the Union may be considered bound, and which it can duck out off.

The autonomy claim first manifested itself through *Costa* v *ENEL*, when the EEC Treaty (and the norms stemming from it) was characterised as an independent source of law.[6] This laid the basis for a structural priority of European law over norms of domestic law. Owing to that premise, 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 some time 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 of the proposed judicial body and the ECJ.[7] 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 interpretation and consistency problems, eroding the very foundations of the European legal order.[8]

[5]Some partners have been more receptive to this claim than others, as demonstrated in e.g. de Waele and Kuipers (2013).

[6]Case 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*.

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

[8]Opinion 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).

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.[9] 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, nor in the interpretation of their own legal rules. This means that the EU can ultimately not 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 judgment in the *Kadi* case.[10] 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 the instrument 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'.[11]

The Court's attachment to the idea of autonomy reached an apex with Opinion 2/13.[12] In one bold swoop, accession to the European Convention on Human Rights was declared to be impossible on the basis of the terms that were negotiated in the preceding years. Several problems were identified that allegedly put in danger the foundations of the EU legal order, inter alia the dilution of the ECJ's monopoly on dispute settlement, the envisaged 'co-respondent mechanism', and the jurisdiction over CFSP acts conceded to the ECtHR. This unexpectedly stern verdict left politicians dumbfounded and forced the responsible diplomats to go back to the drawing board—an exercise from which they have yet to return.

In all then, one could say that the unique quality and quasi-independent position of the European system in the international arena has been vigorously stressed on different occasions. Admittedly, the EU Courts have also repeated several times that the Union must respect international law in the exercise of its powers.[13] Still, it 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 be

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

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

[11]Ibid., paragraph 316.

[12]Opinion 2/13, *Accession of the European Union to the European Convention on Human Rights*.

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

attributed to the spirit and stipulations permeating the founding Treaties, which are regarded as unassailable constitutional documents.[14] On the other hand, the treasured autonomy has not prevented the Courts from considering the Union to be fulsomely bound by the GATT, pushing aside the prerogatives of the Member States in the process.[15] Also, it has welcomed the thought that some international rules do in fact form an integral part of the European legal order, among others, the UN Convention on the Law of the Sea and rules of customary international law.[16]

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 Union 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 system 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 plane (with the exception of *ius cogens* norms).[17] Simultaneously, international agreements concluded by the EU will, in case of conflict, trump any divergent secondary legislation (e.g. Regulations or Directives).[18] 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.[19]

[14]Cf. Case 294/83, *Parti écologiste 'Les Verts'* v *European Parliament*, paragraph 23.

[15]Joined Cases 41-44/70, *NV International Fruit Company and others* v *Commission*.

[16]See 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-366/10, *Air Transport Association of America and Others* v *Secretary of State for Energy and Climate Change*.

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

[18]See 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*.

[19]See 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. International agreements concluded by the EU automatically become part of EU law, and the rules contained therein may be relied upon in front of the EU Courts and the courts of the Member States.[20] This e.g. holds for provisions in various association and cooperation agreements.[21]

Box 9.2 Monism v Dualism: A Dichotomy in Need of Nuance

The monism–dualism dichotomy served as a popular explanatory matrix throughout the twentieth century. Dualism posits the existence of a barrier between the international and the domestic legal order, in that an act of incorporation or transformation is required before a treaty norm can become judicially invocable. No such act is necessary in a monist approach. Although intellectually useful, the distinction has nowadays been criticised, sometimes even abandoned—the modern realisation being that there lies a whole spectrum between two extremes. Most countries find themselves somewhere in the middle, and few adhere to a purely monist or dualist position. Besides, a monist approach does not rule out incidental blockades, nor does dualism impede a fluid reception of international norms through other means (e.g. conform interpretation).

Provisions contained in an agreement concluded by the EU will however not be awarded direct effect before an examination has been made of the spirit, general scheme and terms of that agreement.[22] Moreover, when the invalidity of EU legislation is pleaded in front of a national court, the ECJ only reviews 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 merely 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.[23]

Contrary to what one might presume, the latter does not constitute an entirely straightforward matter, and quirky outcomes may well be reached. Earlier, we

[20]See 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*.

[21]See 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*.

[22]See 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 Ikonomikon*.

[23]See e.g. Case C-344/04, *The Queen on the application of International Air Transport Association and European Low Fares Airline Association* v *Department for Transport*.

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, but sadly this is to little avail for those individuals who actually wish to rely on them.[24] In *Intertanko*, taking a rather dubious view of the UNCLOS, the ECJ also rejected the direct effect of its provisions, in light of their nature and broad logic.[25] The same went for the Aarhus Convention in *Stichting Natuur en Milieu*, impeding private citizens' access to justice in environmental matters.[26] The number of agreements that is denied direct effect now seems to be growing steadily.

Diverse explanations have been offered to explain the variations in the Court's jurisprudence, whereby it fails to apply the steps in its test with the exactly same rigour. Some emphasise the growing negotiation power and political interests of the EU; others stress the importance of regarding whether the rules have a bilateral or a multilateral dimension.[27] 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 based on external norms, with the Court adopting instead a rather merciless position in cases where the legality of Member State action is challenged.[28] We should add that, after a string of erratic pronouncements, the Court now seems to display a greater consistency towards (the invocability of) international customary law as well.[29]

A salient trend on the political front may eventually divert attention from the (supposed) preferences of the ECJ. With ever greater frequency, the EU institutions and the Member States elect to insert clauses in international agreements that aim themselves to exclude their direct effect before domestic courts.[30] Disconcertingly, this exclusion extends to sections on investment protection, social rights and environmental standards—a hardly coincidental situation, given the sensitive character of those topics. As a redeeming feature, by explicitly denying the immediate invocability of the relevant provisions, their indirect effect has (accidently or intentionally) not been ruled out.

[24] See Chap. 4, Sect. 4.4.

[25] 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*.

[26] Joined Cases C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*; see also Case C-612/13 P *ClientEarth* v *Commission*.

[27] An excellent overviews offers Bronckers (2008).

[28] As argued by Mendez (2013); see also Wouters et al. (2013).

[29] See Case C-366/10, *Air Transport Association of America and Others* v *Secretary of State for Energy and Climate Change*. Contrast e.g. Case C-162/96, *A. Racke GmbH & Co.* v *Hauptzollamt Mainz*.

[30] Further illustrated in Semertzi (2014).

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.[31] Also, as stipulated in the first sentence of Article 351 TFEU, no provision of EU law may affect rights or obligations of Member States that arise from agreements they concluded with third countries or international organisations prior to becoming members of the Union.[32] It should be realised that this rule not only functions to the benefit of Member States, but 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.[33]

Box 9.3 The Remarkable Tolerance for *Inter Se* Agreements
Despite the ever-expanding reach of EU law, the ECJ has exhibited a remarkable tolerance for *inter se* agreements, i.e. treaties concluded between the individual Member States. Of late, these are gaining in popularity in order to tackle contentious issues located on the outskirts of Union competence, especially when not all members of the (European) Council prove willing to adopt a 'proper' EU instrument. A prominent example from 2012 forms the Treaty on Stability, Coordination and Governance in the EMU. The main condition attached to the approach is that it may in no way impinge on the Union's (exclusive or shared) powers. Occasionally however, the principle of sincere cooperation may require that Member States abstain from the practice in certain areas, even when there are no common rules yet in the field.

[31]E.g. 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 that of the CFSP).

[32]For the founding members of the EU, the reference is to agreements concluded prior to 1 January 1958; for states that have acceded later, the date of their accession presents the relevant yardstick.

[33]Case 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*.

The freedom of the Member States to uphold their preceding treaty commitments with external partners is subject to four limitations. Firstly, the powers that 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 context of the EU.[34] Contrary to what one might think, the principle of sincere cooperation contained in Article 4(3) TEU is of general application and not restricted to situations where the Union possesses an exclusive power.[35] 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.[36]

A second limitation concerns the exercise of the rights stemming from the earlier treaty commitments, referred to in the first sentence of Article 351 TFEU. As the ECJ has established, Member States cannot award priority to those over their Union law obligations when the agreement *allows,* but does not *require* the Member State to adopt a measure that seems to be contrary to EU law.[37]

A third limitation also relates to the earlier treaty commitments, and is to be found in the second sentence of Article 351 TFEU. As a rule, in case an agreement concluded by a Member State before it joined the Union 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.[38] 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.[39]

A fourth and final limitation concerns the fact that the second sentence of Article 351 TFEU can bite even if an incompatibility arises through subsequent EU law.

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

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

[36]Of 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.

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

[38]Case 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).

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

What is more, the Court has ruled that the obligation to eliminate incompatibilities extends to hypothetical ones, with the rationale being that the prevention of a potential norm conflict at the earliest possible stage guarantees the effective implementation of future EU rules.[40]

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 Article 351 TFEU on the other. Ostensibly, the combination of these provisions renders largely nugatory the prerogatives handed by the first sentence of Article 351 TFEU.[41] 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.[42]

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 uninhibited influx of 'foreign norms', the international agreements the Union has concluded with third countries and international organisations form an integral part of the European legal order.[43] 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 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 Union exercised an exclusive competence to bring those agreements into being.[44] The *pacta tertiis* principle is however brushed aside by Article 216(2) TFEU, which stipulates that agreements concluded by the Union are not only binding upon its institutions, but also on its Member States. So, combined with the aforementioned obligations flowing from Article 4(3) TEU and 351 TFEU, it becomes clear that the latter do not represent true *tertiis*. They therefore 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 European law

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

[41]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).

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

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

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

supremacy inexorably holds sway here too. Furthermore, any determination of the Courts in Luxembourg regarding the (lack of) direct effect of provisions of an international 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.[45]

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 (depending on the degree of monism/dualism the country subscribes to).

9.3.3 The Management of Mixed Agreements

Mixed agreements are the typical product of the exercise of a competence shared between the EU and the Member States. The triangle between these two separate entities and the external contracting party can give rise to convoluted legal puzzles.[46] 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.[47]

Here again, the Member States are specifically guided and restricted by the principle of sincere cooperation, encapsulated in Article 4(3) TEU. Over the years, the 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.[48] The ECJ 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.[49] 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 Court, from that moment on, the Member

[45]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*.

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

[47]Cf. Delgado Casteleiro (2016).

[48]Case C-266/03, *Commission* v *Luxembourg*; Case C-433/03, *Commission* v *Germany*.

[49]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*.

States are bound to work together with the Union institutions.[50] Strikingly, the ECJ has gone a step further, ruling that the Member States are already bound by special duties of action and abstention once the Commission has submitted proposals to the Council for a concerted EU action—even if the Council did not (yet) adopt them.[51]

As discussed before, if decisions are to be adopted in an international organisation the Union is unable to join or participate in (despite possessing competences in the field concerned), the Member States are to act as its trustees.[52] The Court has nevertheless empowered the Council to coordinate their actions in advance, pursuant to Article 218(9)—especially warranted when it concerns a field of exclusive EU competence.[53] In Opinion 1/13, this Council prerogative was even deemed to cover decisions on the admission of third countries to the organisation concerned.[54]

In the conclusion of mixed agreements, a duty to facilitate the exercise of Union competence may be considered implicit, flowing from Article 4(3) TEU and the specific obligations of solidarity that govern all 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.[55]

In the implementation of mixed agreements, the second and the third sentences of Article 4(3) TEU play a particular role. On that footing, the Courts have expanded their jurisdiction significantly, empowering themselves to interpret mixed agreements in their entirety (i.e. including the provisions that are outside EU competence).[56] In the view of the judiciary, 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.[57] As a result, should national courts entertain

[50]Case C-266/03, *Commission* v *Luxembourg*; Case C-433/03, *Commission* v *Germany*.

[51]Case C-246/07, *Commission* v *Sweden*, elaborated on in Chap. 5, Sect. 5.3.1. 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.

[52]Opinion 2/91, *Conclusion of ILO Convention No. 170 concerning safety in the use of chemicals at work*.

[53]Case C-399/12, *Germany* v *Council*.

[54]Opinion 1/13, *Accession of third states to the Hague Convention on the civil aspects of international child abduction*.

[55]See e.g. Council Decision 2000/278/EC on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, OJ [2006] L 89/6; Council Decision 2002/358/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.

[56]Case C-53/96, *Hermès International* v *FHT Marketing Choice BV*; Joined Cases C-300/98 and C-392/98, *Parfums Christian Dior SA* v *TUK Consultancy BV* and *Assco Gerüste GmbH and Rob van Dijk* v *Wilhelm Layher GmbH & Co. KG and Layher BV*.

[57]Case C-13/00, *Commission* v *Ireland*.

doubts with regard to any aspect of a mixed agreement, they are obliged to refer preliminary questions to the ECJ.[58]

One might 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 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.[59] 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.[60] For the Court, harking back to the 'ILO effect', it sufficed that the general field was covered in large measure by EU 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).[61]

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 (i.e. outside the scope of EU law), it may equally seek resolution of the dispute before international conflict resolution bodies.

[58] Joined Cases C-300/98 and C-392/98, *Parfums Christian Dior SA* v *TUK Consultancy BV* and *Assco Gerüste GmbH and Rob van Dijk* v *Wilhelm Layher GmbH & Co. KG and Layher BV*; Case C-431/05, *Merck Genéricos – Produtos Farmacêuticos Lda* v *Merck & Co. Inc. and Merck Sharp & Dohme Lda*.

[59] Case C-13/00, *Commission* v *Ireland*.

[60] Case C-239/03, *Commission* v *France*.

[61] Yet, 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.

Box 9.4 The Powers of the Commission in International Litigation
Article 335 TFEU renders the Commission competent to represent the Union, a power commonly assumed to extend to representation vis-à-vis international courts and tribunals. Nonetheless, Article 16(1) TEU hands key policy-making and coordination prerogatives to the Council, which should not be too easily overlooked in such dossiers. For many years, the Council clung to the idea that the Commission was unable to act when no EU position had been (pre)defined, in accordance with Article 218(9) TFEU. In surprising contrast, in a dispute regarding an advisory procedure at the International Tribunal for the Law of the Sea (Case C-73/14), the ECJ held that the Commission may submit written statements to international courts on behalf of the EU, without it needing to ask prior approval from the Council.

Where the dispute pertains to a mixed agreement, the room for litigation by the Member States is stymied by the legal obligations resulting from EU membership. In the seminal *Mox Plant* case, Ireland was held to account for suing the United Kingdom at the ITLOS.[62] 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 Union measures. Ireland was therefore condemned for violating Article 4(3) TEU, as well as Article 344 TFEU, which prohibits Member States from submitting a dispute on the interpretation or application of the Treaties to any methods of settlement other than those provided for therein.[63] Again, the Court presumed that it is in the Union'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.

9.4 Conclusion

The preceding chapters have highlighted the interplay between the different sets of rules that together make up the layered global player. As the current 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—still proudly present on the global scene themselves. They remain independent actors that are active under, and fully recognised by, the rules of public 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

[62]Case C-459/03, *Commission* v *Ireland*.

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

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.[64]

At this point though, it should be admitted that the norms reviewed, stemming from a kaleidoscope of international, European and domestic sources, do not dovetail completely, and that the emerging picture is therefore not one of a seamless web. In its own way, the difficulty of categorising the Union's reception of external norms in the classic terms of monism and dualism testifies to that fact. It is open to question whether a clearer alignment may be expected in the future, while the legal world order grows ever more complex, and the dilemmas before the European Courts proliferate.

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[64]Cf. De Baere and Roes (2015).

Conclusion: An Effective Global Player? 10

Contents

10.1 The Legal Dynamics

Quantum leaps have been made 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 impede the Member States' exercise of their reserved sovereign prerogatives. Nevertheless, over time, with the sometimes implicit, sometimes explicit support of national governments, the ambit of the Community'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. 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. These repeated tussles, in turn, 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.

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From a formal-legal perspective, the Treaty of Lisbon still marks the latest innovation we have witnessed. Quite possibly, with no other major amendments currently being foreseen, it presented the greatest sea change yet. In the first decade since the Lisbon Treaty's entering into force, most of the remaining scattered dots were connected at long last. Article 21 TEU unequivocally unified 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 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 instruments. The democratic quality of the Union's external policies has been beefed up too, by expanding the powers of the Parliament to cover the CCP, but also by introducing the ordinary legislative procedure in e.g. the field of development cooperation. An integrated, maximally coherent approach has now tangibly come within grasp.

At present, the requirement of consistency in EU external action crops up abundantly in the primary law. Prior to the entry into force of the Lisbon Treaty, the middle layers of the Union, composed of the former Community competences, had already attained a (crude) equilibrium amongst themselves. Simultaneously, the turf wars with the outer layers appeared to have ended in their favour as well.[1] Whereas the lines between the spheres have only been redrawn slightly, the balance is ostensibly reinforced by Article 40 TEU, which expounds that the various layers should be considered separate but equivalent. Hitherto, the predicted, concomitant dilemmas for the Court of Justice did not manifest themselves in an acute way.

As demonstrated before, the principle of sincere cooperation deploys its effects across the entire range of external competences, therewith touching all the layers in equal measure. In turn, this necessitates a permanent vigilance among civil servants, policy wonks and legal officers of both the Union and the Member States. Justice and Home Affairs topics are noticeably rising in prominence, with the national competences in the field becoming more than ever entangled in the fabric of EU law.[2] While the frequency of its arising has gone down, supranational competence creep may still occur through the implied powers mechanism (no longer so implied after its codification)—with the obligation of 'Union loyalty' rendering resistance largely futile. This entails that, in the familiar pattern we have observed on countless occasions before, the Member States' external powers could eventually be downsized in this domain as well.[3]

[1] Case C-91/05, *Commission* v *Council* (ECOWAS).

[2] In the present volume this subject has not received detailed discussion; for incisive studies, see e.g. Flaesch-Mougin and Rossi (2013). In the metaphor adhered to, the external aspects of the JHA are to be located in the middle layers, alongside inter alia the EEP and EHRP. The same goes for the external aspects of e.g. transport, energy, and social policy.

[3] Notwithstanding the insertion into the Treaties of several red lines and safeguard clauses. See also Matera (2017).

10.2 The Political Realities

For all the great promise that the past and present legal dynamics may hold for the future, the effectiveness of the EU as a global player depends predominantly on the political realities: as always, a cardinal precondition for rules to function smoothly is the goodwill of those who are to put them in practice. Foreign policy is traditionally an extremely sensitive domain that goes to the heart of a country's national sovereignty. Of course, the Member States consciously agreed to attribute at least some competences to the EU, and either consented or acquiesced to their gradual expansion. Even so, they have not cast aside their hesitations altogether, and signs of obstinacy have been coming to light time and again.

After the failures of the primordial Common Foreign and Security Policy, in face of the Balkan wars of the 1990s, the Iraq crisis of 2003 provided the first crucible for the revamped CFSP and CSDP. Due to unbridgeable divisions among the Member States, no common stance could be agreed upon, wherewith the policies faltered; in spite of the new, more advanced arrangements, the EU could not help to disappoint in the same vein as before. A streamlined set of legal instruments and innovative abstention mechanisms may then come in very handy, but their added value is limited if the decision-makers refuse to utilise them. Whereas the vacillation was much less palpable in the run-up to the 2011 Libya intervention, the subsequent prevarications in the Syria dossier serve as another negative case in point.

In similar vein, as depicted earlier, the EU feigns to be vigorously committed to a proactive external human rights policy.[4] At the same time, when evaluating the EHRP's actual operation, the adage of the pot calling the kettle black springs to mind. As we have seen, the Union and its Member States refuse to indulge in serious introspection, are happy to subject their treaty partners to criticism and resort to retaliatory measures, turning a blind eye to their own deficiencies in living up to the standards that are alleged to be non-negotiable. While the Charter of Fundamental Rights could offer a useful yardstick, it proves to be of limited practical significance in the external relations of the EU, considering that its enforcement takes shape in a largely unidirectional way. Ditto can be said for the Union's environmental policy, when the EU professes to adhere to ambitious standards in the wider world but where the internal differences of opinion between Member States simmer on. Domestic resistance to an elevation of the level of protection (as e.g. manifest in the opposition to a stronger curbing of emissions) impairs the efficacy of the EEP in equal fashion.

In sum, despite the Union's official motto being 'united in diversity', the internal heterogeneity might at the present day and time have become slightly too virulent, with inescapable, damaging external ramifications. Admittedly, the unwieldy plurality of interests possesses a longer pedigree, but it multiplied in linear fashion with the accession of every new Member State. Obviously, the EU's doubling in size since the turn of the last century aggravated rather than alleviated the problem.

[4] See Chap. 6.

At this point, it should be stressed that the political reality hampering the effectiveness of the Union's external policies does not exclusively pertain to the conduct of the Member States.[5] Apart from the Council, many other EU institutions, agencies and bodies are known to engage in occasional foot-dragging. For instance, the strife was legendary between the Members of the Commission carrying distinctive aspects of EU external relations in their portfolios. At present, the fact that the Commission is not always prone to side with the Council, though imperative for the adoption of external rules in e.g. the CCP and EEP, continues to constitute a further cause for delay and stagnation. In recent years, the enhanced position of the High Representative did limit the number of clashes that might otherwise have occurred.[6] This pattern rhymes with the intention of the authors of the Lisbon Treaty to let the office operate as a *trait d'union* between the Commission and the Council, connecting the supranational with the intergovernmental sphere. Simultaneously, frictions emerge between this upgraded office and MEPs demanding to be heard, and complaining of a lack of oversight. Also, the HR has to walk a tightrope between the different national foreign offices and will find his hands tied without sufficient backing in the FAC.[7] Moreover, as outlined, the CFSP and CSDP are overcrowded with a multitude of bodies and agencies, the roles and tasks of which have not been delineated that strictly.[8] Again, even where the black letter text may be regarded as unequivocal, this does not prevent (pragmatic-political) conflicts of interest from arising. The EEAS was created with the aim of spanning the whole gamut, bolstering coherence. It alas did not get off to a brilliant start, and essentially forms yet another addition to the pile.[9]

The EU Courts have thrown their own spanners into the works. Though officially impartial and independent, they have not shown themselves to be immune to particular policy choices, with their asymmetric rulings on the effect of international treaty norms presenting a most salient example.[10] Here, the Union's judiciary is inter alia seeking to defend a particular view of world trade law that suits the strategic interests of the Union, epitomising once again how legal rules are made to bow to political necessity.

Lastly, while there is of course every reason to hail the greater powers of the Parliament, the absence of parliamentary interference did throughout time prove highly efficient, guaranteeing a speedy decision-making. The more extensive involvement of the Parliament has undeniably increased the transparency of EU action.[11] Yet, the jousts between individual parties and representatives are known to

[5]Cf. Gosalbo Bono and Naert (2016) and de Waele (2013).

[6]The innovation did not, however, bring to a complete end the competition between the various Commission DGs.

[7]As pointed out already at an early stage by Wouters (2004).

[8]See Chap. 2.

[9]Cf. the appraisals in Bátora and Spence (2015).

[10]See Chap. 9.

[11]Cf. Kleizen (2016).

result in hard-wrought compromises that fail to satisfy all those concerned. As a result, in the post-Lisbon era, political haggling has wound up an unavoidable recurring feature in the great majority of the Union's external policies.[12]

10.3 Frictions v Deficiencies

The question may now be addressed whether the gap that yawns between the legal and the political world is systemic and inevitable. For, to the extent that the suboptimal performance of the EU could be ascribed to the suboptimal design of the rules that govern its external relations, novel solutions may be sought and implemented to close the rift. If however the identified frictions prove to be perennial and insoluble, no modification of the legal rules will succeed in bringing the political reality more in line with them.[13] An exhaustive treatment of this issue is beyond the scope of this book. All the same, some tentative inferences may be drawn.

Evidently, the Member States are keen to preserve certain core privileges of sovereignty. Where the EU has for instance not yet reached the stage where every aspect of military and defence policy is covered by common rules, it cannot be surprising that the Member States have not been willing to resign themselves to the prevalence of an 'internal market logic'.[14] Once however that a truly common defence is established, and the attendant (cost) effectiveness demonstrated, one may assume that the reluctance subsides quickly. Likewise, the EU High Representative does not have the stature of a real foreign minister, and presently neither his authority nor that of the External Action Service trumps that of the national foreign offices. By consequence, the frictions between the HR and the Member States (and between the Commission and the Council) are bound to persist, until the Union evolves into a unitary polity and national diplomatic services are fully absorbed by the EEAS. Thus, in these two cases, we encounter no deficiencies of the present rules, rather an inherent tension; in all likelihood, the discrepancy between the existing rules and the deviating conduct can only be overcome once the Member States proceed to transform the EU into a full-blown federation.[15]

As regards the double-heartedness in the treatment of third countries, one may follow a different trail of thought. European law allows for the creation of special relationships through association; but, if so desired, the status of EU member may be conferred.[16] Although the Treaties are not straightforward with regard to the requirements for membership, the institutions and the Member States clearly prefer the accession of certain third countries to others. Nevertheless, to appease all

[12]Save for the policies in Title V TEU, which still keep the Parliament at the periphery of decision-making.

[13]Naturally, the cynic may then opt for aligning the legal world with the political reality.

[14]See Chap. 3.

[15]But cf. Schütze (2009).

[16]See Chap. 8.

neighbours, hybrid frameworks have been established (e.g. the ENP). Both practices sit uncomfortably with the rules of primary law. Yet, as the inclinations of Member States to entertain a certain type of relation with a particular third state appear to be inherently political, they are likely to prevail even if the Treaty rules are considered deficient, and subsequently modified. Ditto with regard to the way in which the EU imposes its external human rights standard: as there is no question of a deficiency in the internal rules, nor in the legal means for promoting them externally, any dissimilar application towards third countries must be the result of innate political preferences that cannot be changed by legal norms.

As mentioned, both the environmental and the development cooperation policies of the EU are facing pockets of national opposition.[17] One could venture to suggest that these frictions are caused by the shared nature of the competences concerned. We would thus encounter a deficiency here that may eventually be resolved. However, since some advocate the EU giving up its extant powers, a greater transfer could only turn out to be counterproductive. The Member States perceive the current rules to be suboptimal, but only their (unlikely) abrogation would bring the recurrent frictions to an end.

At the same time, Article 40 TEU functions to resolve tensions flowing from a vertical antithesis (conflicts between the EU and Member States), as well as those from a horizontal one (discrepancies between EU policies vis-à-vis one another). The Achilles heel of this provision is that it proclaims the equality of the various layers. Nonetheless, the EU Courts entrusted with preserving the boundaries have to decide in favour of one, to the detriment of another. Accordingly, their rulings reflect a political choice that may not be to the liking of every European or national actor, which may in turn result in non-compliance. Arguably then, the provision presents a cause for friction rather than a prophylactic; it may for that reason indeed be considered deficient. True, the previous rendition of this provision contained a structural bias towards the competences of the middle layer. Yet, it incontrovertibly did more to boost the consistency of the Union's external action as a whole.

In sum, whereas the rules that govern the EU's international relations might nowadays convey an impression of harmony, their actual application displays a less rosy picture. The institutions as well as the Member States exhibit deviant behaviour, which may only to a limited extent be ascribed to systemic deficiencies. For the largest part, it seems impossible to alter the political realities by altering the Treaties. Admittedly, in some respects, the road does appear negotiable; but in view of the struggles involved in the latest attempts, there exists no sense of urgency for enacting a comprehensive series of amendments. For now, one thus needs to acquiesce to the majority of discrepancies, even if the enduring fracture lines render the practice of EU external relations law much more byzantine than the theory.

Of course, the latter inference is not to be understood in a normative and exonerating sense: for, as long as the rationale of a particular rule is sound, transgressors ought to be held accountable for their actions. Furthermore, whenever

[17] See Chaps. 5 and 7.

ambiguities in the Treaties are claimed to have provoked the non-compliance, the counsel of the EU Courts should always be sought preceding a *farà da sè* manoeuvre, and their dicta obeyed as rigorously as elsewhere.

10.4 An (In)effective Global Player?

Due to the emphasis placed in the preceding sections on the discrepancies between the abstract norms and the actual facts, one might easily get the impression that in reality, the EU hardly achieves what it sets out to attain. Somewhat disparagingly, it has been portrayed as a 'patchwork power'.[18] To counter this presumption, we perhaps ought to conclude by underlining some of its sterling successes across time and space.[19]

First of all, the EU constitutes a notably attractive experiment—a construct that has inspired others to engage in regional integration as well. ASEAN, the African Union and the Andean Community figure as prominent emulators. Apart from the EU being a role model itself, its special relationships with third countries have also exemplified how new forms of bilateral and multilateral cooperation can be undertaken.

Secondly, the EU functions as a market player, on the one hand using its competences to shield the Member States from wanton influxes of products from the outside (e.g. through anti-dumping measures), on the other hand employing its powers to pry open foreign agorae, facilitating trade currents, and accelerating economic progress.

Thirdly, the EU operates as a rule generator, exporting its own norms and principles, but participating in the creation and enforcement of norms and principles on a larger scale too (e.g. within the UN and the WTO), even fostering ideas of justice and inclusiveness.[20]

Fourthly, the EU has performed the role of stabiliser, exporting cardinal values such as the rule of law and fundamental rights, seeking to ensure cohesion, stability and democracy in third countries, promoting international law and multilateral solutions, and placing emphasis on the importance of regional linkages (inter alia in its Global Strategy).

Fifthly and finally, the EU forms a magnet to its neighbouring countries, spurring them to mimic the practices of the Member States, so that they may eventually qualify for membership themselves. The wholesome effects of the Union's stimuli can be gleaned by looking at the socio-economic advancement of the countries that chose to join since 1973.

In these differing capacities, the EU has over the years proven to be a far from ineffective global player. True, its influence comes across as markedly

[18] Gstöhl (2009).

[19] The following distinction is derived from Cremona (2004).

[20] Albeit not in an incontestable way: see Chap. 6.

weaker beyond its periphery, in some respects rendering it an accomplished continental, instead of a genuine world power.[21] This weakness is exacerbated by the shifting context in which it operates, whereby many of the principles that traditionally structured the international community find themselves in flux. A stealthy benefit is that other major players like the United States and Japan are losing as much, if not more, of their clout. At the end of the day, despite recurrent frustrations about opportunities that are squandered, the EU Member States do manage to sing from a single hymn sheet with increasing regularity.

If nothing else, the foregoing meant to illustrate that the legal foundations buttressing the Union's external relations have become stable enough. Though there will always remain room for improvement, they provide it with a solid enough basis to build on its past achievements.

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[21] Webber (2014).

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