Integration and Constitutionalisation in EU Foreign and Security Policy

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I Introduction

The European Union's (EU) presentation of its foreign and security policy has been ambivalent from the outset. In the context of the present book it is perhaps the best example of a combination of national, EU and international legal elements that is increasingly under pressure from not only globalisation, but also from the EU's own ambitions to partly shift its attention from its own Member States to the rest of the world. The ambiguity follows from the fact that Member States continue to see (or at least present[1]) the Common Foreign and Security Policy (CFSP) as a policy area that has not developed beyond the intergovernmental European Political Cooperation (EPC) of the 1970s and 1980s, while neglecting an integrationist and constitutional undercurrent that is boosted by both internal and external developments. While this view is certainly no longer supported (if ever[2]) by the current treaty provisions, the question is whether – ironically – the continued intergovernmental representation of CFSP did not serve as a vehicle for further integration in that field. Indeed, a less visible integration perhaps – as CFSP is much less used as a legal basis for policy making than other external relations provisions – but nevertheless one that has changed the position of CFSP in the EU and hence

1 Although primarily made for domestic consumption, the following representation of CFSP by the UK Foreign Secretary while explaining the result of the 2007 Lisbon negotiations to Parliament is striking: 'Common foreign and security policy [CFSP] remains intergovernmental and in a separate treaty. Importantly … the European Court of Justice's jurisdiction over substantive CFSP policy is clearly and expressly excluded. As agreed at Maastricht, the ECJ will continue to monitor the boundary between CFSP and other EU external action, such as development assistance. But the Lisbon treaty considerably improves the existing position by making it clear that CFSP cannot be affected by other EU policies. It ring-fences CFSP as a distinct, equal area of action.' Secretary of State for Foreign and Commonwealth Affairs (David Miliband), HC Debs. 20 February 2008, col. 378. Similar views were reported to have been shared by the France's Prime Minister François Fillon and the Spanish Foreign Minister Miguel Moratinos; 'Debate on the European External Action Service, European Parliament', CRE 07/07/2010–12, European Parliament, Strasbourg, 7 July 2010, www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20100707?+ITEM-012+DOC+XML+V0//EN. See more extensively: P.J. Cardwell, 'On "Ring-Fencing" the Common Foreign and Security Policy in the Legal Order of the European Union' (2015) 64(4) *Northern Ireland Legal Quarterly* 443–63.

2 R.A. Wessel, 'Lex Imperfecta: Law and Integration in European Foreign and Security Policy' (2016), 1 *European Papers: A Journal on Law and Integration* 439-468. This chapter is a further developed version of that shorter piece. See earlier already R.A. Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation' (2009) 1 *ECLR* 117–42; M. E. Smith, Europe's Foreign and Security Policy: The Institutionalization of Cooperation (Cambridge University Press, 2004).

the commitments of the Member States, the role of the institutions and the way the EU is perceived by other states in relation to its role in global governance.[3]

Yet, it is difficult to change the image of CFSP. It has been argued that there is a 'tradition of otherness'[4] which continues to keep alive the notion that CFSP is a policy of the joint Member States rather than of the Union (admittedly, the term *Common* Foreign and Security Policy may support that notion, although the argument is never made in relation to the other *common* policies within the EU). This chapter aims to highlight the consolidation of EU foreign policy – as well its constitutionalisation as part of the Union's legal order – and will do so from both an internal and an external perspective.[5] Internally, subsequent treaty modifications as well as institutional adaptations have led to a further 'normalisation' of CFSP in the Brussels policy-making machinery. Externally, the need for a clearer EU foreign policy stance flowed from the increasingly undeniable external dimension of successful internal policies. Yet, both the internal and the external dimensions are sides of the same coin; they are intertwined and basically reveal the Union's coming of age as a polity with the ambition to validate the external potential of its internal development. As we will see this also complicates seeing the governance of CFSP as a template (or perhaps a laboratory[6]) for other forms of international cooperation.

From the outset (the 1992 Maastricht Treaty) much has been written on the position of CFSP in the Union and its legal nature.[7] This chapter has no intention of repeating these analyses. Rather, it purports to take a fresh look at the current treaty provisions. In fact, taking these provisions at face value (rather than dwelling on informal interpretations that may serve certain political goals) may allow for a clearer view of the result of the negotiations and the texts Member States agreed on. Too many analyses reveal a poor or selective reading of the treaty texts and seem to be affected by the 'tradition of otherness' which prevents seeing CFSP in a new light and in the context of an EU that is redefining its contribution to global governance.[8]

Looking at a policy area from an integrationist perspective is largely left to political scientists and international relations scholars.[9] Indeed, those disciplines have extensively analysed EU foreign policy from different theoretical perspectives, including European-

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3 See more extensively on the external perception of the EU: C. Eckes and R. A. Wessel, 'The European Union: An International Perspective' in T. Tridimas and R. Schütze (eds.), *The Oxford Principles of European Union Law , I: The European Union Legal Order* (Oxford University Press, 2018), 74-102.

4 Cardwell, 'On "Ring-Fencing"' (above), 445.

5 Parts of the argumentation used in this contribution was developed over the years in earlier publications. See the references throughout this chapter and more particularly: B. van Vooren and R. A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014).

6 See the Introduction to this volume by R. Schütze.

7 See for an overview see e.g. Wessel, 'The Dynamics of the European Union Legal Order' (above n. 2). See recently also M. Cremona, 'The CFSP-CSDP in the Constitutional Architecture of the EU', in S. Blockmans and P. Koutrakos (eds.), *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar Publishing, 2018; forthcoming)

8 Cf. D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order* (Cambridge University Press, 2014); B. Van Vooren et al. (eds.), *The Legal Dimension of Global Governance, What Role for the EU?* (Oxford University Press, 2013).

9 Yet, 'integration through law' has of course been part of the debates. Key publications include: M. Cappelletti et al. (eds.), *Integration Through Law: Europe and the American Federal Experience* (de Gruyter, 1985); S. Weatherill, *Law and Integration in the European Union* (Oxford University Press, 1995); D. Augenstein (ed.), *'Integration through Law' Revisited: The Making of the European Polity* (Ashgate, 2012).

Integration Theory (EIT).[10] While earlier studies followed the classic works on the internal aspects of integration, the development of the external dimension (through CFSP as well as other external relations policies) triggered new integration analyses.[11] In general, research in political science and European Studies concluded on a 'move beyond intergovernmentalism' in CFSP.[12] Yet – and that seems to be a hallmark of international relations and political science studies – the application of different theories results in different outcomes (or: whatever the outcome, there is always a theory to explain it). Thus, while a neofunctionalist approach may be able to explain the development of CFSP and the further integration into the EU's legal-political framework, intergovernmentalism will be able to let us know why this is in fact not the case since in the end European integration is determined by states' interests.[13]
Nevertheless, it has been argued that:

> EIT is capable of providing the answer to the question why European foreign-policy cooperation has developed in a specific historic way and not in another … Secondly … EIT contributes to our understanding of which actors drive integration processes in the foreign policy domain and through which channels and mechanisms … Third, EIT … also has the potential to explain European foreign-policy non-decisions and inaction.[14]

For legal scholars the extensive debates in international relations, European studies and political science may be relevant in the sense that they show us where to look when we wish to study European integration. And, in a way, the same theoretical approaches are at the background of our choices to focus on the role of the Commission or the European Parliament, or on the voting procedures in the Council when defining the nature of, for instance, CFSP. Yet, also as the present chapter will testify, *legal* integration has a somewhat different focus.

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10 An overview can be found in J. Bergmann and A. Niemann, 'Theories of European Integration' in K. E. Jørgensen et al. (eds.), *The SAGE Handbook of European Foreign Policy*, 2 vols. (Sage, 2015), I, 166–82.

11 See e.g. the analyses by R. Ginsberg, 'Conceptualizing the European as an International Actor: Narrowing the Theoretical Capability-Expectations Gap' (1999) *JCMS* 429–54, 432; B. Tonra and T. Christiansen, 'The Study of EU Foreign Policy: Between International Relations and European Studies' in B. Tonra and T. Christiansen (eds.), *Rethinking European Union Foreign Policy* (Manchester University Press, 2004), 1–9.

12 P. M. Norheim-Martinsen, 'Beyond Intergovernmentalism: European Security and Defence Policy and the Governance Approach' (2010) 48(5) *JCMS* 1351–65; H. Sjursen, 'Not So Intergovernmental After All? On Democracy and Integration in European Foreign and Security Policy' (2011) 18(8) *JEPP* 1078–95; A. Juncos and K. Pomorska, 'Invisible and Unaccountable? National Representatives and Council Officials in EU Foreign Policy' (2011) 18(8) *JEPP* 1096. And, true to their character, these academic disciplines came up with new ways to describe the new modes of co-operation, using terms like 'transgovernmentalism' (S. Hoffmann, 'CSDP: Approaching Transgovernmentalism?' in X. Kurowska and F. Breuer (Eds.) *Explaining the EU's Common Security and Defence Policy: Theory in Action* (Palgrave MacMillan, 2011)) or 'supranational intergovernmentalism' (J. Howorth, 'Decision-Making in Security and Defense Policy: Towards Supranational Inter-Governmentalism?' (2012) 47(4) *Cooperation and Conflict* 433–53). Yet, also note the term 'progressive supranationalism' coined by (then) Director of the Council's legal service, R. Gosalbo-Bono, 'Some Reflections of the CFSP Legal Order' (2006) 43 *CML Rev* 337–94.

13 Bergmann and Niemann, 'Theories of European Integration' (above) point to the importance of quite a number of different theories in relation to European foreign policy: federalism, neofunctionalism, intergovernmentalism, the governance approach, policy-network analysis, new institutionalism and social constructivism. In addition, a special role is often devoted to the theory of 'Europeanisation', also in relation to European foreign policy. 'Europeanisation' focuses on the impact of the European integration process on Member States. See e.g. B. Tonra, 'Europeanization' in K. E. Jørgensen et al. (eds.), *The SAGE Handbook of European Foreign Policy*, 2 vols. (Sage, 2015), I, 184–96.

14 Bergmann and Niemann, 'Theories of European Integration' (above), 176.

In particular in relation to EU foreign policy, our aim is to note shifts and developments on the basis of new legal provisions (or new interpretations of provisions). We compare competences and confront actors with the legal choices they made. We look for (in)consistencies and try to make sense of paradoxical provisions. In doing so, we indeed have an internal as well as an external perspective: internally, more integration would mean that CFSP has become more similar to other (more supranational) policies (section III below); externally, integration would be triggered by the simple need for the Union to act in a more unified and coherent fashion (section IV). First of all, however, we will reassess the position of CFSP within the EU on the basis of the current treaty provisions (section II).

II The Current Position of CFSP in the EU Treaties

A The Purpose of CFSP

So, let's see what we are dealing with. The first reference to CFSP can be found in the preamble to the Treaty on European Union (TEU), where the signatories state to be:

> RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence in accordance with the provisions of Article 42, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world.

Three key elements are already evidenced by this statement: (i) the signatory states not only aim at implementing CFSP, they also intend to work on the further development of a common defence (policy); (ii) all of this is meant to promote peace, security and progress, both in Europe and in the rest of the world; (iii) the European identity and its independence will be reinforced through the implementation of CFSP and the further development of a common defence policy. The latter is particularly important for the narrative of the present contribution: CFSP is important to reinforce the European identity.

At the same time CFSP is a *foreign* policy and its main objectives relate not to the EU itself but to the rest of the world, while stimulated by the EU's own integration. Article 5(3) TEU phrases this as follows:

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

And, Article 21(1) TEU even more extensively provides:

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

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

Specific references to CFSP are absent. Indeed, the 2009 Lisbon Treaty consolidated the Union's external relations objectives and CFSP is just one of the means to attain these objectives. The requirement of consistency in Article 21(3) TEU is meant to prevent a fragmentation of the Union's external action (see below).
Zooming in on the objectives (Article 21(2) TEU) reveals their extraordinarily broad scope. Aside from perhaps issuing a declaration of war, there is very little that does not fall within the purview of these objectives:

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

Articles 3(5) and 21 TEU give a double response to the question as to what kind of international actor the EU is, and how it relates to the international order. On the one hand, there is the substantive answer. These provisions in the TEU impose substantive requirements on EU international relations by stating that there are certain fundamental objectives which shall guide its internal and external policies.[15] On the other hand, these provisions also impose a strong methodological imperative upon EU international action: it must pursue its action through a multilateral approach based on the rule of law. Yet, no clear link is made between these objectives and the means to attain them; but CFSP is clearly needed to make this work.

B Consistency Between CFSP and Other External Relations Policies

Article 21 TEU is the first provision in Title V that was invented to integrate (but also still partly separate) the EU external relations. The title is named 'General provisions on the Union's

15 See also J. Larik, 'Entrenching Global Governance: The EU's Constitutional Objectives Caught between a Sanguine World View and a Daunting Reality' in B. Van Vooren et al. (eds.), *The Legal Dimension of Global Governance, What Role for the EU?* (Oxford University Press, 2013), 7–22.

external action and specific provisions on the Common Foreign and Security Policy'. One could argue that the first Chapter (called 'General Provisions of the Union's External Action') is indeed general in the sense that it aims to regulate EU external relations in general, whereas Chapter 2 entails 'Specific Provisions on the Common Foreign and Security Policy'. Yet, Article 21(3) TEU establishes a legal connection between the different parts. Indeed, it imposes a binding obligation of coherence in EU external relations, illustrating that coherence is not merely an academic notion but a tangible legal principle of EU primary law. It provides that:
The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

Indeed, paragraph 3 of Article 21 TEU can be considered the *lex generalis* coherence obligation in EU external relations. Thus, what this paragraph does is connect the list of policy objectives in 21(2) to each other, and to the functioning of pertinent legal principles, by imposing a legally binding obligation of coherence between all EU internal and external policies which must pursue them. Specifically through the case law of the Court of Justice, the obligation of loyalty has become directly connected to the objective of 'ensur[ing] the coherence and consistency of the action and its [the Union's] international representation'.[16]
The TEU contains four other provisions which pertain to coherence in its material and institutional dimensions. All in their own way, these provisions strengthen the relationship (or in fact, the integration) between CFSP and other external relations policies.[17]

– Article 13(1) TEU imposes coherence as one of the overarching purposes for the activities of the EU institutions: 'The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.' The explicit reference to the Member States can be read as meaning that it concerns not merely coherence between policies and action of the Union itself (horizontal), but also between that of the Union and its Member States (vertical).

– Article 16(6) TEU imposes on the General Affairs Council an obligation of substantive policy coherence between the work of the different Councils, and a specific obligation for the Foreign Affairs Council since it 'shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent'.

– Article 18(4) TEU imposes a specific coherence obligation on the EU High Representative (HR) with a strong institutional dimension, as it relates to the connection between the work of the HR and that of the Commission: 'The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union's

16 See for instance Case C-266/03, Commission v. Luxembourg [2005] ECR I-4805, para. 60, and Case C-476/98, Commission v. Germany [2002] ECR I-9855, para. 66. See for a recent analysis of the principle of consistency M. Estrada Cañamares, '"Building Coherent Responses": Coherence as a Structural Principle in EU External Relations', in M. Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart Publishing, 2018), pp. 244-262.

17 This analysis of the provisions on coherence and consistency is partly based on Chapter 1 of Van Vooren and Wessel, *EU External Relations Law* (above).

external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action.'

– Article 26(2) TEU contains an obligation of substantive policy coherence specifically for the EU's Common Foreign and Security Policy: 'The Council and the High Representative of the Union for Foreign Affairs and Security Policy shall ensure the unity, consistency and effectiveness of action by the Union.'

Furthermore, in the Treaty on the Functioning of the Union (TFEU), we find coherence obligations that do not relate to the institutions as such, but are predominantly substantive in the nature of their requirement.

– Article 7 TFEU is found in Title II of that treaty, under the heading 'Provisions Having General Application' and states that: 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.' Because this article is of general application and not specific to EU external relations, it must be read as requiring substantive, positive coherence between EU internal policies and EU external policies.

– Part Five of the Treaty on the Functioning of the Union concerns 'external action by the Union'. Article 205 TFEU is the first and general provision of that Title and reads that 'the Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union'. This article is a cross-reference to Articles 21 and 22 TEU and has a triple consequence. First, any of the external competences listed in Part Five of the TFEU (common commercial policy, development policy, and so on) must be conducted in line with the coherence obligation of Article 21(3) TEU. Second, any of these competences must all pursue the objectives listed in Article 21(2) TEU. Third, where Article 22(1) TEU states that 'the European Council shall identify the strategic interests and objectives of the Union', Article 205 TFEU is yet another confirmation that this EU institution is given the principal role in ensuring overarching coherence across all EU external policies.

In three competence-specific articles we also find obligations to maintain coherence. In Article 208(1) TFEU concerning development policy there is an obligation that it pursue 'the principles and objectives of the Union's external action' (e.g. an obligation of horizontal coherence with Articles 3(5) TEU and 21(2) TEU), and a vertical obligation of coherence stating that 'the Union's development cooperation policy and that of the Member States complement and reinforce each other'. In Article 212 TFEU concerning economic, financial and technical co-operation with third countries we find similar obligations: one of horizontal coherence but this time with EU development policy, and one of vertical coherence with Member States' respective policies. Finally, Article 214 TFEU concerning humanitarian aid, is formulated in similar terms: a general reference to the EU's principles and objectives in external relations, and the need for EU measures and those of Member States to 'complement and reinforce each other'. This is thus a reciprocal obligation of substantive, positive, policy coherence.

All in all, by simply reading the Treaties one can only conclude that everything is geared towards an integration of the overall external relations regime, of which CFSP forms an integral part.

C Legal Basis and Competence

However, this conclusion brings us to the question of the attention that is also paid by treaty provisions to separating CFSP from all other Union policies. The fact that CFSP –including Common Security and Defence Policy (CSDP) – is the only policy area, with perhaps one exception,[18] that is not regulated by the TFEU but by the TEU may be interpreted differently. The TFEU is usually considered to be the operational treaty, whereas the TEU may be seen as the constitutional foundation, providing the legal-constitutional framework for the EU's actions. Perhaps ironically, this would allude to a 'higher' or 'more important' status of CFSP norms as they seem to form part of the constitutional set-up of the Union. At the same time, we know that it owes this special position to fears by certain Member States that aligning CFSP with some former Community policies could make an end to what they perceive as the 'intergovernmental' nature of CFSP.[19]

Indeed, the textbook classification of CFSP as 'intergovernmental' often conceals the fact that CFSP decisions are taken by the Union – following strict rules and procedures – and not by the Member States. Article 2(4) TFEU clearly refers to CFSP as an EU competence:

The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

CFSP is not the sum of national foreign policy issues; CFSP is primarily an EU policy. And, in the words of Keukeleire and Delreux:

> it is questionable whether EU foreign policy must automatically – and on all levels – be seen as a substitute or as a transposition of individual Member States' foreign policies to the European level. The specificity and added value of an EU foreign policy can be precisely that it emphasizes different issues, tackling different sorts of problems, pursuing different objectives through alternative methods, and ultimately assuming a form and content that differs from the foreign policy of its individual members.[20]

Yet, the legal basis to be used by the Union to adopt CFSP Decisions is to be found in the 'Specific Provisions on the Common Foreign and Security Policy' (Chapter 2 of Title V TEU). The intention does not seem to be to set CFSP aside from other policies; the term 'specific provisions' is rather to be read in relation to the 'general provisions' on external relations (Chapter 1 of Title V TEU). In fact, also as far as external relations are concerned, the TEU and TFEU are clearly linked. Part V of the TFEU (bearing the very general title 'The Union's External Action') starts with a reference in Art. 205 to Title V of the TEU:

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18 Although not formally framed as a 'policy area', Article 8 TEU forms the basis of the EU's 'neighbourhood policy'.

19 The intergovernmental nature is often related to Declarations 13 and 14 annexed to the Treaties, which indicate that CFSP does not affect 'the responsibilities of the Member States, as they currently exist for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organizations' and that it 'will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organizations'. Yet, a close reading of these Declarations reveals that they mainly state the obvious and repeat rules that are also reflected in the general principle of conferral.

20 S. Keukeleire and T. Delreux, *The Foreign Policy of the European Union* (Palgrave Macmillan, 2014), 18–19.

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

So, Union action *pursuant to this Part* of the TFEU (which includes the Common Commercial Policy, Development Cooperation, Economic, Financial and Technical Cooperation with Third States, Humanitarian Aid, Restrictive Measures, International Agreements, the Union's Relations with International Organisations and Third Countries and Union Delegations, as well as the Solidarity Clause) *shall be conducted in accordance with* the general provisions on external action in the TEU. This seems to indicate a subordination of this TFEU Part to general TEU provisions on external action. At least it reveals the intention of the treaty legislator to consolidate the different provisions on external action, despite the positioning of CFSP in the TEU. At the same time, it underlines that CFSP may be placed in the TEU, but that the general provisions on EU external relations are also put there. Title V of the TEU is therefore presented as the basis for EU external relations, including CFSP.[21]

Another link is made by the general competence of the Union 'to define and implement' CFSP, which is laid down in the TFEU (Article 2(4)) and the more concrete legal bases that can indeed be found in the 'specific provisions' in the TEU. And despite their specificity, action of the Union on the basis of the CFSP provisions is also to be 'conducted in accordance with' the general principles (Article 23 TEU). Unfortunately, the distinction between CFSP and other external action is not made clear by the Treaties. 'The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence' (Article 24(1) TEU). Considering that the TFEU mentions many other areas where the EU has external competences, one will have to conclude that 'foreign policy' is everything that is not covered by other competences. That this is easier said than done will become clear in the next section.

It is well known that CFSP is formed on the basis of 'specific rules and procedures' (Article 24(1) TEU). The exclusion of the use of the 'legislative acts'[22] (Article 23(1) TEU; and thereby the use of the legislative procedure which is the regular decision-making procedure for other Union policies), unanimity rather than qualified majority voting (QMV) as the default voting rule,[23] the 'specific role of the European Parliament and of the Commission' and the

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21 All of this is again confirmed by Article 24(2) TEU: 'Within the framework of the principles and objectives of its external action, the Union shall conduct, define and implement a common foreign and security policy … '. Emphasis added.

22 Note that this does not imply that CFSP acts are not binding on Member States. See R. A. Wessel, 'Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?' (2015) 20 *European Foreign Affairs Review* 123–45.

23 Unanimity continues to form the basis for CFSP decisions, 'except where the Treaties provide otherwise' (Article 24(1) TEU). In that respect it is interesting to point to the fact that apart from the previously existing possibilities for QMV under CFSP, it is now possible for the Council to adopt measures on this basis following a proposal submitted by the High Representative (Article 31(2) TEU). Such proposals should, however, follow a specific request by the European Council, in which, of course, Member States can foreclose the use of QMV. In addition, QMV may be used for setting up, financing and administering a start-up fund to ensure rapid access to appropriations in the Union budget for urgent financing of CFSP initiatives (Article 41(3) TEU). This start-up fund may be used for crisis management initiatives as well, which would potentially speed up the financing process of operations. In addition, QMV may be extended to new areas on the basis of a decision by the European Council (Article 31(3) TEU).

fact that 'the Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty [decision on the legal basis] and to review the legality of certain decisions as provided for by the second paragraph of Article 275 [restrictive measures against natural or legal persons]'.

Yet, many policy areas have their own rules and exceptions. The fact that CFSP – to accommodate the strong political preferences of certain Member States – was placed in another Treaty is clearly compensated by the many links and cross-references between the Treaties. And, despite their public presentation of CFSP as an intergovernmental form of co-operation, the Member States drafted the Treaties as to allow for a far-reaching integration foreign policy into the Union's external relations regime; thereby allowing for a further integration dynamic on the basis of the Union's external action.

III Internal Pressures Towards Integration

This integration dynamic is first of all set in motion by internal developments triggered by the treaty provisions. Thus, the consolidation of EU external policies was not only accompanied but also boosted by a revised role for the Institutions. At the same time the Court of Justice seems to push for a further alignment of CFSP and other policies.

A A New Institutional Set-Up

Perhaps the most visible body representing the Union's ambitions to consolidate its external relations is the European External Action Service (EEAS). Much has been written on the status and position of this new body.[24] The EEAS, mentioned only in Article 27(3) TEU, was formally established by a Council Decision in 2010, and was officially launched in January 2011.[25] Its set-up is ambiguous. In a way, the EEAS can be seen as a continuation of a process that defined the former EPC and the establishment of the early CFSP: a decades-old struggle of the Union seeking to project a strong, coherent voice on the international scene; counterbalanced by the Member States' wish to retain control over various aspects of international relations. At the same time the EEAS was created to overcome this fragmentation. The idea is to bring together policy preparation and implementation on external relations into one new body, under the auspices of the High Representative for CFSP. In terms of policy fields covered by the new EEAS, the current structure remains a typical EU-type compromise. It is *not* an EU institution, which significantly constrains its power to legally influence EU external decision-making.

24 See M. Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination* (Brill|Nijhoff, 2016). And earlier e.g. B. Van Vooren, 'A Legal Institutional Perspective on the European External Action Service' (2011) 48 *CML Rev* 475–502, 500–1; as well as G. de Baere and R. A. Wessel, 'EU Law and the EEAS: Of Complex Competences and Constitutional Consequences' in J. Bátora and D. Spence (eds.), *The European External Action Service: European Diplomacy Post-Westphalia* (Palgrave MacMillan, 2015), 175–93. A thorough legal analysis was done by S. Blockmans et al., *EEAS 2.0: A Legal Commentary on Council Decision 2010/427/EU Establishing the Organisation and Functioning of the European External Action Service*, ed. S. Blockmans and C. Hillion (CEPS/Sieps/EUI, 2013); and by the same authors *European External Action Service 2.0: Recommendations for the 2013 EEAS Review* (CEPS/Sieps/EUI, 2013).

25 Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ 2010 L 201/30.

Furthermore, the EU external action service has no say whatsoever in the Common Commercial Policy, where the Commission remains very firmly in the driver's seat. Development policy is more opaque, where both the EEAS and the Commission have been given a role in the policy-making process. Similarly, in the domain of EU external energy policy, the EEAS has 'some kind' of role to play, but disagreement persists as to its exact relationship with the European Commission.

The preamble of the Council Decision reaffirms that coherence remains the final objective of setting up the EEAS, and does this by copying and pasting the text of Article 21(3) second paragraph TEU (see above). In all practical terms the EEAS may be seen as the EU's Foreign Ministry, which does not at all deny that other 'Ministries' (the Commission's Directorates General) may engage in their own external relations. Article 2 of the EEAS Decision indicates that CFSP may be its core business, but also hints at a more general role in EU external relations:

> 1. The EEAS shall support the High Representative in fulfilling his/her mandates as outlined, notably, in Articles 18 and 27 TEU:
> – in fulfilling his/her mandate to conduct the Common Foreign and Security Policy ('CFSP') of the European Union, including the Common Security and Defence Policy ('CSDP'), to contribute by his/her proposals to the development of that policy, which he/she shall carry out as mandated by the Council and to ensure the consistency of the Union's external action,
> – in his/her capacity as President of the Foreign Affairs Council, without prejudice to the normal tasks of the General Secretariat of the Council,
> – in his/her capacity as Vice-President of the Commission for fulfilling within the Commission the responsibilities incumbent on it in external relations, and in coordinating other aspects of the Union's external action, without prejudice to the normal tasks of the services of the Commission.
> 2. The EEAS shall assist the President of the European Council, the President of the Commission, and the Commission in the exercise of their respective functions in the area of external relations.

Deep disagreement existed throughout the negotiation process on the EEAS's position in the EU institutional set-up. On the one hand, there was Member State agreement that 'the EEAS should be a service of a *sui generis* nature separate from the Commission and the Council Secretariat',[26] while Parliament's opinion was that it should be connected to the Commission. The final result laid down in Article 1(2) reveals that Parliament has lost out in the final compromise. Article 1 of the EEAS Decision provides that the EEAS is 'functionally autonomous' and 'separate' from the Council Secretariat and Commission. Given the negotiation history to the EEAS ('equidistance'), these notions should be interpreted as meaning that in supporting the High Representative, the EU diplomatic service does not take instructions from the Council or the Commission. Its instructions come from the *office of* the High Representative,[27] who is in her turn accountable to the EU institutions proper – notably also the Parliament. The EEAS is certainly part of a 'command structure' which runs vertically via the High Representative, then through to the Council and up to the European Council, with

26 October 2009 Presidency Report, DOC 14930/09, 6.

27 Heads of the EU delegations can also receive instructions from the Commission 'in areas where they exercise powers conferred upon it by the Treaties'. Otherwise the delegations only receive instructions from the High Representative (Article 5(3) EEAS Decision).

a strand of accountability connecting it to Parliament. However, the EEAS is horizontally not an institutional participant in the EU's institutional balance, or part of an Institution itself.[28]

An interesting institutional integrationist development took place with the creation of the 'Union delegations'. On the basis of Article 221(1) TFEU (!) 'Union delegations in third countries and at international organisations shall represent the Union.' In the absence of any further description in the Treaties, their mandate is based on Article 5 of the EEAS Decision and turns them into an integral part of the EEAS,[29] with the Head of Delegation (clearly an EU official appointed by the High Representative, who receives instructions from the High Representative and the Commission) exercising 'authority over all staff in the Delegation, whatever their status, and for all its activities', including the staff members seconded by Member States. Yet, the EEAS is often presented as a CFSP body, whereas Article 221 TFEU indicates that delegations represent the Union as a whole.[30] At the same time the link with the High Representative for Foreign and Security Policy is clear. Article 221(2) TFEU states that 'Union delegations shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy. They shall act in close cooperation with Member States' diplomatic and consular missions.' The 'HR/VP' in turn combines her function with the one of Vice-President of the Commission and Chairperson of the Foreign Affairs Council (Article 18 TEU). This is referred to as 'triple-hatting', and is again hoped to support attaining coherence in EU external relations (Article 21(3) TEU).

Significantly, a study commissioned by the European Parliament found that most stakeholders now agree that the *sui generis* positioning of the EEAS was a mistake: the Commission perceives the construction of the EEAS as a loss of power that ought to be regained or protected, while Member States believe the priorities set out by the EEAS often compete with their own national priorities.[31] The hybrid position of the EEAS, and in particular the position of the HR/VP, was put on the agenda again at the start of the new Juncker Commission in November 2014. Juncker preferred to have the new High Representative, Federica Mogherini, as fully operational Vice-President. 'Mogherini's symbolic decision to install her office in the Berlaymont building, the appointment of Stefano Manservisi, an experienced hand at the Commission, as her Chef de Cabinet, and the recruitment of half of her cabinet from Commission staff, have served her well in striving to attain that goal.'[32] Yet, it is questionable whether this is the best solution. While it will still be possible for the High

28 See more extensively van Vooren, 'A Legal Institutional Perspective on the European External Action Service' (above); and De Baere and Wessel, 'EU Law and the EEAS' (above).

29 Yet, see the judgment of the General Court in the *Elti v. EU Delegation to Montenegro* case, where it argued that 'the legal status of the Union Delegations is characterised by a two-fold organic and functional dependence with respect to the EEAS and the Commission' (Case T-395/11, para. 46). In a similar case on the former Commission delegations, the Court came to the same conclusion (Case T-264/09, *Technoprocess v. Commission and EU Delegation to Morocco*, ECLI:EU:T:2011:319, para. 70). While different interpretations are possible, at least the Court underlined that in order for the delegations to represent the Union as a whole, they need to work both for the EEAS and the Commission.

30 See also Article 5(7) EEAS Decision, indicating that the delegation 'shall have the capacity to respond to the needs of other institutions of the Union, in particular the European Parliament'.

31 J. Wouters, et al., *The Organisation and Functioning of the European External Action Service: Achievements, Challenges and Opportunities* (European Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department, 2013), 93.

32 S. Blockmans and F. S. Montesano, 'Mogherini's First 100 Days: Not the Quiet Diplomat', *CEPS Commentary*, 12 February 2015.

Representative to use her EEAS office for her HR functions, her closest staff will be in the Berlaymont Building and it will remain difficult to clearly separate the issues, possibly triggering member states that are particularly sensitive on the issue of Commission involvement in CFSP to open a new battle front. Thus, while a closer entanglement between EEAS and other external policies is to be welcomed from a consistency perspective, time will tell whether this somewhat bold move did not come too soon. In any case, recent studies reveal that the role of the Commission in relation to foreign policy is often underestimated.

This is nevertheless one of the best examples of the internal dynamics pushing towards a further 'normalisation' of CFSP. While the Commission undeniably retained control over (important) parts of the EU's external relations, the HR/VP does function as a bridge-builder as she is forced to align the different external policies.[33] At the same time, since the entry into force of the Treaty of Lisbon, a new interinstitutional agreement between the European Parliament and the Commission foresees the involvement of the former by the latter in the CFSP:[34] 'Within its competences, the Commission shall take measures to better involve Parliament in such a way as to take Parliament's views into account as far as possible in the area of the Common Foreign and Security Policy.'[35] 'Within its competences': yet, the traditional view is that these competences are extremely limited in relation to CFSP. Again, however, this picture needs to be nuanced. The limited formal competences of the Commission in the CFSP area have not led to the Commission being completely passive in this field. From the outset, the Commission has been represented at all levels in the CFSP structures. Within the negotiating process in the Council, the Commission is a full negotiating partner as in any working party or Committee (including the Political and Security Committee; PSC). The President of the Commission attends European Council and other ad hoc meetings. The Commission is in fact the 'twenty-ninth Member State' at the table; it safeguards the *acquis communautaire* and ensures the consistency of the action of the Union other than CFSP. In the implementation of CFSP Decisions the Commission's role is however formally non-existent as delegation of executive competences from the Council to the Commission is prevented by the fact that CFSP acts are not legislative acts (Article 29 TFEU). Nevertheless, practice from the outset showed an involvement of the Commission in the implementation of CFSP Decisions, not in the least because other measures were in some cases essential for an effective implementation of CFSP policy decisions. Some studies even reveal a considerable influence of the Commission on one of the most sensitive dimensions of CFSP, the security and defence policy and the military missions.[36] Regardless of these competences and practices of the Commission under CFSP, it is not difficult to conclude that this institution is nowhere near the pivotal position it occupies in the other areas of the Union. Although it is not formally excluded by Article 17 TEU, the Commission lacks its classic function as a watchdog under CFSP. The

33 See for a recent evaluation of the function post-Lisbon N. Herwig, 'The High Representative of the Union: The Quest for Leadership in EU Foreign Policy' in J. Bátora and D. Spence (eds.), *The European External Action Service: European Diplomacy Post-Westphalia* (Palgrave MacMillan, 2015), 87–104.

34 Cardwell, 'On "Ring-Fencing"' (above), 459.

35 Framework Agreement on Relations between the European Parliament and the European Commission (2010) 20 November 2010, OJ 304/47, Article 10.

36 M. Riddervold, '(Not) in the Hands of the Member States: How the European Commission Influences EU Security and Defence Policies' (2015) 54(2) *JCMS* 353–369.

absence of an exclusive right of initiative also denies the Commission another indispensable role it has in other areas.

B Legal Bases

Perhaps the best example of a necessary combination of CFSP and other EU rules is formed by the regulation of restrictive measures. In fact, legislative decisions taken by the Union in this area depend on a prior CFSP decision. Article 251(1) TFEU provides:

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

Paragraph 2 adds that this procedure is also to be followed whenever a CFSP decision provides for restrictive measures against natural or legal persons and groups or non-state entities.

While other CFSP decisions do not automatically affect the creation of Union legislative acts, it remains clear that they form part of the Union's legal order and that all decisions related to a certain external policy are to be interpreted taking their content into account and irrespective of their place in the Treaties (see also the rules on consistency referred to above). Apart from the example of restrictive measures, which present a CFSP decision as the foundation for subsequent action, no automatic hierarchy exists. Article 40 TEU simply provides:

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

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

In other words, in adopting CFSP decisions the Council should be aware of the external policies in the TFEU, and vice versa. Despite its 'balanced' approach, Article 40 implies that foreign policy measures are excluded once they would interfere with exclusive powers of the Union, for instance in the area of Common Commercial Policy (CCP). This may seriously limit the freedom of the Member States in the area of restrictive measures (above) or the export of 'dual goods' (commodities which can also have a military application).[37] The current text of Article 40 TEU forces the Court to take a different view on the relationship between CFSP and other areas of external action. No longer should an automatic preference be given to a non-

37 Council Regulation 1334/2000/EC setting up a Community regime for the control of exports of dual-use items and technology, OJ 2000 L 159/1; in the meantime replaced by Council Regulation 428/2009/EC setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ 2009 L 134/1. Exception was only made for certain services considered not to come under the CCP competence. For these services (again) a CFSP measure was adopted: Council Joint Action 2000/401/CFSP concerning the control of technical assistance related to certain military end-uses, OJ 2000 L 159/216.

CFSP legal basis whenever this is possible. One could argue that Article 40 is merely a confirmation of the principle of consistency, now that is does no longer establish a hierarchy between CFSP and other policies.[38] At the same time, the fact that Article 40 does not really add anything to the treaty regime may be interpreted as confirming a separate status of CFSP, which again underlines what has been termed the 'integration–delimitation paradox', which from the outset has characterised the position of CFSP in the treaties.[39]

Despite the fact that a combination of legal bases in CFSP and other external policies remains difficult because of the diverging decision-making procedures and instruments,[40] an integrationist pull can again come from the Union's unified external objectives. Indeed, as argued by Merket on the basis of a study of the relationship between development and security policy, 'Objectives of conflict prevention, crisis management, reconciliation and post-conflict reconstruction cannot be assigned to one or the other EU competence, forging an indissoluble link between development cooperation and the CFSP.'[41] Yet, obviously it would have been easier when CFSP and other policies could be combined in single legal instruments.

C. Integrationist Case Law?

Yet, while the consistency requirement hints at a combination of legal bases, the different CFSP procedures and instruments preclude that. In fact, the combination of the different CFSP procedures/instruments and the requirement of consistency seems to form a key challenge for the Court of Justice.[42] The role of the Court in relation to CFSP has been subject to legal analysis over the years,[43] yet new case law has more recently led to many more analyses.[44] A

38 Pre-Lisbon, Article 47 TEU contained the clear rule that 'nothing in the TEU shall affect the EC Treaty'. See also Case C-91/05, Commission v. Council (*Small Arms/ECOWAS*) [2008] ECR I-3651. See further: C. Hillion and R. A. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?' (2009) 46 *CML Rev* 551–86.

39 H. Merket, *The European Union and the Security-Development Nexus: Bridging the Legal Divide*, PhD thesis, defended at the University of Ghent, Belgium, 2015; see on this issue in particular Chapter 2.

40 See e.g. Joined Cases C-164–5/97, Parliament v. Council, ECLI:EU:C:1999:99, para. 14, in which the Court held that no combination of legal bases is possible 'where the procedures laid down for each legal basis are incompatible with each other'.

41 Merket, 'The European Union and the Security-Development Nexus' (above), Chapter 3.

42 Arguments in this section are further developed in Wessel, 'Resisting Legal Facts' (above).

43 S. Griller, 'The Court of Justice and the Common Foreign and Security Policy' in A. Rosas et al. (eds.), *Court of Justice of the European Union – Cour de Justice de l'Union Européenne, The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (T. M. C. Asser Press, 2013), 675-92; G. de Baere and P. Koutrakos, 'The Interactions between the Legislature and the Judiciary in EU External Relations' in P. Syrpis (Ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012), 243–73; L. Saltinyté, 'Jurisdiction of the European Court of Justice over Issues Relating to the Common Foreign and Security Policy under the Lisbon Treaty' (2010) 119 *Jurisprudence* 261; A. Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford University Press, 2009).

44 See, most notably C. Hillion, 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' in M. Cremona and A. Thies (eds.), *The European Court of Justice and External Relations Law* (Hart Publishing, 2014); C. Hillion, 'Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy' (2016) *European Papers* 55; C. Eckes, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' (2016) *European Law Journal* 492; G. Butler, 'The Coming of Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (2017) *European Constitutional Law Review* 673; M. Cremona, 'Effective Judicial Review is of the Essence of the Rule of Law: Challenging Common Foreign and Security Policy Measures before the Court of Justice' (2017) *European Papers* 671; P. Koutrakos, 'Judicial Review in the EU's Common Foreign And Security Policy' (2018) *International and*

clear example is Hillion, who convincingly argued that the view that the Court is not competent at all in the area of CFSP can no longer be upheld. He summarised the areas in which the Lisbon Treaty has created a competence for the Court in relation to CFSP as follows:

> First, it has made it possible for the Court, albeit within limits, to *exercise judicial control* with regard to certain CFSP acts, thus abolishing the policy's conventional immunity from judicial supervision. Second, it has recalibrated the Court's role in *patrolling the borders* between EU (external) competences based on the TFEU and the CFSP, turning it into the guarantor of the latter's integrity. Third, the Treaty has generalized the Court's capacity to *enforce the principles underpinning the Union's legal order*.[45]

This role of the Court should not have come unexpected, given the intertwining of CFSP and other external Union policies – in particular through the principle of consistency referred to above. This would also explain the major change initiated by the Lisbon Treaty: no longer is the Court's role explicitly excluded in relation to CFSP; rather the general rule seems to be that the Court is competent unless its role is excluded in a specific situation.[46]

This leads to a role for the Court in relation to CFSP in different situations.[47] First of all, as we have seen, restrictive measures taken on the basis of CFSP acts against natural or legal persons fall under the scrutiny of the Court (Article 24(1) TEU jo. Articles 275 and 263 TFEU). Second, there is the situation under Article 40 TEU, calling for a balanced choice for either a CFSP or another legal basis of decisions (e.g. trade or development co-operation). In the 2012 Case C-130/10, *European Parliament* v. *Council the Court*, the Court was given a first chance to develop an approach towards the function of Article 40.[48] Being confronted with the question of the appropriate legal basis for 'restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban',[49] the Court held that Article 215 TFEU (following a previous CFSP decisions) rather than Article 75 TFEU (in the Area of Freedom, Security and Justice (AFSJ)) was the correct choice, despite the limited role of the European Parliament in relation to the CFSP/Article 215 procedure. The context of peace and security proved to be decisive for the Court's conclusion. The Court did not shy away from referring to CFSP provisions as well and seemed to focus on the distinction between internal policies and external action.[50]

These legal basis questions are relevant for the point this chapter aims to make. As argued by Advocate General Kokott in a similar case:

Comparative Law Quarterly, 1; C. Hillion and R.A. Wessel, 'The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP', in S. Blockmans and P. Koutrakos (eds.), *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar Publishing, 2018); and J. Heliskoski, 'Made in Luxembourg: the Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy' (2018) 2 *Europe and the World: A Law Review* (forthcoming).

45 C. Hillion, 'A Powerless Court?'(above).

46 Hinarejos, Judicial Control in the European Union (above), 150.

47 See more extensively and for many case law references Hillion, 'A Powerless Court?' (above).

48 Case C-130/10, Parliament v. Council, ECLI:EU:C:2012:472.

49 Council Regulation (EU) No. 1286/2009 of 22 December 2009 amending Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, OJEU L 346/42 (2010).

50 Cf. Hillion, 'A Powerless Court?' (above).

> At first sight this might all seem a question of technical detail which certainly does not hold the same excitement as many literary treatments of the subject of piracy. Nevertheless, the problem at issue here has considerable political and even constitutional implications because it is necessary to define more sharply the limits of the common foreign and security policy and to delimit it from other European Union policies.[51]

This became clear also when the Court had a chance to revisit the issue in the so-called *Mauritius* case.[52] Here the Court chose context over content and argued that the EU–Mauritius Agreement, concluded in the framework of Operation Atalanta, was rightfully based within CFSP.[53] Yet, this does not limit the application of procedural EU rules and principles. In the words of Peers:

> the Court's ruling means that any CFSP measure can be litigated before it, as long as the legal arguments relate to a procedural rule falling outside the scope of the CFSP provisions of the Treaty (Title V of the TEU). For instance, it arguably means that the Court would have the power to rule on the compatibility of proposed CFSP treaties with EU law, since that jurisdiction is conferred by Article 218 TFEU and not expressly ruled out by Article 275. But such disputes might often include arguments about the substance of the measure concerned (for instance, whether it would breach the EU's human rights obligations), and it could be awkward to distinguish between procedural and substantive issues in practice.[54]

Third, international agreements in the area of CFSP are concluded on the basis of the general EU provisions in this regard (Article 218 TFEU), despite some specific procedural rules, and no exception is made in relation to legality control by the Court.[55] It has further been noted – and in a way conformed by the *Mauritius* case – that Article 218(11) does not seem to exclude EU agreements that relate 'exclusively or principally' to the CFSP from the Court's scrutiny.[56] In the end, all international agreements (whether not, wholly or partly) CFSP agreements, are agreements for which the Union as such is internationally formally responsible. It would therefore be difficult to maintain the view that the Court could not scrutinise CFSP international agreements or CFSP parts in agreements. In any case, the Article 40 TEU situations could by itself already cause a need for the Court to assess international agreements in their entirety. In Case C-658/11 on the EU–Mauritius Agreement (and more recently confirmed in Case C-263/14, *Tanzania*), the Court underlined its jurisdiction in relation to CFSP-related agreements

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51 View of AG Kokott in Case C-263/14, European Parliament v. Council, , ECLI:EU:C:2015:729, 28 October 2015, para. 4.

52 Case C-658/11, European Parliament v. Council (*Mauritius Agreement*), ECLI:EU:C:2014:2025. See C. Matera and R. A. Wessel, 'Context or Content? A CFSP or AFSJ Legal Basis for EU International Agreements – Case C-658/11, European Parliament v. Council (*Mauritius Agreement*)' (2014) *Revista de Derecho Comunitario Europeo* 1047–64.

53 A similar conclusion was drawn by AG Kokott in the more recent Tanzania case, Case C-263/14, *European Parliament v. Council*, ECLI:EU:C:2015:729, 28 October 2015.

54 S. Peers, 'The CJEU Ensures Basic Democratic and Judicial Accountability of the EU's Foreign Policy', *EU Law Analysis*, 24 June 2014, http://eulawanalysis.blogspot.nl/2014/06/the-cjeu-ensures-basic-democratic-and.html.

55 T. Tridimas, 'The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?' in T. Tridimas and P. Nebbia (eds.), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order, I: Constitutional and Public Law. External Relations* (Hart Publishing, 2004), 128; G. de Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, 2008), 190.

56 Hillion, 'A Powerless Court?' (above); as well as P. Eeckhout, *EU External Relations Law* (Oxford University Press, 2011) 498.

where the right of the European Parliament (EP) to be informed is concerned. All cases can be seen as underlining that CFSP is part and parcel of the Union's constitutional set-up.

Fourth, whereas the Court in the *Mauritius* case argued that the simple fact that there is a CFSP relation does not deprive Parliament from its constitutional prerogatives, in another recent case it had already argued that a CFSP link could not form a reason to deny an individual the right to bring a case. And in *H.* v. *Council* – a case brought by a staff member of the EU Police Mission in Bosnia and Herzegovina (EUPM) – the Court set clear limits to the exclusion of CFSP-related matters from its jurisdiction:

> [T]he scope of the limitation, by way of derogation, on the Court's jurisdiction . . . cannot be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions.[57]

Overall, the Lisbon Treaty thus seems to have strengthened the Court's role as a Constitutional Court, allowing it to enforce the fundamental EU principles across the board.[58] The Treaties do not provide reasons to exclude CFSP from this holistic approach, simply because it finds its basis in another treaty. On the contrary. What becomes clear is that many of these cases, irrespective of their clear CFSP context, might be about an application of more general rules and principles. Thus, one could say that the Court (merely) underlines a Union-wide application of, *inter alia*, rules on role of the European Parliament in the procedure to conclude international agreements,[59] legal protection by the different EU and/or national courts,[60] regulations for (seconded) staff to EU bodies and missions,[61] or of rules on public procurement.[62]

The obvious question is whether Article 24(1) TEU does not simply provide an exhaustive list of the powers of the Court in relation to CFSP. After all, the text of that provision is quite clear:

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57 Case C-455/14P *H v Council*, ECLI:EU:C:2016:569.

58 Cf. C. Hillion, 'Conferral, Cooperation and Balance in the Institutional Framework of EU External Action', in Cremona (above) 117-174. And earlier: D. M. Curtin and I. F. Dekker, 'The European Union from Maastricht to Lisbon: Institutional and Legal Unity Out of the Shadows' in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, 2nd edn (Oxford University Press, 2011), 155–86, 170. This is not to say that the Court did not have this role prior to the Lisbon Treaty; see e.g. D. M. Curtin and R. A. Wessel, 'Rechtseenheid van de Europese Unie? De rol van het Hof van Justitie als constitutionele rechter' (2008) 10 *SEW Tijdschrift voor Europees en economisch recht* 371–8; as well as D. M. Curtin and R. H. van Ooik, 'Een Hof van Justitie van de Europese Unie?' (1999) *SEW Tijdschrift voor Europees en economisch recht* 24–38.

59 See also C-130/10 Parliament v. Council; Case C-658/11, European Parliament v. Council (*Mauritius Agreement*); and Case C-263/14, *Tanzania*.

60 Case 72/15 *Rosneft*: "Since the purpose of the procedure that enables the Court to give preliminary rulings is to ensure that in the interpretation and application of the Treaties the law is observed, in accordance with the duty assigned to the Court under Article 19(1) TEU, it would be contrary to the objectives of that provision and to the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of Article 275 TFEU, to which reference is made by Article 24(1) TEU […]"

61 Case C-455/14P, *H v Council*, ECLI:EU:C:2016:569.

62 Case C-439/13P *Elitaliana*, ECLI:EU:C:2015:753.

> The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.

Taking into account our analysis above, the answer seems to be that it remains difficult to see a role for the Court in pure CFSP situations, in which the context of other EU external relations is absent. The most obvious lack of judicial control is apparent when competences and decision-making procedures *within* the CFSP legal order are at stake. This means, for instance, that neither the Commission, nor the EP can commence a procedure before the Court in cases where the Council has ignored their rights and competences in CFSP decision-making procedures in a situation where CFSP as a legal basis is not disputed. This brings about a situation in which the interpretation and implementation of the CFSP provisions (including the procedures to be followed) is left entirely to the Council (or perhaps worse: to individual Member States). Remembering their preference for 'intergovernmental' co-operation where CFSP is concerned, it may be understandable that Member States at the time of the negotiations had the strong desire to prevent a body of 'CFSP law' coming into being by way of judicial activism on the part of the European Court of Justice, but it is less understandable that they were also reluctant to allow for judicial control of the *procedural* arrangements they explicitly agreed upon (although it is acknowledged that it may be difficult to unlink procedures and content).

At the same time, given the dynamics of the Lisbon approach to consolidating the EU's external relations, it will be increasingly difficult to deny a link with other policies, allowing the Court to take CFSP-dimensions into account in its assessment of those policies. Arguments can be found why the current treaty regimes also allow for an extended role for domestic courts in relations to CFSP.[63] Yet, what about the two notions that are often said to differentiate CFSP norms from other EU norms: primacy and direct effect?[64] The question of primacy and direct effect of CFSP norms is far from new. Earlier, it has been contended that these principles cannot be said to be completely alien to the CFSP legal order.[65] At the same time Declaration No. 17 on primacy explicitly refers to both the TFEU and the TEU: 'in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law'. Obviously, one could argue that there is not so much case law in the area of CFSP; yet this could also be seen as a reference to the *Segi* case in which the Court had already claimed the Union-wide application of primacy.[66]

Indeed, both the legal nature and the normative content of CFSP decisions may form an obligation for Member States to allow for direct effect and primacy in their national legal order in specific cases. This would also be in line with the general demand laid down in Article 19(1) TEU that 'Member States shall provide remedies sufficient to ensure effective legal protection

63 See more extensively Hillion and Wessel, 'The Good, the Bad and the Ugly' (above).

64 According to the first principle a Court would need to set aside a national rule in case of a conflict with an EU norm; on the basis of the second principle EU norms can in principle be invoked in domestic proceedings.

65 Gosalbo-Bono, 'Some Reflections of the CFSP Legal Order' (above).

66 In a similar vein: Case C-105/03, *Pupino* [2005] ECR I-05285.

in the fields covered by Union law.' Once individuals are confronted with rights or obligations on the basis of CFSP decisions that are 'sufficiently clear and unconditional' it may become difficult for national courts to ignore an important EU decision simply because its status has not been regulated in as much detail as some other EU instruments. Effective legal protection includes the protection of fundamental rights,[67] which (as underlined by Article 6(3) TEU) 'shall constitute general principles of the Union's law'.

All in all, while enforcement of CFSP decisions as such remains difficult, the case law of the Court reveals that the 'special position' of CFSP should not affect general principles of EU law, that there may be good reasons to opt for CFSP rather than for any other external policy and that individuals have a right to effective protection. Admittedly, apart from perhaps the restrictive measures, not many CFSP decisions have a substantive impact on the EU's legal order or on the position of individuals.[68] Yet, the foreseen extended role of the Union in global governance may change this.

IV. External Pressures Towards Integration

Integration in European foreign policy is not only triggered by an internal institutional dynamic, but increasingly also by external reactions to the EU's global ambitions and its more visible posture in the international arena. The wish of the Union to 'play along' calls for an adaptation of the Union to the rules and customs of international law. This is indeed a two-way street: while we have seen that the Union aims to contribute to global governance, it also has to find its place in a legal order that has states as its primary subjects.

At the same time, the internal debates (partly described above) have to a large extend resulted in navel-gazing. The outside world is less interested in internal (horizontal as well as vertical) competence battles. This had led the Union to develop its so-called 'comprehensive approach', which as observed by Merket:

> indicates a tendency to move away from pre-determined off-the-shelf solutions or politically correct but vague calls for coherence. This is replaced by a gradual systematisation of mechanisms that stimulate continuous interaction between all relevant stakeholders in order to arrive at made-to-measure comprehensive approaches continuously adapted to the specific needs of any given situation.[69]

The question is to what extent outside pressures help the EU to integrate and consolidate its external relation regime.

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67 Including the right to access to justice. See also C. Eckes, EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions (Oxford University Press, 2009). See also the *Rosneft* case (above).

68 See also Cardwell, 'On "Ring-Fencing"' (above), 461: 'The reasoning set out above leads to a conclusion that the practice of the CFSP, beyond sanctions, remains declaratory in nature. "Declaratory" is a criticism that has been levelled at the CFSP since its creation, and whilst declarations may have some foreign policy impact, it is curious that these are the hallmark of the policy, instead of the instruments which have been specifically created for its use. The extent to which non-CFSP measures are used already suggests that actions and policies toward third countries or issues are there but not badged as such under the CFSP.'

69 Merket, 'The European Union and the Security-Development Nexus' (above), Conclusions of Chapter 6.

A External Representation

It is not to be expected that the international legal order will be adapted to allow the EU to fully play its role as a global actor. In fact, the Union's demands – often related to its complex internal division of competences – may increasingly annoy third states for whom it may remain unclear with whom they are actually dealing.[70] The current Treaty regime therefore aims to streamline the Union's external representation. While this is also clearly driven by internal developments, the external pressure is obvious as well.[71]

Traditionally, diplomatic relations are established between states and the legal framework is strongly state-oriented. As an international organisation enjoying international legal personality, the EU is allowed to enter into legal relations with states and other international organisations.[72] At the same time, its external competences are limited by the principle of conferral (Article 5 TEU), and in many cases the EU is far from exclusively competent and shares its powers with the Member States. Indeed, the TEU mandates that 'essential state functions'[73] of the Member States are to be respected by the Union and it is in diplomatic relations in particular that one may come across these state functions.[74] Yet, the Treaties reveals the EU's new diplomatic ambitions, in particular through the establishment of the EEAS, which has been called 'the first structure of a common European diplomacy'.[75]

International representation is a core element of international (diplomatic) law. The first indent of Article 3(1) of the Vienna Convention on Diplomatic Relations lists as a task of embassies: 'Represent the sending state in the receiving state'.[76] Several EU Treaty articles provide a solid basis for the Union to establish a formal and substantive presence as a single, fully matured diplomatic actor represented in third countries and international organisations.[77] As regards the physical presence through its delegations, EU activities are based on Article

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70 An example is formed by the Draft Agreement on the Accession of the EU to the European Convention on Human Rights, which contains many complex innovations to allow the Union to participate in what was set-up as a system for states only. On the various aspects see e.g. the special issue of the GLJ: http://www.germanlawjournal.com/volume-16-no-01/.

71 See recently on this topic: S. Duquet, *The Contribution of the European Union to Diplomatic and Consular Law*, PhD-thesis KU Leuven, 2018; and earlier J. Wouters and S. Duquet, 'Unus inter plures? The EEAS, the Vienna Convention and International Diplomatic Practice' in J. Bátora and D. Spence (eds.), *The European External Action Service: European Diplomacy Post-Westphalia* (Palgrave MacMillan, 2015). See earlier R. A. Wessel, 'Can the European Union Replace its Member States in International Affairs? An International Law Perspective' in I. Govaere et al. (eds.), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers, 2013), 129-47; as well as R. A. Wessel and B. van Vooren, 'The EEAS's Diplomatic Dreams and the Reality of International and European Law' (2013) 20(9) *JEPP* 1350–67.

72 R.A. Wessel and J. Odermatt (eds.), *Research Handbook on the EU's Engagement with International Organisations* (Edward Elgar Publishing, 2018; forthcoming).

73 Cf. Article 4(2) TEU.

74 The EEAS Decision acknowledges this in Article 5(9): 'The Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States'. See also B. Van Vooren, 'A Legal-Institutional Perspective on the European External Actions Service', CMLR, 2011, 475–502, who points out that due to consistency obligations this should be read as a general obligation to co-operate between the EEAS and the national diplomatic services (at 497).

75 Consular and Diplomatic Protection: Legal Framework in the EU Member States, Report of the EU CARE project, December 2010, 31; available at http://www.careproject.eu/images/stories/ConsularAndDiplomatic-Protection.pdf.

76 Article 3(a) of the Vienna Convention on Diplomatic Relations.

77 Articles 220 and 221 TFEU io Article 3(5) and 21(1) TEU.

221(1) TFEU: 'Union Delegations in third countries and at international organisations shall represent the Union.' The ambition flowing from this new provision in the TFEU should be quite clear: the Union no longer wishes to have an international presence through delegations of only one of its institutions (e.g. Commission delegations), or through the diplomats of the Member State holding the rotating presidency.[78] The purpose of this new treaty provision was to have 'less Europeans and more EU';[79] that is, a single diplomatic presence for the Union speaking on behalf of a single legal entity active globally.

The transformation from Commission delegations into embassies proper was not purely formal, but was in some cases accompanied by added powers to at least some of those representations abroad. While all 139 Commission delegations[80] were transformed into EU delegations mere weeks after the entry into force of the Lisbon Treaty, 54 were immediately transformed into 'EU embassies' in all but name.[81] This meant that these 'super-missions' were not merely given the new name, but also new powers in the form of an authorisation to speak for the entire Union (subject to approval from Brussels); and the role to co-ordinate the work of the member states' bilateral missions. Prominent exclusions among those fifty-four delegations were those to international bodies, of which there are eight: New York (UN), Geneva (UN and WTO), Vienna (IAEA, UNODC, UNIDO, OSCE), Strasbourg (Council of Europe), Addis Ababa (AU), Paris (UNESCO and OECD) and Rome (FAO, WFP, IFAD, Holy Sea, and Order of Malta).[82] The Union still has to work out how to handle EU representation in multilateral fora under Lisbon.[83] However, it is certainly the EU's ambition to 'progressively' expand these powers to other EU delegations as well.[84]

So far, the representation by the Union delegations largely followed the pre-Lisbon practice which was developed on the basis of the experience with the Commission delegations. Representation by the Union did not replace representation by the Member States. Indeed, as

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78 But see the EEAS document 'EU Diplomatic Representation in Third Countries – First half of 2012', Council of the European Union, Doc. 18975/1/11, REV 1, 11 January 2012, which reveals that in some countries the EU is still represented by a Member State.

79 A. Missiroli, 'The New EU Foreign Policy System After Lisbon: A Work in Progress' (2010) 15(4) *European Foreign Affairs Review* 427–52.

80 See www.eeas.europa.eu/delegations/index_en.htm.

81 A. Rettman, 'EU Commission "Embassies" Granted New Powers', *EU Observer*, 21 January 2010. Yet, see the many differences between Union delegations and national embassies: P. Kerres and R. A. Wessel, 'Apples and Oranges? Comparing European Union Delegations to National Embassies', *CLEER Paper*, 2015/2.

82 UN: United Nations; WTO: World Trade Organisation; IAEA: International Atomic Energy Agency; UNODC: United Nations Office on Drugs and Crime; UNIDO: United Nations Industrial Development Organisation; OSCE: Organisation for Security and Co-operation in Europe; AU: African Union; UNESCO: United Nations Educational, Scientific and Cultural Organisation; OECD: Organisation for Economic Co-operation and Development; FAO: Food and Agriculture Organisation; WFP: World Food Programme; IFAD: International Fund for Agricultural Development.

83 Idem. Similarly, A. Rettman, 'Ashton Designates Six New "Strategic Partners"', *EU Observer*, 16 September 2010, quoting an EU official on the importance of the EEAS for the role of Mrs Ashton in external representation: 'Lady Ashton has de facto 136 ambassadors at her disposal'.

84 See e.g. EEAS, 'EU Diplomatic Representation in Third Countries – Second Half of 2011', 11808/2/11 REV 2 (Brussels, 25 November 2011), and EEAS, 'EU Diplomatic Representation in Third Countries – First Half of 2012', 18975/11 (Brussels, 22 December 2011). These documents always start with two paragraphs quoting Article 221 TFEU and an excerpt from the Swedish Presidency report on the EEAS of 23 October 2009, which set out the Member States' view on the scope of the EEAS in relation to the HR mandate. On that basis these reports continue by stating that the 'responsibility of representation and coordination on behalf of the EU has been performed by a number of Union delegations as of 1 January 2010, or later', and insofar as they have not taken over such functions, pre-Lisbon arrangements and the role of the Presidency continue to apply.

Article 5(9) of the EEAS Decision provides: 'The Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States.' Yet, ongoing budget cuts may trigger Member States to close some of their own representations and to rely more on the new 'EU embassies'. This may be unthinkable for most of the larger Member States at this moment, and the current EEAS legal regime does not yet include this option. Obviously, any transfer of powers will depend on the consent of the Member States, as they may have good reasons to continue a bilateral representation. After all, essential elements of a relationship between a Member State and a third state may not be covered by the EU's competences or a special relationship may exist between an EU state and a third country, either due to historical ties and/or geographic location.[85] Nevertheless, one medium-sized Member State openly discussed the possible benefits of a transfer of certain consular tasks and the collection of information to Union delegations.[86]

The development of the external representation through the High Representative, but above all by establishing 'Union delegations', was certainly also triggered by the demands and customs of the international diplomatic system. The arrangements concluded with third states reveal that the Union has adopted the rules of the game and has in fact 'contracted-in' to the rules of international diplomatic law.

B An EU Contribution to International Law?

Another external trigger for further integration in the area of foreign policy is formed by the need for the Union to co-design the international rules, now that it is becoming more affected by them. In other words: the coming of age of the EU as a global actor also slowly turns the EU from a passive recipient into an active contributor to the further development of international law. As we have seen, the EU Treaties contain the idea that the EU should – at least partly – shift its focus from its own Member States to third states. By now the EU has a legal relationship with almost all states in the world and it is an active participant in many international organisations (either directly or through its Member States). It has been held that the EU is a global normative actor,[87] in particular in the promotion of its own values and by influencing global policy-making. Yet, influencing policies is not the same as influencing legal norms. International law is known for its quite strict rules on what it considers to be a legitimate source. The question is to what extent EU practice may indeed contribute to international law-making.[88]

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85 C. Cusens, 'The EEAS vs. the National Embassies of EU Member States?' in P. Quinn, *Making European Diplomacy Work: Can the EEAS Deliver*?, EU Diplomacy Paper 08/2011, College of Europe, 11–13, 12.

86 See the report by the Netherlands Ministry for Foreign Affairs, 'Nota modernisering Nederlandse diplomatie' (8 April 2011), 10 and 18, www.rijksoverheid.nl/documenten-en-publicaties/notas/2011/04/08/nota-modernisering-nederlandse-diplomatie.html.

87 See e.g. I. Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *JCMS* 235–58; H. Sjursen, 'The EU as a Normative Power: How Can this Be?' (2006) 13(2) JEPP 235–51; R. Whitman (ed.), *Normative Power Europe: Empirical and Theoretical Perspectives* (Palgrave, 2011); and T. Forsberg, 'Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal-Type' (2011) 49(6) *JCMS* 1183. See also some chapters in N. Witzleb et al. (eds.), *The European Union and Global Engagement: Institutions, Policies and Challenges* (Edward Elgar, 2015).

88 See also F. Hoffmeister, 'The Contribution of EU Practice to International Law', M. Cremona (ed.), *Developments in EU External Relations Law* (Oxford University Press, 2008).

It remains important to underline that – irrespective of the clear link between many internal and external policies – the Union has a choice to participate in either international law-making or to legislate domestically. In the words of De Witte and Thies: 'the competence allocation under the Treaties does not distinguish, in principle, between internal and external competences of the EU and therefore does not establish any "venue preference". In other words, where the EU has competence to legislate, it can do so in any accessible venue.'[89] Yet, as also underlined by these authors, there may be legal constraints. While internal legal constraints flow for the rules and principles in the EU Treaties, external constraints are related to the fact that the Union, as a non-state actor, may have limited access to traditional international law-making procedures and venues. An interesting effect, however, is that law-making at the global level may trigger increased activity of the Union in that area, and vice versa. De Witte and Thies described this in terms of upstream and downstream 'sequencing', pointing to and ever stronger interaction between internal and external policy-making.[90] Thus, international agreements may trigger new legislation at EU level (for instance in the area of food safety, private international law or the rights of disabled persons), which in turn strengthens the international role of the Union in these areas in discussions on implementation or revision of agreed rules, principles or standards.[91]

Taking a broader perspective than just CFSP, the EU can influence the international legal order in different ways. Obviously, the most common way for the EU to influence international law, or to contribute to it, is by concluding an international agreement. Treaties form a key source of international law. As a matter of EU law, the competence to conclude international agreements is undisputed.[92] The EU is a party to well over 1,000 treaties.[93] With the increasing internal competences the scope of the Union's legal dealings with third states was extended to almost all areas covered by the Treaties. The EU's Treaties Database thus lists international agreements in the areas of Agriculture, Coal and Steel, Commercial Policy, Competition, Consumers, Culture, Customs, Development, Economic and Monetary Affairs, Education, Training, Youth, Energy, Enlargement, Enterprise, Environment, External Relations, Fisheries, Food Safety, Foreign and Security Policy, Fraud, Information Society, Internal Market, Justice, freedom and security, Public Health, Research and Innovation, Taxation, Trade, and Transport. Both bilateral and multilateral agreements form a source of international law and, as a major global player, the EU may substantially influence the text of an agreement. Yet, the question may be rightfully posed whether this can be seen as EU law

89 B. de Witte and A. Thies, 'Why Choose Europe? The Place of the European Union in the Architecture of International Legal Cooperation' in B. Van Vooren et al. (eds.), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013), 23–58, 34. For a more extensive development of some the ideas presented here, see R.A. Wessel, 'Flipping the Question: The Reception of EU Law in the International Legal Order' (2016) *Oxford Yearbook of European Law*, 533–561.

90 Ibid., 36.

91 More extensively on this interaction: R. A. Wessel and J. Wouters, 'The Phenomenon of Multilevel Regulation: Interaction between Global, EU and National Regulatory Spheres', *International Organizations Law Review*, 2007, 257–89.

92 Cf. Opinion 1/2003 on the Lugano Convention: 'whenever Community law created for the [EU] institutions powers within its internal system for the purpose of attaining a specific objective, the Community has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect'.

93 See the Treaties Office Database of the European External Action Service, http://ec.europa.eu/world/agreements/default.home.do.

forming a source of international law. After all, in many cases substantive EU law may not exist at the time of the negotiations and the EU is simply one of the parties. Thus, we have seen an active role played by the EU in such diverging areas as security issues, environmental policies, financial governance or migration.[94]

Apart from international agreements, the EU may influence the international legal order through the issuing of unilateral acts, which on the basis of international law bind the Union vis-à-vis third states both in relation to internal market issues,[95] as well as on foreign policy. Once the Union has succeeded in formulating a policy, this may result in the creation of expectations on the side of the third party. It is generally held that apart from the Member States and the institutions, the third states involved must be able to rely on the official decisions of an organisation.[96] Thus, the legal effects of EU Decisions would reach beyond the internal system of the EU legal order. This considerably extends the scope of the effect of EU external action. Potentially, it not only includes a wide range of decisions taken in the framework of the Union's foreign and security policy, but also the vast amount of declaration issues by the Union (or the High Representative for Foreign and Security Policy) on an almost daily basis. Obviously, the statements must have been phrased in a way to trigger legitimate expectations on the side of third states which are to be upheld by the Union.

Third, the EU may contribute to the development of international customary law. Traces, at least, of a 'European' influence of international norms are already to be found in the effects of the case law of the European Court of Human Rights. A case in point may be the tension between the international rules on the immunity of international organisations and the demands laid down in Article 6 of the European Convention on Human Rights in relation to the right to fair trial and the interpretation of the Court that this implies that international organisations are to cater for a system of 'equivalent protection' compared to that of states.[97] Fourth, the EU may influence international law-making through participation in international organisations.[98] Apart from its participation in a number of actual international organisations, the institutionalisation of the role of the EU in the world is reflected in its position in international regimes in various policy fields. The position of the EU in international institutions is part and parcel of its foreign policy and it is at these fora that a *structural* role of the EU in global governance becomes most visible. Moreover, it is this role that has become

94 See e.g. the contributions to B. Van Vooren et al. (eds.), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013).

95 An example being the EU's Generalised Scheme of Preferences' (GSP), which allows for developing country exporters to pay less or no duties on their exports to the EU. This gives them vital access to EU markets and contributes to their economic growth. See Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No. 732/2008.

96 Cf. J. Klabbers, *The Concept of Treaty in International Law* (Kluwer Law International, 1996), 94.

97 See on the relevant case law e.g. A. Reinisch and U. A. Weber, 'In the Shadow of Waite and Kennedy: The Jurisdictional Immunity of International Organizations, The Individuals Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement' (2004) 1 *International Organizations Law Review* 59–110. See for a view by a number of European lawyers: Brief of European Law Scholars and Practitioners as Amici Curiae in Support of Plaintiffs-Appellants, Case Delama Georges et al. v. United Nations et al., United States Court of Appeals, No. 15–455, 2015, www.ijdh.org/wp-content/uploads/2015/06/EuroLaw-Amicus-Brief.pdf.

98 Cf. S. Blavoukos and D. Bourantonis (eds.), *The EU Presence in International Organizations* (Routledge, 2010); Wessel and Odermatt (above).

more interesting now that it becomes clear that many EU (and national) rules find their origin in decision-making processes in other international organisations. The question of how effective the EU has been in influencing the outcome of law and policy-making processes at international institutions is again one that has primarily been on the table of non-lawyers. Overall – and despite major internal turf-battles – the view is that the EU's influence is quite substantive,[99] and that it largely practices what it preaches in terms of the promotion of values.[100]

While the above-mentioned examples are the most clear expressions of the EU's contribution to international law-making, the Union's role in 'shaping the international legal order'[101] is much more extensive. Conceptions of 'normative power Europe' have in particular been developed in International Relations Theory and EU Studies and aim to draw attention to 'the EU's "promotion of norms in a normative way"– ie the promotion of multilateralism and of values such as respect for international law, human rights and democracy, through non-coercive means'.[102] The question then is to what extent the promotion of norms can lead to actual law-making. In that respect it is well-known that EU views may function as a reference point in many areas. On the basis of their co-operation with the EU, third states may even (be forced to) adopt elements of EU law in their domestic legal orders. The closer the relationship with the EU is (candidate countries, associated countries, countries participating in the European Neighbourhood Policy, countries that are dependent on the EU for parts of their development etc.) the more frequent this will be the case.

Generally, it is clear that to be successful as a 'normative power', the EU will have to adapt its strategies to the norms on international law-making. Again, this causes an external pressure on the external representation of the EU and the way in which it succeeds in aligning its internal policies and actors towards a unified force in foreign policy.

V. Conclusion

The EU's foreign and security policy represents a clear paradox. Set up as a largely intergovernmental network, the aim of most Member States was to limit integration in the area. Yet, both internal and external factors put the intergovernmental nature into perspective and the Union's legal order as well as the global system pulled CFSP closer to other policy areas.

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99 See e.g. K. E. Jørgensen and K. Laatikainen (Eds.) *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power* (Routledge, 2013). For a general overview of different opinions see C. Hill and M. Smith, 'Acting for Europe: Reassessing the European Union's Place in International Relations' in C. Hill and M. Smith (eds.), *International Relations and the European Union*, 2nd edn (Oxford University Press, 2011).

100 Cf. S. Lucarelli, 'Values, Principles, Identity and European Union Foreign Policy' in S. Lucarelli and I. Manners (eds.), *Values and Principles in European Union Foreign Policy* (Routledge, 2006). See for legal analyses of this matter: M. Cremona, 'Value in EU Foreign Policy' in M. Evans and P. Koutrakos (eds.), *Beyond the Established Legal Orders: Policy Interconnectedness between the EU and the Rest of the World* (Hart, 2011).

101 Cf. Kochenov and Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order* (above).

102 G. de Búrca, 'EU External Relations: The Governance Mode of Foreign Policy' in B. Van Vooren et al. (eds.), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press, 2013), 39–58, 39–40.

Ironically, this seems to have happened while the perception of 'otherness' was not affected; or perhaps *because* this perception was not affected. In a way it is surprising how limited the effects of treaty changes and internal and external developments have been on the perception of the nature of CFSP. Most probably, the same amount of integration could not have been reached if the issues had been laid out on the table.

Despite the fact that one stream in literature has always pointed to the clear links between CFSP and other Union policies, legal scholarship traditionally has been slow in picking up on real-life developments. The focus on legal texts sometimes blurs our view of what is going on in reality. As we have seen, other academic disciplines (such as political science and European studies) have been more clear on the integrationist tendencies in CFSP. Yet, these days many more lawyers would agree with Cardwell that 'the perspective of the CFSP as being intergovernmental is not only out-dated but misleading because it stresses that the Member States are the only significant actors in it and that anything which concerns the world beyond the borders of the EU must take place within CFSP'.[103] At the same time, while political scientists may more easily take things as they come, lawyers struggle with inconsistencies and paradoxes. As indicated by Merket, for instance, 'one of the main post-Lisbon challenges for EU external action will therefore be to solve this integration-delimitation paradox. In other words, how to reconcile the remaining plea for delimitation of the CFSP, with the equally strong call for coherence, integration and comprehensiveness.'[104]

This chapter aimed to show that this is not a challenge we should fear. And that the development of CFSP is as much connected to internal integrationist tendencies as to external demands to the new kid on the (state-centred) block.

103 Cardwell, 'On "Ring-Fencing"' (above), 456.
104 Merket, 'The European Union and the Security-Development Nexus' (above), Chapter 1.