



ARTICLES

LEX IMPERFECTA: LAW AND INTEGRATION IN EUROPEAN FOREIGN AND SECURITY POLICY

RAMSES A. WESSEL*

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ABSTRACT: This article aims to overcome the traditional image of the European Union's foreign and security policy by revealing an integrationist undercurrent that is boosted by both internal and external developments. It argues that both internal and external drivers have caused a consolidation of EU foreign policy, as well as a *constitutionalisation* underlining that CFSP is part of the Union's legal order. The aim is to note shifts and developments on the basis of new legal provisions (or new interpretations of provisions). It is argued that the treaty provisions as well as the case law of the Court point to an on-going integration and that even in the area of foreign policy EU nation-states have developed into Member States. At the same time, CFSP law remains *lex imperfecta*, as many logical next steps – for instance related to the role of Courts or the enforcements of CFSP norms – have not (yet) been taken.

KEYWORDS: Common Foreign and Security Policy – European integration – Court of Justice of the European Union – EU external relations – constitutionalisation – EU legal order.

I. INTRODUCTION

The European Union (EU)'s presentation of its foreign and security policy has been ambivalent from the outset. 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

* Professor of International and European Law and Governance, University of Twente, ramses.wessel@utwente.nl.

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: “[c]ommon 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 im-

policy area that has not developed beyond the intergovernmental European Political Cooperation of the 1970s and 1980s, while neglecting an integrationist undercurrent that is boosted by both internal and external developments. While this view is certainly no longer supported (if it ever was)² by the current treaty provisions, the question is whether – ironically – the continued intergovernmental representation of CFSP did in fact 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 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 contribution 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, while at the same time revealing a “movement towards member statehood”,⁶ challenging the sovereignty of EU Member States in the area of foreign policy. *Externally*, the need for a clear-

proves 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”, European Parliament CRE 07/07/2010-12, 7 July 2010, www.europarl.europa.eu. See more extensively: P.J. CARDWELL, *On ‘Ring-Fencing’ the Common Foreign and Security Policy in the Legal Order of the European Union*, in *Northern Ireland Legal Quarterly*, 2015, pp. 443-463.

² R.A. WESSEL, *The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation*, in *European Constitutional Law Review*, 2009, pp. 117-142; M.E. SMITH, *Europe’s Foreign and Security Policy: The Institutionalization of Cooperation*, Cambridge: Cambridge University Press, 2004.

³ See more extensively on the external perception of the EU: C. ECKES, R.A. WESSEL, *The European Union: An International Perspective*, in T. TRIDIMAS, R. SCHÜTZE (eds), *The Oxford Principles of European Union Law. Volume 1: The European Union Legal Order*, Oxford: Oxford University Press, 2016 (forthcoming).

⁴ P.J. CARDWELL, *On ‘Ring-Fencing’ the Common Foreign and Security Policy*, cit., p. 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, R.A. WESSEL, *EU External Relations Law: Text, Cases and Materials*, Cambridge: Cambridge University Press, 2014.

⁶ C.J. BICKERTON, *European Integration: From Nation-States to Member States*, Oxford: Oxford University Press, 2012, (Chapter 5: From Nation States to Member States in European Union Foreign Policy) p. 151.

er 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 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 The current contribution 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 a European Union 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-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 IR and politi-

⁷ See for an overview for instance R.A. WESSEL, *The Dynamics of the European Union Legal Order*, cit.

⁸ Cf. D. KOCHENOV, F. AMTENBRINK (eds), *The European Union's Shaping of the International Legal Order*, Cambridge: Cambridge University Press, 2014; B. VAN VOOREN, S. BLOCKMANS, J. WOUTERS (eds), *The Legal Dimension of Global Governance, What Role for the EU?*, Oxford: Oxford University Press, 2013.

⁹ Yet, "integration through law" has of course been part of the debates. Key publications include: M. CAPPELLETTI, M. SECCOMBE, J.H. WEILER (eds), *Integration Through Law: Europe and the American Federal Experience*, Berlin, New York: de Gruyter, 1985; S. WEATHERILL, *Law and Integration in the European Union*, Oxford: Oxford University Press, 1995; D. AUGENSTEIN (ed.), *'Integration through Law' Revisited: The Making of the European Polity*, Farnham, UK: Burlington; USA: Ashgate, 2012.

¹⁰ An overview can be found in J. BERGMANN, A. NIEMANN, *Theories of European Integration*, in K.E. JØRGENSEN, Å.K. AARSTAD, E. DRIESKENS, K. LAATIKAINEN, B. TONRA (eds), *The SAGE Handbook of European Foreign Policy, Vol. 1 and 2*, London: Sage, 2015, pp.166-182.

¹¹ See for instance the analyses by R. GINSBERG, *Conceptualizing the European as an International Actor: Narrowing the Theoretical Capability-Expectations Gap*, in *Journal of Common Market Studies*, 1999, p. 432; B. TONRA, T. CHRISTIANSEN, *The Study of EU Foreign Policy: Between International Relations and European Studies*, in B. TONRA, T. CHRISTIANSEN (eds), *Rethinking European Union Foreign Policy*, Manchester: Manchester University Press, 2004, pp. 1-9.

¹² P.M. NORHEIM-MARTINSEN, *Beyond Intergovernmentalism: European Security and Defence Policy and the Governance Approach*, in *Journal of Common Market Studies*, 2010, pp. 1351-1365; H. SJURSEN, *Not So Intergovernmental After All? On Democracy and Integration in European Foreign and Security Policy*, in *Journal of*

cal 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 neo-functional 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 IR, 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, as also the present contribution will testify, *legal* integration has a somewhat different focus. 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

European Public Policy, 2011, pp. 1078–1095; A. JUNCOS, K. POMORSKA, *Invisible and Unaccountable? National Representatives and Council Officials in EU Foreign Policy*, in *Journal of European Public Policy*, 2011, p. 1096. And, true to their character, these academic disciplines came up with new ways to describe the new modes of cooperation, using terms like "transgovernmentalism" (S. HOFFMANN, *CSDP: Approaching Transgovernmentalism?*, in X. KUROWSKA, F. BREUER (eds), *Explaining the EU's Common Security and Defence Policy: Theory in Action*, London: Palgrave MacMillan, 2011) or "supranational intergovernmentalism" (J. HOWORTH, *Decision-making in Security and Defence Policy: Towards Supranational Inter-governmentalism?*, in *Cooperation and Conflict*, pp. 433–453). 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*, in *Common Market Law Review*, 2006, pp. 337–394.

¹³ J. BERGMANN, A. NIEMANN, *Theories of European Integration*, cit., point to the importance of a 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 "Europeanization", also in relation to European foreign policy. "Europeanization" focuses on the impact of the European integration process on Member States. See for instance B. TONRA, *Europeanization*, in K.E. JØRGENSEN et al., *The SAGE Handbook*, cit., pp. 184–196.

¹⁴ *Ivi*, p. 176.

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

II.1. THE PURPOSE OF CFSP

As indicated above, in many discussions on the nature of CFSP Treaty provisions are frequently ignored. So, let's see what we are dealing with. The first reference to CFSP can be found in the Preamble to the 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: 1) the signatory States not only aim at implementing CFSP, they also intend to work on the further development of a common defence (policy); 2) all of this is meant to promote peace, security and progress, both in Europe and in the rest of the world; 3) 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. Art. 5, para. 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 Art. 21, para. 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 Art. 21, para. 3, TEU is meant to prevent a fragmentation of the Union’s external action (see below).

Zooming in on the objectives (Art. 21, para. 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”.

Arts 3, para. 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

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, S. BLOCKMANS, J. WOUTERS, *The Legal Dimension of Global Governance*, cit., pp. 7-22.

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.

II.2. CONSISTENCY BETWEEN CFSP AND OTHER EXTERNAL RELATIONS POLICIES

Art. 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 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 Ch. 2 entails “Specific Provisions on the Common Foreign and Security Policy”. Yet, Art. 21, para. 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, para. 3 of Art. 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 Art. 21, para. 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

Art. 13, para. 1, TEU imposes coherence as one of the over-arching purposes for the activities of the EU institutions: “[t]he 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

¹⁶ Court of Justice, judgment of 2 June 2005, case C-266/03, *Commission v. Luxembourg*, para. 60, and Court of Justice, judgment of 5 November 2002, case C-476/98, *Commission v. Germany*, para. 66.

¹⁷ This analysis of the provisions on coherence and consistency is partly based on Chapter 1 of B. VAN VOOREN, R.A. WESSEL, *EU External Relations Law*, cit.

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).

Art. 16, para. 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”.

Art. 18, para. 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: “[t]he High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union’s 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 [...]”.

Art. 26, para. 2, TEU contains an obligation of substantive policy coherence specifically for the EU’s Common Foreign and Security Policy: “[t]he 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 TFEU, we find coherence obligations that do not relate to the institutions as such, but are predominantly substantive in the nature of their requirement.

Art. 7 TFEU is found in Title II of that treaty, under the heading “provisions having general application” and states that “[t]he 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 TFEU concerns “external action by the Union”. Art. 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 Arts 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 Art. 21, para. 3, TEU. Second, any of these competences must all pursue the objectives listed in Art. 21, para. 2, TEU. Third, where Art. 22, para. 1, TEU states that “the European Council shall identify the strategic interests and objectives of the Union”, Art. 205 TFEU is yet another confirmation that this EU institution is given the principal role in ensuring over-arching coherence across all EU external policies.

In three competence-specific articles we also find obligations to maintain coherence. In Art. 208, para. 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 Arts 3, para. 5, TEU and 21, para. 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 Art. 212 TFEU concerning economic, financial and technical cooperation 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 Art. 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.

II.3. 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 CSDP) is the only policy area 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.¹⁸

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. Art. 2, para. 4, TFEU clearly refers to CFSP as an

¹⁸ 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.

EU competence: “[t]he 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”.¹⁹

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” (Ch. 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 (Ch. 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: “[t]he 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 the only policy area that is 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.²⁰

¹⁹ S. KEUKELEIRE, T. DELREUX, *The Foreign Policy of the European Union*, Basingstoke: Palgrave Macmillan, 2014, pp. 18-19.

²⁰ All of this is again confirmed by Art. 24, para. 2, TEU: “[w]ithin 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).

Another link is made by the general competence of the Union “to define and implement” CFSP, which is laid down in the TFEU (Art. 2, para. 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 (Art. 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” (Art. 24, para. 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” (Art. 24, para. 1, TEU). The exclusion of the use of the “legislative acts”²¹ (Art. 23, para. 1, TEU; and thereby the use of the legislative procedure which is the regular decision-making procedure for other Union policies) is often mentioned as a main reason for setting CFSP apart. At the same time it is difficult to maintain that the inapplicability of the legislative procedure implies that CFSP acts are not binding on Member States. In the *H*-case, AG Wahl recently put it like this:

“[...] it has to be acknowledged that, in the field of the CFSP, the Union has the power to adopt acts that are legally binding not only on its institutions, but also on the Member States. The wording of Articles 24(3) (13) and 31(1) (14) TEU is particularly informative in that regard. On the other hand, the Union is not meant, in the field of the CFSP, to adopt acts that lay down general abstract rules creating rights and obligations for individuals. That explains why, in essence, the CFSP has been conceived, since its creation with the Treaty of Maastricht, as a set of rules which I would define as *lex imperfecta* [...]”.²²

At the same time, the institutional distinctions remain clear: unanimity rather than Qualified majority voting (QMV) as the default voting rule,²³ the “specific role of the Eu-

²¹ See R.A. WESSEL, *Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?*, in *European Foreign Affairs Review*, 2015, pp. 123-145.

²² Opinion of AG Wahl delivered on 7 April 2016, case C-55/14, *H v. Council of the European Union and European Commission*, paras 37-38.

²³ Unanimity continues to form the basis for CFSP decisions, “except where the Treaties provide otherwise” (Art. 24, para. 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 (Art. 31, para. 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

European Parliament and of the Commission” and the 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]” (see further below).

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 cooperation, 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 caused 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.

III.1. 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 Art. 27, para. 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

of CFSP initiatives (Art. 41, para. 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 (Art. 31, para. 3, TEU).

²⁴ See for instance B. VAN VOOREN, *A Legal Institutional Perspective on the European External Action Service*, in *Common Market Law Review*, 2011, pp. 500-501; as well as G. DE BAERE, R.A. WESSEL, *EU Law and the EEAS: Of Complex Competences and Constitutional Consequences*, in J. BĄTORA, D. SPENCE (eds), *The European External Action Service: European Diplomacy Post-Westphalia*, Basingstoke: Palgrave MacMillan, 2015, pp. 175-193. A thorough legal analysis was done by S. BLOCKMANS, M. CREMONA, D. CURTIN, G. DE BAERE, S. DUKE, C. ECKES, C. HILLION, B. VAN VOOREN, R. WESSEL, J. WOUTERS, in S. BLOCKMANS, C. HILLION (eds), *EEAS 2.0: A Legal Commentary on Council Decision 2010/427/EU Establishing the Organisation and Functioning of the European External Action Service*, Brussels: CEPS; Stockholm: Sieps; Florence: EUI, 2013; and by the same authors in S. BLOCKMANS, C. HILLION (eds), *European External Action Service 2.0: Recommendations for the 2013 EEAS Review*, Brussels: CEPS; Stockholm: Sieps; Florence: EUI, 2013.

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

continuation of a process that defined the former European Political Cooperation 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. 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 Art. 21, para. 3, second subparagraph, 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 DGs) may engage in their own external relations. Art. 2 of the EEAS Decision indicates that CFSP may be its core business, but also hits 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' 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 Com-

mission and the Council Secretariat”,²⁶ while Parliament’s opinion was that it should be connected to the Commission. The final result laid down in Art. 1, para. 2 reveals that Parliament has lost out in the final compromise. Art. 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 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 Art. 221, para. 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 Art. 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 Art. 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. Art. 221, para. 2, TFEU states that “Union delegations shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Securi-

²⁶ Presidency Report DOC 14930/09 of October 2009, para. 16.

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 (Council Decision 2010/427/EU, Art. 5, para. 3).

²⁸ See more extensively B. VAN VOOREN, *A Legal Institutional Perspective*, cit.; and G. DE BAERE, R.A. WESSEL, *EU Law and the EEAS*, cit.

²⁹ Yet, see General Court, judgment of 13 December 2012, case T-395/11, *Elti v. EU Delegation to Montenegro*, 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”. In a similar case on the former Commission Delegations, the General Court came to the same conclusion: General Court, order of 30 June 2011, case T-264/09, *Technoprocess v. Commission and EU Delegation to Morocco*, 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 Art. 5, para. 7, of the Council Decision 2010/427/EU, indicating that Delegation “shall have the capacity to respond to the needs of other institutions of the Union, in particular the European Parliament”.

ty 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 (Art. 18 TEU). This is referred to as "triple-hatting", and is again hoped to support attaining coherence in EU external relations (Art. 21, para. 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 a fully operational Vice President. "Mogherini's symbolic decision to install her office in the Berlaymont building, the appointment of Stefano Manservigi, 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 Mogherini 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

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

³² S. BLOCKMANS, F.S. MONTESANO, *Mogherini's First 100 Days: Not the Quiet Diplomat*, in *CEPS Commentary*, 12 February 2015.

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, D. SPENCE (eds), *The European External Action Service*, *cit.*, pp. 87-104.

of the former by the latter in the CFSP:³⁴ “[w]ithin 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 PSC). The President of the Commission attends European Council and other *ad hoc* meetings. The Commission is in fact the *29th 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 no legislative acts (Art. 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. Recent 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 Art. 17 TEU, the Commission lacks its classic function as a watchdog under CFSP. The absence of an exclusive right of initiative also denies the Commission another indispensable role it has in other areas.

III.2. 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. Art. 215, para. 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,

³⁴ P.J. CARDWELL, *On ‘Ring-Fencing’ the Common Foreign and Security Policy*, cit., p. 459.

³⁵ Framework Agreement on Relations between the European Parliament and the European Commission, 2010, Art. 10.

³⁶ M. RIDDERVOLD, *(Not) in the Hands of the Member States: How the European Commission Influences EU Security and Defence Policies*, in *Journal of Common Market Studies*, 2015, pp. 1-7.

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”.

Para. 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 decisions as the foundation for subsequent action, no automatic hierarchy exists. Art. 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, Art. 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. This may seriously limit the freedom of the Member States in the area of restrictive measures (*supra*) or the export of “dual goods” (commodities which can also have a military application).³⁷ The current text of Art. 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-CFSP legal basis whenever this is possible. One could argue that Art. 40 is merely a confirmation of the principle of consistency, now

³⁷ Council Regulation (EC) 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology; in the meantime replaced by Council Regulation (EC) 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items. 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 of 22 June 2000 concerning the control of technical assistance related to certain military end-uses.

that it does no longer establish a hierarchy between CFSP and other policies.³⁸ At the same time, the fact that Art. 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 CFSP and other external policies legal basis’ is 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 recently argued by Merket on the basis of a study on the relationship between development and security policy, “[o]bjectives 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.

III.3 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 the impact of the changes by the Lis-

³⁸ Pre-Lisbon Art. 47 TEU contained the clear rule that “nothing in the TEU shall affect the EC Treaty”. See also Court of Justice, judgment of 20 May 2008, case C-91/05, *Commission v. Council* (Small Arms/ECOWAS). See further: C. HILLION, R.A. WESSEL, *Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?*, in *Common Market Law Review*, 2009, pp. 551-586.

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

⁴⁰ See for instance Court of Justice, judgment of 8 July 1999, joined cases C-164/97 and C-165/97, *Parliament v. Council*, 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 H. MERKET, *The European Union and the Security-Development Nexus*, cit., Ch. 3.

⁴² Arguments in this section are further developed in R.A. WESSEL, *Resisting Legal Facts*, cit.

⁴³ S. GRILLER, *The Court of Justice and the Common Foreign and Security Policy*, in A. ROSAS, E. LEVITS, Y. BOT (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*, The Hague: T.M.C. Asser Press, 2013, pp. 675-692; G. DE BAERE, 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: Cambridge University Press, 2012, pp. 243-273; L. SALTINYTÉ, *Jurisdiction of the European Court of Justice over Issues Related to the Common Foreign and Security Policy under the Lisbon Treaty*, in *Jurisprudence*, 2010, p. 119 et seq.; A. HINAREJOS, *Judicial Control in the European Union - Reforming Jurisdiction in the Inter-governmental Pillars*, Oxford: Oxford University Press, 2009.

bon Treaty has only partly been recognized in literature. A clear exception 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.⁴⁴ He sees three areas in which the Lisbon treaty has created a competence for the Court in relation to CFSP:

“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”.

This role of the Court should not 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.⁴⁵

This leads to a role for the Court in relation to CFSP in different situations.⁴⁶ 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 (Art. 24, para.1, TEU, Arts 275 and 263 TFEU). Secondly, there is the situation under Art. 40 TEU, calling for a balanced choice for either a CFSP or another legal basis of decisions (e.g., trade or development cooperation). In the 2012 case *European Parliament v. Council* the Court was given a first chance to develop an approach towards the function of Art. 40.⁴⁷ 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”,⁴⁸ the Court held that Art. 215 TFEU (following a previous CFSP decisions) rather than Art. 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 Art. 215 procedure. The context of peace and security proved to be decisive for the

⁴⁴ C. HILLION, *A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy*, in M. CREMONA, A. THIES, *The European Court of Justice and External Relations Law*, Oxford: Hart Publishing, 2014, pp. 47-70. See also C. HILLION, *Decentralised Integration? Fundamental Rights Protection in the EU Common Foreign and Security Policy*, in *European Papers*, 2016, www.europeanpapers.eu, pp. 55-66.

⁴⁵ A. HINAREJOS, *Judicial Control in the European Union*, cit., p. 150.

⁴⁶ See more extensively and for many case law references C. HILLION, *A Powerless Court?*, cit.

⁴⁷ Court of Justice, judgment of 19 July 2012, case C-130/10, *Parliament v. Council*.

⁴⁸ Council Regulation (EU) 1286/2009 of 22 December 2009 amending Regulation (EC) 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.

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.⁴⁹

These legal basis questions are relevant for the point the present contribution aims to make. As recently argued by AG Kokott in a similar case “[a]t 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”.⁵⁰ This became clear also when the Court had a chance to revisit the issue in the so-called *Mauritius* case.⁵¹ 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.⁵² 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”.⁵³

Thirdly, international agreements in the area of CFSP are concluded on the basis of the general EU provisions in this regard (Art. 218 TFEU), despite some specific procedural rules, and no exception is made in relation to legality control by the Court.⁵⁴ It has

⁴⁹ Cf. C. HILLION, *A Powerless Court?*, cit., who also notes that this “is one of, if not the first time that the all-encompassing character of the CFSP is evoked in the case law”.

⁵⁰ Opinion of AG Kokott delivered on 28 October 2015, case C-263/14, *European Parliament v. Council*, para. 4.

⁵¹ Court of Justice, judgment of 24 June 2014, case C-658/11, *European Parliament v. Council (Mauritius Agreement)*. See C. MATERA, 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)*, in *Revista de Derecho Comunitario Europeo*, 2014, pp. 1047–1064.

⁵² A similar conclusion was drawn in Opinion of AG Kokott, *European Parliament v. Council (Tanzania case)*, cit.

⁵³ S. PEERS, *The CJEU Ensures Basic Democratic and Judicial Accountability of the EU’s Foreign Policy*, in *EU Law Analysis*, 24 June 2014, eulawanalysis.blogspot.nl.

⁵⁴ T. TRIDIMAS, *The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?*, in T. TRIDIMAS, P. NEBBIA (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order. Vol. 1: Constitutional and Public Law. External Relations*, Oxford: Hart Publishing, 2004, p. 128; G. DE BAERE, *Constitutional Principles of EU External Relations*, Oxford: Oxford University Press, 2008, p. 190.

further been noted – and in a way conformed by the *Mauritius* case – that Art. 218, para. 11 does not seem to exclude EU agreements that relate “exclusively or principally” to the CFSP from the Court’s scrutiny.⁵⁵ 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 scrutinize CFSP international agreements or CFSP parts in agreements. In any case, the Art. 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 by AG Kokott in the similar case C-263/14), the Court underlined its jurisdiction in relation to CFSP-related agreements where the EP’s right 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.

Fourthly, where 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. Without being able to go to the heart of the matter, in *H v. Council and Commission* – a case brought by a staff member of the EU Police Mission in Bosnia and Herzegovina (EUPM) – the President of the General Court held that:

“[...] it should be ensured that [the] institutions do not evade any review by the Courts of the European Union in respect of purely administrative decisions which are taken in relation to staff management within the EUPM, which would be clearly separable from the ‘political’ measures taken as part of the CFSP. Where such a decision adversely affects the person to whom it is addressed and significantly alters that person’s legal position, it cannot be acceptable in a European Union based on the rule of law that such a decision escape any judicial review [...]”.⁵⁶

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.⁵⁷ The Treaties do not provide reasons to exclude CFSP from this holistic ap-

⁵⁵ C. HILLION, *A Powerless Court?*, cit.; as well as P. EECKHOUT, *EU External Relations Law*, Oxford: Oxford University Press, 2011, p. 498.

⁵⁶ Order of the President of 22 July 2010, case T-271/10 R, *H. v. Council and Commission*, para. 25. Similarly – at least as argued by AG Jääskinen in his Opinion delivered on 21 May 2015, case C-439/13 P, *Elitaliana SpA v. Eulex Kosovo* – the EU Courts should be able to hear individuals on budgetary issues, even if a particular decision was taken by an entity established under CFSP.

⁵⁷ Cf. D.M. CURTIN, I.F. DEKKER, *The European Union from Maastricht to Lisbon: Institutional and Legal Unity Out of the Shadows*, in P. CRAIG, G. DE BÚRCA (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, p. 170. This is not to say that the Court did not have this role prior to the Lisbon Treaty; see for instance D.M. CURTIN, R.A. WESSEL, *Rechtseenheid van de Europese Unie? De rol van het Hof van Justitie als constitutionele rechter*, in *SEW Tijdschrift voor Europees en economisch recht*, 2008, pp. 371–378; as well as

proach, simply because it finds its basis in another treaty. The obvious question is whether Art. 24, para. 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: “[t]he 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 European Parliament 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* cooperation 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).

Yet, recent and pending cases shed more light on the Court’s jurisdiction and the interpretation of the *carving out* provisions in the Treaties. In his recent Opinion in the *Rosneft* case,⁵⁸ AG Wathelet does exactly what the present article proposes to do more: carefully analyse the text of the relevant Treaty provisions. The case concerns EU measures targeted at certain Russian undertakings including Rosneft Oil Company, which specialises in the exploration and production of oil and gas. Rosneft challenged the validity of certain measures adopted by the UK authorities to implement the Council Decision and accompanying Regulation. The High Court of England and Wales referred a number of questions to the Court of Justice. As we know, restrictive measures are based on a combination of Arts 24 TEU (CFSP) and 275 TFEU. The AG concludes that the

D.M. CURTIN, R.H. VAN OOIK, *Een Hof van Justitie van de Europese Unie?*, in *SEW Tijdschrift voor Europees en economisch Recht*, 1999, pp. 24-38.

⁵⁸ Opinion of AG Wathelet delivered on 31 May 2016, case C-72/15, *Rosneft Oil Company OJSC v. Her Majesty’s Treasury, The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*.

Court has jurisdiction to give a ruling and review the legality of a decision adopted under the CFSP:

“I would also point out that there is a difference in wording between the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU.

43. According to the last sentence of the second subparagraph of Article 24(1) TEU, ‘the Court of Justice of the European Union shall not have jurisdiction with respect to *these provisions*’, (17) whereas the first paragraph of Article 275 TFEU provides that ‘the Court of Justice of the European Union shall not have jurisdiction with respect to the *provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions*’.

44. The use in the first paragraph of Article 275 TFEU of the words ‘provisions relating to the [CFSP]’ might create the false impression that the European Union Courts have no jurisdiction in relation to any provisions of the FEU Treaty that, while not falling within the scope of the CFSP, may relate to it”.

In other words, a “relation” with CFSP does not automatically grant jurisdictional immunity to an EU act. As clarified by the AG:

“52. I would point out that the reason for the limitation of the Court’s jurisdiction in CFSP matters brought about by the ‘carve-out’ provision is that CFSP acts are, in principle, solely intended to translate decisions of a purely political nature connected with implementation of the CFSP, in relation to which it is difficult to reconcile judicial review with the separation of powers. [...]”

65. I therefore consider that the ‘claw-back’ provision in the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU enables the European Union Courts to review the compliance with Article 40 TEU of all CFSP acts (either in an action for annulment or in preliminary ruling proceedings) as well as to review the legality of CFSP decisions adopted by the Council in accordance with Chapter 2 of Title V of the EU Treaty which provide for restrictive measures against natural or legal persons (again, either in an action for annulment or in preliminary ruling proceedings)”.

Yet, important also in this case is the relation with Art. 275 TFEU. This link between CFSP and other policies, however, is not a rare one. 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 along in its assessment of those policies. Arguments can be found why the current Treaty regimes also allows for an extended role for domestic courts in relations to CFSP. Recently this question was addressed briefly by AG Kokott in her View on Opinion 2/13 (the accession of the EU to the European Convention on Human Rights). She somewhat cryptically argued:

“[T]he very wide interpretation of the jurisdiction of the Courts of the EU which it proposes is just not necessary for the purpose of ensuring effective legal protection for individuals in the CFSP. This is because the – entirely accurate – assertion that neither the Member States nor the EU institutions can avoid a review of the question whether the

measures adopted by them are in conformity with the Treaties as the basic constitutional charter does not necessarily always have to lead to the conclusion that the Courts of the EU have jurisdiction”.⁵⁹

The reason is that “national courts or tribunals have, and will retain, jurisdiction”.⁶⁰ A similar and even more extensive reference to domestic courts was made by AG Wahl in the *H* case.⁶¹ In fact, according to the AG, when the CJEU does not have jurisdiction it is for the national courts “to examine the lawfulness of the contested decisions and rule on the related claim for damages” (para. 89). In doing so, they may have to ask preliminary questions:

“90. [...] it cannot be excluded that the competent national courts may have doubts as to the extent of their review of the contested decisions as well as on the possible consequences of that review.

91. Should that be the case, I would remind those courts that they are at liberty – and they may sometimes be obliged – to submit a request for a preliminary ruling to the Court under Article 267 TFEU. In that connection, the Court may still be able to assist those courts in deciding the case before them, while remaining within the boundaries established by Articles 24(1) TEU and 275 TFEU. It occurs to me that such requests for a preliminary ruling ought to be welcomed [...]”.

Indeed, an acceptance of a role of domestic courts (which is, by the way, fully in line with Art. 19 TFEU as well as Art. 47 of the Charter of Fundamental Rights of the European Union (EU Charter); and the Courts earlier view in Opinion 1/09)⁶² almost automatically leads to the need for preliminary references. As we have seen, in the AG’s Opinion in the above-mentioned *Rosneft* case it was also held that a relation with CFSP does not automatically change the rules on preliminary rulings for domestic courts:

“66. The contrary view, expressed by Advocate General Kokott in her View in Opinion 2/13 [...] according to which ‘the Treaties [...] specifically do not provide for the Court of Justice to have *any* jurisdiction to give preliminary rulings in relation to the CFSP’, would, in my opinion, be difficult to reconcile with Article 23 TEU, which provides that ‘the Union’s action on the international scene [...] shall be guided by the principles [...] laid down in Chapter 1’, which include the rule of law and the universality and indivisibility of human rights and fundamental freedoms, which unquestionably include the right of access to a court and effective legal protection”.

⁵⁹ Opinion of AG Kokott delivered on 13 June 2014, Opinion 2/13, para. 95. For an academic appraisal see, *inter alia*, A. LAZOWSKI, R.A. WESSEL, *When Caveats turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, in *German Law Journal*, 2015, pp. 179-212.

⁶⁰ *Ivi*, para. 96.

⁶¹ Opinion of AG Wahl, *H v. Council of the European Union and European Commission*, cit.

⁶² Opinion of the Court (Full Court) of 8 March 2011, Opinion 1/09, *European Patent Court*.

Yet, what about the other two notions that are often said to differentiate CFSP norms from other EU norms: primacy and direct effect.⁶³ 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.⁶⁴ 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.⁶⁵

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 Art. 19, para. 1, TEU that “Member States shall provide remedies sufficient to ensure effective legal protection 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 simply 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,⁶⁶ which (as underlined by Art. 6, para. 3, TEU) “shall constitute general principles of the Union’s law”.

All in all, while enforcement of CFSP decisions as such remains difficult,⁶⁷ 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 sub-

⁶³ 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.

⁶⁴ R. GOSALBO-BONO, *Some Reflections of the CFSP Legal Order*, cit.

⁶⁵ In a similar vein: Court of Justice, judgment of 16 June 2005, case C-105/03, *Pupino* [GC].

⁶⁶ Including the right to access to justice. See also C. ECKES, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford: Oxford University Press, 2009.

⁶⁷ Cf. Opinion of AG Wahl, *H v. Council of the European Union and European Commission*, cit., para. 39: “no judicial procedure for enforcement and penalties in case of breaches is expressly provided for in the Treaties. Accordingly, there is hardly any way to ensure compliance with those rules by recalcitrant Member States or by non-conforming EU institutions”.

stantive 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 extent resulted in navel-gazing. The outside world is less interested in internal (horizontal as well as vertical) competence battles. This has 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 then is to which extent outside pressures help the EU in integrating and consolidating its external relation regime.

It is not to be expected that the international legal order will be adapted to allow the European Union to fully play its role as a global actor.⁷⁰ 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.⁷¹ The current Treaty regime therefore aims to streamline the Union's external representation.

⁶⁸ See also P.J. CARDWELL, *On 'Ring-Fencing' the Common Foreign and Security Policy*, cit., p. 461: "[t]he 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 H. MERKET, *The European Union and the Security-Development Nexus*, cit., Conclusions of Ch. 6.

⁷⁰ See more extensively on this: R.A. WESSEL, *Flipping the Question: The Reception of EU Law in the International Legal Order*, in *Oxford Yearbook of European Law*, 2016 (forthcoming).

⁷¹ A recent example is 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. See on the various aspects for instance the special issue of the *German Law Journal*, 2015, no. 1, www.germanlawjournal.com.

While this is also clear driven by internal developments, the external pressure is obvious as well.⁷²

Traditionally, diplomatic relations are established between States and the legal framework is strongly State-oriented. As an international organization enjoying international legal personality the EU is allowed to enter into legal relations with States and other international organizations. At the same time, its external competences are limited by the principle of conferral (Art. 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 In the report of December 2011 evaluating the first year of the new Diplomatic Service, its foundation is viewed as an historic opportunity to rise above “internal debates pertaining to institutional and constitutional reform”, and instead to focus on “delivering new substance to the EU’s external action”.⁷⁶ When the EEAS is to deliver this “new diplomatic substance”, the Treaties obviously provide binding guidance on the method and substance of EU action in the world. But at the same time, everything will have to fit into the existing international legal framework.

International representation is a core element of international (diplomatic) law. The first indent of Art. 3, para. 1, VCDR lists as a task of Embassies: “[r]epresent the sending state in the receiving state”.⁷⁷ Several EU Treaty articles provide a solid basis for the Union to establish a formal and substantive presence as a single, fully matured diplomatic

⁷² See on this topic also: J. WOUTERS, S. DUQUET, *Unus inter plures? The EEAS, the Vienna Convention and International Diplomatic Practice*, in J. BÁTORA, D. SPENCE (eds), *The European External Action Service*, cit. See earlier R.A. WESSEL, *Can the European Union Replace its Member States in International Affairs? An International Law Perspective*, in I. GOVAERE, E. LANNON, P. VAN ELSUWEGE, S. ADAM (eds), *The European Union in the World: Essays in Honour of Marc Maresceau*, Leiden, Boston: Martinus Nijhoff Publishers, 2013, pp. 129-147; as well as R.A. WESSEL, B. VAN VOOREN, *The EEAS’ Diplomatic Dreams and the Reality of International and European Law*, in *Journal of European Public Policy*, 2013, pp. 1350-1367.

⁷³ Cf. Art. 4, para. 2, TEU.

⁷⁴ The EEAS Decision acknowledges this in Art. 5, para. 9: “[t]he 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*, in *Common Market Law Review*, 2011, pp. 475-502, who points out that due to consistency obligations this should be read as a general obligation to cooperate between the EEAS and the national diplomatic services (p. 497).

⁷⁵ Report of the EU CARE project, *Consular and Diplomatic Protection: Legal Framework in the EU Member States*, December 2010, www.careproject.eu, p. 31.

⁷⁶ EEAS, *Report by the High Representative to the European Parliament, the Council and the Commission*, 22 December 2011, p. 2. See also S. BLOCKMANS, *The European External Action Service One Year On: First Signs of Strengths and Weaknesses*, in *CLEER Working Paper*, 2012.

⁷⁷ Art. 3, let. a), VCDR.

actor represented in third countries and international organisations.⁷⁸ As regards the physical presence through its delegations, EU activities are based on Art. 221, para. 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.⁷⁹ The purpose of this new Treaty provision was to have “less Europeans and more EU”,⁸⁰ e.g. 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 delegations⁸¹ 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.⁸² This meant that these *super-missions* were not merely given the new name, but also new powers in the form of an authorization 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 54 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 Abeba (AU), Paris (UNESCO and OECD) and Rome (FAO, WFP, IFAD, Holy Sea, and Order of Malta). The Union still has to work out how to handle EU representation in multilateral forums under Lisbon.⁸³ However, it is certainly the EU’s ambition to “progressively” expand these powers to other EU delegations as well.⁸⁴

⁷⁸ Arts 220 and 221 TFEU, Arts 3, para. 5 and 21, para. 1, TEU.

⁷⁹ 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 of 11 January 2012, which reveals that in some countries the EU is still represented by a Member State.

⁸⁰ A. MISSIROLI, *The New EU Foreign Policy System After Lisbon: A Work in Progress*, in *European Foreign Affairs Review*, 2010, pp. 427-452.

⁸¹ See www.eeas.europa.eu.

⁸² A. RETTMAN, *EU Commission ‘Embassies’ Granted New Powers*, in *EUObserver*, 21 January 2010. Yet, see the many differences between Union Delegations and national embassies: P. KERRES, R.A. WESSEL, *Apples and Oranges? Comparing European Union Delegations to National Embassies*, in *CLEER Papers*, 2015.

⁸³ *Ibid.* Similarly, A. RETTMAN, *Ashton Designates Six New ‘Strategic Partners’*, 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”, 16 September 2010.

⁸⁴ See for example: EEAS 11808/2/11 REV 2, *EU diplomatic representation in third countries – second half of 2011*, Brussels, 25 November 2011, and EEAS 18975/11, *EU diplomatic representation in third countries – first half of 2012*, Brussels, 22 December 2011. These documents always start with two paragraphs quoting Art. 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

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 Art. 5, para. 9, of the EEAS Decision provides: “[t]he Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States”. Yet, on-going 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 already 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.

V. CONCLUSION

The European Union’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. 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

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.

⁸⁵ C. CUSENS, *The EEAS vs. the National Embassies of EU Member States?*, in P. QUINN (ed.), *Making European Diplomacy Work: Can the EEAS Deliver?*, in *EU Diplomacy Papers 8/2011*, Bruges, Natolin: College of Europe, 2011, p. 12.

⁸⁶ See the report by the Netherlands Ministry for Foreign Affairs, “Nota moderniserende Nederlandse diplomatie” of 8 April 2011, pp. 10 and 18, www.rijksoverheid.nl.

probably, the same amount of integration could not have been reached when the issues would have 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 is traditionally slow in picking up on real life developments. 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”.⁸⁷ 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”.⁸⁸

The present contribution 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.

⁸⁷ P.J. CARDWELL, *On 'Ring-Fencing' the Common Foreign and Security Policy*, cit., p. 456.

⁸⁸ H. MERKET, *The European Union and the Security-Development Nexus*, cit., Ch.1.