Ever-closer in Brussels – ever-closer in the world? EU external action after the Lisbon Treaty

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EU EXTERNAL ACTION AFTER THE LISBON TREATY

edited by Joris Larik and Madalina Moraru

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

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Abstract

This edited Working Paper addresses three fundamental questions concerning EU External Action after the Lisbon Treaty: the institutional position and allegiance of the newly-established European External Action Service, the future of the 'left out' Directorate-General for Trade and the Common Commercial Policy, and the protection of EU citizens abroad. These enquires are prompted by both an institutional innovation – the launch of the EEAS – as well as by a number of substantive changes to the legal framework of EU External Action. An ambitious agenda has been inserted into the primary law, around which the Union institutions and Member States are to rally. It is in turn the *raison d'être* of the EEAS to foster the ensuing need for consistency, as well as to provide impetus to the EU's external action. Structurally, it is in itself a *sui generis* institution composed of officials from the Commission, the Council and the Member States. This raises a number of fundamental questions that go well beyond those concerning which person is going to be the new EU ambassador in Washington or Beijing. Above all, can these substantive and institutional innovations live up to the grand ambitions of the peculiar entity that is the EU? What old problems does it purport to solve, and what are the new problems it is likely to create? Essentially, to which extent does bundling the external objectives in the Treaties as well as pooling together the institutional resources in Brussels and the delegations actually render the EU an 'ever-closer' actor in the world?

Keywords

Lisbon Treaty – EU external action – European External Action Service (EEAS) – Common Commercial Policy

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Introduction: Ever-Closer in Brussels – Ever-Closer in the World?

> *'We can now move forward to build a modern, effective and distinctly European service for the 21st century. The reason is simple: Europe needs to shape up to defend better our interests and values in a world of growing complexity and fundamental power shifts.'*[1]

With those words, the High Representative for Foreign and Security Policy Catherine Ashton welcomed the Council's decision to establish the European External Action Service (EEAS) on 26 July 2010.[2] At that point, the Lisbon Treaty envisaging this institutional innovation had already been in force for more than half a year. The institutional reform coincides with a number of substantive changes to the legal framework of EU external action, both of which have as their overarching rationale the achievement of an 'ever-closer Union' in the world. The necessity to strengthen the external identity of the Union in its relations with third countries was among the principal considerations that underpinned the latest amendment of the founding Treaties.

Consequently, an ambitious agenda has been inserted into the primary law, calling on the EU in its relations with the world to 'promote its values and interests', 'contribute to the protection of its citizens' and to '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' (Art. 3(5) TEU). These principles are not to be pursued in isolation, but in a consistent manner and are to be 'guided by the principles which have inspired [the EU's] own creation' (Art. 21 TEU). As becomes evident from the quote above, it is the ambition of the EEAS to foster both consistency in the EU's external action and to provide impetus in order to effectively pursue these goals. Looking at its structure, one can see that it is in itself a *sui generis* institution: Headed by the High Representative, who is at the same time Vice-President of the Commission and Chairperson of the External Relations Council, and composed of officials from the Commission, Council and the Member States. This overhaul of both the substance and institutional framework of EU external action raises some fundamental questions that go well beyond those concerning which person is going to be the new EU ambassador in Washington, Beijing or Moscow. Above all, can this institutional innovation live up to the ambitions of the *sui generis* entity that is the EU? What old problems does it purport to solve, and what are the big new question marks that it raises? In essence, to which extent does bundling the external objectives in the Treaty as well as pooling together the institutional resources in Brussels and the delegations render the EU actually an ever-closer power in the world?

In order to address these questions, the *Working Group on EU External Relations Law* at the European University Institute (Relex Working Group) hosted a two-day workshop on 21 and 22 January 2011, which brought together academics and practitioners specialized in various areas of EU external relations. The present edited *EUI Law Working Paper* compiles and elaborates upon the ideas presented at this event. While all contributions tackle different aspects of the Lisbon reform with regard to the external action of the Union, three general themes were identified around which to structure the discussion, i.e. the institutional position and allegiance of the *sui generis* EEAS (**Part I**), the future of the 'left out' Common Commercial Policy (CCP) and its institutional protagonist, the Commission's Directorate General for Trade (DG Trade) (**Part II**), and the protection of EU citizens abroad as a task for the Member States and the newly-founded EEAS (**Part III**).

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1 High Representative Catherine Ashton, quoted in: Council of the European Union, *Council establishes the European External Action Service*, press release, Brussels, 26 July 2010, 12589/10, PRESSE 218, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/115960.pdf.

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

The theme of **Part I**, the institutional position and allegiance of the EEAS, is of general importance for the entire Working Paper and touches upon many fundamental questions of EU external relations. The link between law and policy, as well as Treaty reform in terms of substance and institutions becomes immediately visible in *Steven Blockmans'* contribution. He assesses the future role of the EEAS in shaping the Union's decisions in its external action. Departing from the political motivations to launch the EEAS and its legally enshrined mandate, he delves into the service's potential in strategic planning and programming. Essentially, the contribution deals with the question to which extent the EEAS can contribute to the oft-evoked 'coherence' in EU external relations, a goal that is emphasized repeatedly in the reformed primary law. The issue of coherence and the EEAS' contribution thereto is explored further in the piece by *Bart Van Vooren* in terms of the so-called 'security-development nexus'. In light of the fact that the Lisbon reform formally ended the pillar-structure of the EU, which caused a tense relationship between the Community's development policy and the intergovernmental Common Foreign and Security Policy (CFSP) often resulting in legal disputes before the ECJ, Van Vooren addresses the question to which extent the institutionally amalgamated EEAS can ease this tension and avoid future litigation. An equally crucial concept, the duty of sincere cooperation (Art. 4(3) TEU), is discussed by *Kristin Reuter* in the context of the EEAS as an institutional innovation. The duty has played an important role in the EU external relations and has been the subject of numerous seminal ECJ decisions. Against this background, she tackles the question of how the creation of the EEAS and the conclusion of inter-institutional agreements can result in reinforced procedural obligations between the Union institutions and the Member States when acting on the international scene.

While it is true that the EEAS bundles different institutional capacities that used to be separate, the contributions in **Part II** address the 'odd one out' in this reshuffle, i.e. DG Trade, which remains entirely outside of the EEAS. This is a likely source of tension, as in terms of substance, the post-Lisbon primary law now specifically states that the 'common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action' (Art. 207(1) TEU). *Valeria Bonavita* argues that in the context of the EU's overall strategy on dispute resolution in the WTO, the pursuit of the now combined Union objectives, as well as the safeguarding of its reinforced fundamental rights commitments, represent significant challenges for the Union institutions. For her, this both recalibrates and narrows the political institutions' scope of action, and requires a rethinking of the pre-Lisbon 'strategy' in commercial disputes. The fact that the Union pursues its trade goals not only within the multilateral WTO, but is – in parallel – also in the course of concluding a series of new free trade agreements (FTAs) around the world, is underlined in the contribution by *Boris Rigod*. In scrutinizing this policy shift away from multilateralism, he sketches out a view of policy coherence beyond normative substance, re-emphasizing also the Union's economic goals and responsiveness to its competitors. Moreover, he posits that coherence is better understood as a matter of 'institutional choice' and decision-making procedures. From a trade practitioner's perspective, *Joanna Miksa* shows how in the area of market access the Lisbon reform affects not only the institutional and policy framework in Brussels, but importantly also on the ground in the Union delegations (which host both EEAS and DG Trade staff). She argues that by including the European Parliament as well as important stakeholders of the EU business community and actors within third-countries in the decision-making process, a 'post-modern' form of (trade) diplomacy is emerging.

In **Part III**, the contributions delve into the question of how the Lisbon reform tackles the challenge of protecting EU citizens abroad. This is an objective that was absent from the failed Constitutional Treaty, but has been introduced for the first time by the Lisbon Treaty (Art. 3(5) TEU). While EU citizenship is a powerful concept that has been gradually developed from the Maastricht Treaty *within* the Union legal order, its external dimension raises a number of important questions of both international and EU law that have so far been left largely unexplored. *Patrizia Vigni* focuses in her paper on these questions, in particular the public international law implications of the EU model of consular and diplomatic protection of Union citizens. She scrutinizes to which extent public international law, which still mainly relies on states as the primary entity to which individuals are linked through nationality, allows a supranational organization such as the EU, and its Member States, to exercise these traditional forms of State-like protection. In *Madalina Moraru's* contribution, the

diplomatic and consular protection of Union citizens is assessed through the lens of EU law. She addresses the question of which rights can the Union citizens rely on under EU law when they find themselves in distress abroad and points out the problems concerning the effectiveness of these rights. Additionally, the role of the Union itself in the field of consular and diplomatic protection of its citizens abroad is assessed in light of the Lisbon reform. Lastly, *Joris Larik* applies the objective of the protection of EU citizens abroad to the specific case of the EU's anti-piracy operation *ATALANTA* off the coast of Somalia. Beyond consular and diplomatic protection, he points out the international and EU law constraints on the use of military force against this particular type of non-state actor for this purpose. He argues that by focussing on universal humanitarian and economic considerations and not on the protection of its own citizens, the Union fails to live up to the reformed primary law's promise of protection of the *cives europaei* around the world.

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Joris Larik and Madalina Moraru
Coordinators of the EUI Working Group on EU External Relations Law 2010/11

Beyond Conferral:
The Role of the European External Action Service in Decision-Shaping

Steven Blockmans*

Abstract

In a rapidly changing world, the success of the European Union's institutions in effectively addressing challenges and seizing opportunities is helped by the constant revision of EU strategies, as well as the focused support of and provision of resources by the Member States to make a difference. Arguably, when these elements are absent, EU external action flounders. The Union's mixed performance in external action over the past few years illustrates the importance of the Lisbon Treaty, which was intended to create the tools for the EU to develop a more coherent, effective and visible foreign policy. One of the institutional innovations provided for in the Treaty on European Union to meet those ambitions is the creation of a European External Action Service (EEAS), which is intended to support the EU external action heroes. This contribution deals with the question whether the new European External Action Service is likely to enhance inter-institutional coherence in the Union's external action. Specific attention is paid to the cooperation and coordination in strategic planning and programming.

Keywords

Lisbon Treaty – European External Action Service – coherence – strategic planning and programming

> *'The ambition to build a strong EU foreign policy received a major boost with the launch of the European External Action Service – the EEAS – on the 1st of January this year. The service will act as a single platform to project European values and interests around the world. And it will act as a one-stop shop for our partners.*
>
> *The aim of all this is to forge a better, more coherent policy, developing European answers to complex global problems, working with our partners around the world. It's something I know countries have long asked for - and that we can now deliver.'*[1]

1. Introduction

European leaders in Member State capitals and at EU headquarters were caught completely by surprise by the unfolding of history in Tunisia, Egypt and Libya in early 2011. In its first-ever evaluation of Europe's performance in pursuing its interests and promoting its values in the world, the European Council on Foreign Relations (ECFR) found that, while 2010 was not a great year for European foreign policy, the performance of EU institutions and Member States was 'not uniformly mediocre'.[2]

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1 *Statement by High Representative Catherine Ashton on Europe Day*, press release, Brussels, 7 May 2011, A 177/11, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/121895.pdf.

2 J Vaisse and H Kundnani (eds), *European Foreign Policy Scorecard 2010* (London: ECFR 2011). The assessment is of the collective performance of all EU actors rather than the action of any particular institution or country – either the High Representative, the European Council, the European Commission, a group of states like the EU3 (France, Germany and the UK), or an individual Member State.

Among the most united EU responses in 2010, the ECFR counted stabilisation and state building in Iraq, relations with the US on climate change, relations with the Eastern neighbourhood on trade and energy, relations with China on Iran and proliferation, European policy in the World Trade Organization, and relations with the US on terrorism, information sharing and data protection. Unfortunately for the EU, the list of its most divisive issues in 2010 is both longer and more pertinent. The list includes European policy on the rule of law and human rights in China, bilateral relations with Turkey, relations with the US on NATO and NATO reform, relations with the US on global economic and financial reform, European policy in the G20 and G8, and the diversification of gas supply routes to Europe.[3] If anything, these lists show how plentiful and wide apart the foreign policy issues are that the EU has to deal with. To a certain extent, these challenges and opportunities have been outlined in the European Security Strategy of 2003, which was reviewed in 2008.[4] But in a rapidly changing world, the success of the Union's institutions in effectively addressing challenges and seizing opportunities is helped by the constant revision of EU strategies, as well as the focused support of and provision of resources by the Member States to make a difference. Arguably, when these elements are absent, EU external action flounders.

The EU's slow and timid response to the dramatic events of the Arab Spring of 2011[5] – as indeed the Union's mixed performance in external action more widely – illustrate the importance of the Lisbon Treaty, which was intended to create tools for the EU to develop a more coherent, effective and visible foreign policy.[6] One of the institutional innovations provided for in the Lisbon Treaty to meet those ambitions is the creation of a European External Action Service ('EEAS').[7] This contribution deals with the question which role the new European External Action Service is likely to play in shaping the EU's decisions in the field of external action. In order to answer this question, the paper will examine both the *raison d'être* (section 2) and the mandate of the EEAS (section 3), in particular the potential role of the EEAS in strategic policy-planning (section 4) and programming (section 5). In essence, this paper seeks to answer the question whether the EEAS is likely to enhance coherence in EU external action. This contribution will therefore not deal with the other two overriding aims for the creation of the EEAS – effectiveness and visibility.[8]

Before embarking on the analysis, it is worth offering one further conceptual clarification. Rather confusingly, the Treaty on European Union speaks of the need to enhance *consistency* in EU external action.[9] Whereas legal scholarship is more or less united in drawing a distinction between the

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3 Vaisse and H Kundnani (eds), *European Foreign Policy Scorecard 2010*, 11-12.

4 European Security Strategy: A Secure Europe in a Better World, Brussels, 12 December 2003, as complemented by the High Representative's Report on the Implementation of the European Security Strategy – Providing Security in a Changing World, doc. 17104/08 (S407/08), 11 December 2008, endorsed by the European Council, Presidency Conclusions, doc. 17271/08 (CONCL 5), 12 December 2008, pt. 30.

5 Compare, e.g., Statement by EU High Representative Catherine Ashton and European Commissioner for Enlargement Štefan Füle on the situation in Tunisia, Press release A 010/11, Brussels, 10 January 2011; 'EEAS' senior officials mission to Tunisia', Press Release A 029/11, 26 January 2011; and Statement by the EU High Representative Catherine Ashton on Tunisia, Press Release A 034/11, Brussels, 28 January 2011. See also T Garton Ash, 'If this is young Arabs' 1989, Europe must be ready with a bold response' *The Guardian*, 2 February 2011: 'What happens across the Mediterranean matters more to the EU than the US. Yet so far its voice has been inaudible'. www.guardian.co.uk/commentisfree/2011/feb/02/egypt-young-arabs-1989-europe-bold

6 See *Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*', COM(2006) 278 final; the pre-Lisbon Draft IGC Mandate, annexed to the Presidency Conclusions of 22-23 June 2007; and the Annual Report from the Council to the European Parliament on the Main Aspects and Basic Choices of the CFSP (2008).

7 Art. 27(3) TEU.

8 See, *inter alia*, E Drieskens and L Van Schaik (eds), *The European External Action Service: Preparing for Success*, Clingendael Paper No. 1, December 2010; M Emerson et al., *Upgrading the EU's Role as Global Actor: Institutions, Law and the Restructuring of European Diplomacy* (Brussels: CEPS 2011).

9 See Arts. 18(4), 21(3) and 26(2) TEU.

principles of coherence and consistency,[10] the drafters of the Treaties seem to have mistaken the one principle for the other. In the functional approach to the topics at hand, the notion of consistency in primary law is understood here to mean the assurance that the different EU policies do not legally contradict each other. Moreover, synergies are sought in the implementation of these policies. The multi-layered concept of coherence is wider and relates to the construction of a united whole. For ease of distinction, the focus here will only be on the level of synergy between norms, actors and instruments, a synergy which the EU system (in Arts. 21(3), 4(3) and 13(2) TEU) aspires to promote through principles of cooperation and complementarity. For the purpose of this essay, and in spite of the Treaty language, the term coherence is here used to gauge the potential impact of the EEAS on the level of coordination and cooperation in the formulation of EU external relations policy.

2. *Reculer Pour Mieux Sauter*: Lisbon Treaty Changes

In order to develop a more coherent, effective and visible EU foreign policy, the Lisbon Treaty has introduced changes at two levels. Firstly, the objectives of the Union's external policies, from security over development to trade and environment, were merged in Art. 21 TEU. Secondly, the institutional architecture and procedural framework for EU external action were fundamentally amended. All these changes were introduced, however, without the simultaneous streamlining of the distribution of competences or decision-making procedures in EU external relations.[11] As has been observed, the Lisbon Treaty has not ended the first/second pillar dichotomy of late.[12] The Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP) remain located in the Treaty on European Union, separate from the Union's other external relations policies in the Treaty on the Functioning of the EU (trade, development, cooperation with third countries, humanitarian aid, relations with international organisations). Arguably, it is therefore the institutional innovation which should spur the drive for more coherence, effectiveness and visibility.[13] In that context, one can point to the institutionalisation of the European Council,[14] which has been tasked with the identification of the strategic interests and objectives of the Union,[15] as well as the external representation of the Union at Presidential level in the area of the CFSP.[16] Also, the European Parliament's role in EU decision-making in foreign affairs has been greatly enhanced, most notably with respect to the development of the Common Commercial Policy.[17]

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[10] See, *inter alia*, C Tietje, 'The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy' (1997) 2 *European Foreign Affairs Review* 211; P Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford: Hart Publishing 2001) 39-44; C Hillion, '*Tous pour un, un pour tous!* Coherence in the External Relations of the European Union' in M Cremona (ed), *Developments in EU External Relations Law* (Oxford: Oxford University Press 2008) 10-36; M Cremona, 'Coherence in European Union Foreign Relations Law' in P Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Cheltenham: Edward Elgar 2011) 55-92.

[11] The most notable exception, however, is Art. 216 TFEU, which provides a primary law foundation for the power to make international agreements, which had hitherto been developed by the ECJ's case law.

[12] See, e.g., P Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford: Oxford University Press 2010) 380-81. In the same vein, also P Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a new Balance between Delimitation and Consistency' (2010) 47 *Common Market Law Review* 987

[13] This tendency has been most vocally criticized by Kishore Mahbubani, in 'Europe's Errors', *TIME Magazine*, 8 March 2010: '[…] Europe's obsession with restructuring its internal arrangements is akin to rearranging the deck chairs of a sinking Titanic. The focus on internal challenges when the real threats are external is the first of three strategic errors Europe is making.'

[14] Art. 13(1) TEU.

[15] Art. 22(1) TEU.

[16] Art. 15(6) TEU.

[17] Art. 207(2) TFEU.

The most relevant institutional changes in the Lisbon Treaty, however, relate to the position of the High Representative of the Union for Foreign Affairs and Security Policy (HR),[18] who 'conducts' the Union's foreign, security and defence policies,[19] contributes proposals to the development of those policies, and – together with the Council – ensures compliance by the Member States with their CFSP obligations.[20] Primary authority for policy choice in these areas continues to reside with the European Council and the Council.[21] The Commission remains responsible for policy initiation, implementation and external representation in the other domains of EU external action.

To enhance coordination, the HR has been tasked to take part in the work of the European Council,[22] preside over the Foreign Affairs Council,[23] and hold the post of Vice-President of the European Commission (VP).[24] This new 'triple-hatted' person,[25] is to take on the role of the big coordinator of the EU external policy: the HR/VP is to assist the Council and the Commission in ensuring consistency between the different areas of the Union's external action and between these and the EU's other policies.[26] When properly carried out, the upgraded position of HR/VP ought to allow for a stronger and more independent development and implementation of the Union's foreign, security and defence policy, which — potentially — would provide the EU with a more coherent and more effective role on the international scene.[27] To assist the HR/VP in what seems like a mission impossible, the EU Treaty foresees the creation of a brand new diplomatic service of the EU, the idea for which originated during the European Convention in the Working Group on External Action.[28]

The Lisbon Treaty provides for the creation of the diplomatic service in a short and rather open-ended manner. Art. 27(3) TEU is the only Treaty basis for the establishment of the EEAS and stipulates

> 'In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.'

A single general procedural rule was provided for the establishment of the EEAS, i.e. the adoption of a Council Decision, proposed by the HR, with the consent of the Commission after having heard the opinion of the European Parliament. In fact, most of the questions regarding the establishment of the

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[18] The name change (compare the title of the pre-Lisbon position) reflects the fact that it has become clear that the HR indeed represents the Union and not the (collective) Member States. Even the President of the European Council (note: not the European *Union*) exercises that position's external competences 'without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy' (Art. 15 (6)(d) TEU).

[19] Art. 18(2) TEU.

[20] Art. 24(3) TEU.

[21] Arts. 22-26 TEU, resp. Art. 26(2) and 28 TEU.

[22] Art. 15(2) TEU.

[23] Art. 18(2) TEU.

[24] Art. 17(4) TEU.

[25] See J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge: Cambridge University Press 2010) 243.

[26] See Arts. 18(4), 21(3) and 26(2) TEU.

[27] It has been argued that the triple hats worn by the HR could lead to institutional schizophrenia, with the incumbent being subject to conflicting loyalties. See Y Devuyst, 'The European Union's Institutional Balance after the Treaty of Lisbon: "Community Method" and "Democratic Deficit" Reassessed' (2008) 39 *Georgetown Journal of International Law* 247, 294-5. Indeed, the Member States of the EU may well have created an even more impossible job than that of the United Nations Secretary-General – a post often called the most difficult in the world.

[28] CONV 459/02, Final Report of Working Group VII on External Action, Brussels, 16 December 2002, 6-7.

EEAS were left open by the Treaty. It was up to the negotiators of the different parties involved to reach agreement on principles and technical issues.[29]

The High Representative's initial proposal for a Council Decision on the set-up and functioning of the EEAS was drawn up in March 2010 and became subject to intense debates with Member States and, notably, the European Parliament. Much to her credit, the HR managed to navigate the high seas of inter-institutional politics and swiftly moved the legislative process towards adopting the constituent Council Decision on 26 July 2010 ('EEAS Council Decision').[30] This was followed by the adoption of three parallel legislative acts, which changed the EU's financial and staff regulations and established a start-up budget for the EEAS.[31] The completion of this complex process in barely six months triggered one insider to call it a 'Guinness record for speed'.[32] The EEAS was launched on 1 December 2010 and became operational a month later, on 1 January 2011 when 1643 permanent officials were transferred from the Council and the Commission.[33]

The key question now – the *internal* litmus test – is whether the EEAS will be able to provide the kind of assistance to its political master(s) that is needed to better coordinate external policies and thereby attain a higher level of coherence in EU external action.[34] To answer this question, the mandate of the EEAS will first be analysed and then its organisational structure. The mandate of the EEAS writ large entails two dimensions: coordination of EU external action at the levels of strategic planning (decision-shaping) and implementation. Each will be discussed in turn, but the focus will first be on the tasks which can be distilled from a combined reading of the EEAS Council Decision and the TEU.

3. Mandate of the EEAS: To 'assist', 'support' and 'cooperate'

The EEAS Council Decision establishes the Action Service as a functionally autonomous body, separate from the General Secretariat of the Council and from the Commission, with the legal capacity necessary to perform its tasks and attain its objectives.[35] The Service has not been endowed, however, with the power to adopt individual and binding decisions *vis-à-vis* third parties.[36] It is placed under the

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[29] For background and analysis of the negotiation process from which the EEAS emerged, see L Erkelens and S Blockmans, 'Setting Up the European External Action Service: An Institutional Act of Balance' *CLEER Working Papers* (2011), forthcoming.

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

[31] Regulation No 1081/2010 of the European Parliament and of the Council of 24 November 2010 amending Council Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, as regards the European External Action Service, OJ [2010] L 311/9; Regulation No 1080/2010 of the European Parliament and of the Council of 24 November 2010 amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities, OJ]2010] L 311/1; and European Parliament resolution of 20 October 2010 on Council's position on Draft amending budget No 6/2010 of the European Union for the financial year 2010, Section II - European Council and Council; Section III - Commission; Section X - European External Action Service (13475/2010 – C7-0262/2010 – 2010/2094(BUD)).

[32] PS Christoffersen, 'A Guinness Record for Speed' in E Drieskens and L Van Schaik (eds), *The European External Action Service: Preparing for Success*, Clingendael Paper No. 1, December 2010.

[33] See Press Release IP/10/1769, Brussels, 21 December 2010.

[34] For the EU as a whole, the *external* litmus test is the extent to which international partners find the EU to be more effective and visible. This point, however, is beyond the scope of the current essay.

[35] Art 1(2) EEAS Council Decision. On the character of the EEAS, see B Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service', *CLEER Working Papers* 2010/7.

[36] An exception could be provided by the inter-service 'arrangements' which the EEAS can conclude. See Arts. 3(4) and 4(5) EEAS Council Decision. These kinds of acts could potentially entail legal effects *vis-a-vis* third parties, within the meaning of Art. 263 TFEU, and therefore could draw the EEAS into Court proceedings. See further B Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service' (2011) 48 *Common Market law Review* 475, 493-496.

authority of the HR,[37] and assists him/her in fulfilling his/her mandates, as outlined, notably, in Arts. 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.[38]

As it turns out, the HR does not have the EEAS all to him/herself. Art. 2(2) of the EEAS Council Decision states that 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'. Thus, the EEAS is expected to serve multiple political masters.[39] Considering that the EEAS was created as an inter-institutional body, it is indeed well placed to play a coordinating role and assist in efforts to ensure coherence between the different areas of the Union's external action and between those areas and its other policies. How this coordination is expected to play out in practice becomes (more) clear from a close reading of Arts. 3 (Cooperation) and 4 (Central administration of the EEAS) of the EEAS Council Decision.

Art. 3(1) of the EEAS Council Decision specifically prescribes that the EEAS 'shall support, and work in cooperation with, the diplomatic services of the Member States, as well as with the General Secretariat of the Council and the services of the Commission'. To start with the former: the success of the EEAS partly depends on national ownership, on Member States 'buying in' to the system. In this respect, a crucial but still uncertain factor is the willingness of the Member States to play an enabling role in the early functioning of the new Service, in terms of input (contributions by seconded national experts (SNEs)) and output (implementation), both in the capitals (foreign affairs and their line ministries) and the delegations abroad.[40] Through their membership of international decision-making organs, such as the UN Security Council, the G8 and G20, and their differentiated participation in several contact groups (e.g. France, Germany and the UK in the E3 group on Iran), individual Member States will continue to play a key role in EU foreign policy making. A good interaction between the EEAS and the Member States' capitals – either through Brussels structures (COREPER, PSC and working groups) or key figures in the EEAS or in political cabinets – will therefore remain essential.[41] However, such coordination will not be sufficient to tame national ambitions, nor was it ever intended to.[42]

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[37] Art. 1(3) EEAS Council Decision.

[38] Art. 2(1) EEAS Council Decision.

[39] In fact, as one observer mentioned, 'the EEAS' assisting hands are tied to fields that have been transferred to its political 'masters'. While the fields of activity of the EEAS are wider than national diplomatic services (diplomacy + defence + parts of development cooperation), 'finding a common approach between the voices of different actors is a task far more perplexing than one would encounter at a national foreign ministry'. See Drieskens and van Schaik (eds), *The European External Action Service*, 16.

[40] See S Vanhoonacker and S Duke, 'Chairs' Conclusions' in Drieskens and van Schaik (eds), *The European External Action Service* 6.

[41] See M Lefebvre and C Hillion, 'The European External Action Service: towards a common diplomacy?', *SIEPS European Analysis* 2010/6, 7.

[42] A Rettman, 'UK champions own diplomacy over EU 'action service'', *EUObserver*, 5 May 2011, euobserver.com/?aid=32271. Compare also Declarations Nos. 13 and 14 attached to the Lisbon Treaty. These disclaimers show that, indeed, there is still room for national diplomacy after Lisbon.

As far as concerns cooperation between the EEAS and the General Secretariat of the Council (GSC), on the one hand, and between the Action Service and the Commission, on the other, one key phrase mentioned twice in Art. 2(1) of the EEAS Council Decision: the EEAS shall assist the HR/VP in fulfilling his/her mandates 'without prejudice to the normal tasks' of the GSC and those of the services of the Commission. In the absence of an exhaustive *Kompetenzkatalog* of the EU and with the very idea of normality in EU external action having shifted dramatically with the entry into force of the Lisbon Treaty, it is not unlikely that the neutral phrase 'normal tasks' will be interpreted differently by persons with different institutional affiliations.[43] As indicated by Lefebvre and Hillion

> 'Indeed, the functioning of the Service will probably remain determined by an invisible yet genuine distinction between two cultures: a Communitarian-like culture inherited from DG Relex (which will be numerically dominant in the EEAS, and which will most likely have the greatest influence on the geographic and thematic DGs, and on delegations); and a political culture inherited from the Council policy unit and crisis management structures, deemed to retain a certain autonomy within the Service. In this respect, the Council Decision suggests that the EEAS might well internalise past bureaucratic conflicts, rather than do away with them.'[44]

The risk of classic turf wars rearing their ugly heads is also the consequence of the pre-Lisbon manoeuvring by then Commission President designate Jose Manuel Barroso, who in November 2009 unveiled his new team of Commissioners. By way of a simple asterisk behind the names of three designated Commissioners, Barroso indicated that the Commissioners responsible for 'International Cooperation, Humanitarian Aid and Crisis response', 'Development' and 'Enlargement and European Neighbourhood Policy' would exercise their functions 'in close cooperation with the High Representative/Vice-President in accordance with the Treaties.'[45] The requirement of close cooperation with the HR/VP and the condition to work closely with the EEAS (as provided in the Mission Letters) was later structured, under his ultimate leadership, by the President of the Commission so as to ensure the coherence of external policies.[46] It may be clear that this line of action curtails the HR/VP's responsibilities as entrusted to him/her by the Treaty. This is further enhanced by removing responsibility for the ENP from the portfolio External Relations to that of Enlargement. This (re-)reshuffling was not motivated by Barroso (II). Finally, the Trade Commissioner does not cooperate directly with the HR/VP or with the EEAS, notwithstanding the genuine international character of his portfolio. One could say that the High Representative's VP hat represents fewer portfolios and less coordinating powers then under Barroso (I). The 'normal tasks' of the Commission are therefore more expansive than a post-Lisbon coherence-driven process in EU external action would have tolerated.

One former 'normal task' of the GSC now entrusted to the EEAS is assisting the HR with exercising his/her responsibilities under the acts founding the European Defence Agency, the European Union Satellite Centre, the European Union Institute for Security Studies and the European Security and

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[43] According to one member of the Council Legal Service, the phrase should be interpreted in line with existing practice under Art. 23(1) of the Council's Rules of Procedure: 'The Council shall be assisted by a General Secretariat […]' Gilles Marhic at the DSEU Conference 'The Diplomatic System after Lisbon – Institutions Matter', 18–19 November 2010, Maastricht University.

[44] Lefebvre and Hillion, 'The European External Action Service' 7.

[45] Press release IP/09/1837 of 27 November 2009. The requirement of close cooperation was repeated in the Mission Letters of the same date from Barroso (II) to Andris Piebalgs and Stefan Füle, and of 27 January 2010 to Kristalina Georgieva, ec.europa.eu/commission_2010-2014/mission_letters/index_en.htm.

[46] See Art. 17(6)(b) TEU, which states that the President of the Commission shall 'decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body'. On 22 April 2010, Barroso issued an Information Note from the President, 'Commissioners groups', SEC(2010) 475 final, in which the VP is tasked to chair the group of Commissioners responsible for 'External relations', a group further composed of Olli Rehn (economic and monetary affairs), Karel De Gucht (trade) and the three aforementioned Commissioners. The Note also says that 'the President can decide to attend any meeting, which he will then chair'.

Defence College.[47] Other examples of such 'normal tasks' include the administrative tasks of preparing and holding Council meetings.[48]

With respect to the coordination and cooperation between the EEAS and the services of the Commission, the EEAS Council Decision specifically obliges the parties to consult each other on *all* matters relating to the external action of the Union in the exercise of their respective functions, except on matters of CSDP.[49] This far-reaching obligation stems, *inter alia*, from the quasi-blanket competence attributed to the Commission in Art. 17(1), sixth sentence TEU to represent the Union externally 'with the exception of the common foreign and security policy, and other cases provided for in the Treaties'. As the Heads of the EU Delegations receive direct instructions from the HR, the EEAS and the Commission are effectively and legally bound to cooperate in the external representation of the Union.[50] On matters covered by the CSDP, simple coordination between the EEAS and the Commission will not do. In view of the competence distribution in the Lisbon Treaty, the EEAS is explicitly positioned to take part in the preparatory work and procedures relating to acts to be prepared by the Commission in the area of the CSDP.[51] In other words, the Commission relies on the HR and the EEAS in fielding proposals under Art. 42(4) TEU.

At the same time, the EEAS is mandated to provide support for the HR/VP in his/her capacity as the Vice-President of the European Commission. In that capacity, the VP is responsible for the external relations of the EU and for coordinating other aspects of the Union's external action so as to ensure consistency in implementation.[52] The EEAS could be expected to operate in many ways like a service of the Commission, but this will require good will and cooperation on both sides. So far, however, the picture that has emerged from practice is rather mixed.[53]

Although not central to the equation, the European Parliament, European Council, Court of Justice and Court of Auditors are not left out. The EEAS shall extend 'appropriate support and cooperation to the other institutions and bodies of the Union, in particular to the European Parliament'. [54] What constitutes such 'appropriate' support remains unclear, but going by previous practice, it is not expected to amount to much more than sharing information, most notably with the Foreign Affairs (AFET) Committee of the Parliament.

In return for all this assistance, the EEAS, too, may benefit from the support and cooperation of the above-mentioned actors, albeit not with the same generosity with which the Service itself is expected to deliver. The High Representative and the EEAS shall be assisted 'where necessary' by the GSC and the relevant departments of the Commission,[55] and 'as appropriate' by the European Parliament, other

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47 See the seventh recital of the Preamble of the EEAS Council Decision.

48 See Council Rules of Procedure, Arts. 3(2 & 5), 5(3-4), 7(3), 27(3-5).

49 Art. 3(2) EEAS Council Decision. This paragraph shall be implemented in accordance with Chapter 1 of Title V of the TEU, and with Art. 205 TFEU.

50 Art. 5(3) EEAS Council Decision.

51 Art. 3(2) EEAS Council Decision.

52 Art. 18(4) TEU.

53 European Commission President Barroso has been reported to take an uncooperative stance towards the difficulties which VP Ashton often faces to attend the Wednesday meetings of the College. Barroso has barred Ashton from participating via video conference or being deputised when abroad. See B Waterfield, 'Is absent Ashton a part-timer?', *EUObserver*, 10 January 2011, blogs.euobserver.com/waterfield/2011/01/10/absent-ashton-a-part-time-eu-foreign-minister/. On the other hand, cooperation between Ashton and individual Commissioners (Piebals, Füle, Georgieva) has been constructive, e.g. in monitoring the situation in the Arab World. To this end, and in an effort to keep his VP in check, Barroso published an Information Note from the President, *Commissioners Groups*, SEC (2010) 475 final, Brussels, 22 April 2010. For further analysis on this the latter, see Erkelens and Blockmans, 'Setting Up the European External Action Service'. See, more generally, E Brok, 'Préjugés, défis et potentiels: une analyse sans idées préconçues du Service européen pour l'action extérieure', *Fondation Robert Schuman Policy Paper*, *Question d'Europe* n°199, March 2011, 21

54 Art. 3(4) EEAS Council Decision.

55 Art. 4(5) EEAS Council Decision.

institutions and bodies, including agencies.[56] Arguably, the words 'where necessary' and 'as appropriate' leave a margin of discretion to the GSC and the Commission that even the service-level arrangements, which may be drawn up to that end by the said parties,[57] or between the EEAS and other offices or inter-institutional bodies of the Union,[58] could – in all likelihood – not close. The relationship between the EEAS, on the one hand, and the Commission services and GSC, on the other, is inherently asymmetrical with the EEAS performing the role of an assistant to multiple political masters *and* their services.

In short, the EEAS has been endowed with the task to support the Council and the Commission (directly) and the HR (in his/her task to assist the two institutions) in fulfilling their Treaty obligation to ensure coherence between the different areas of the Union's external action and between those areas and the EU's other policies. Moreover, the EEAS has been tasked to serve the President of the European Council and the President of the European Commission in the exercise of their respective functions in the area of external relations. The European Parliament and other institutions and bodies are supported whenever appropriate. The fact that – conversely – the EEAS and its political headmaster, the HR *may* receive the support from the GSC and the relevant departments of the Commission should provide further ground for enhancing coherence in all fields of EU external action. Yet, as Avery has pointed out, there is a grave risk of friction and rivalry between EEAS and the services of the Commission.[59] The threat is significant because much of the EU's action in international affairs is related to common policies, such as environment, energy, trade and agriculture. The analysis will now turn to a review of the Action Service's responsibilities with respect to strategic policy planning and programming.

4. Strategic Planning

It is a self-proclaimed objective of the European Union to increase its strategic approach to tackling global challenges.[60] In fact, there is no shortage of strategic aims that guide the Union's external action. The problem is that they are scattered over so many policy documents and 'strategic partnerships' that the EU begins to look rather rudderless.[61] The European Security Strategy,[62] the European Consensus for Development, [63] the EU Strategy for Sustainable Development,[64] and 'Trade, Growth and World Affairs'[65] are just a few examples. Their contents are often closely connected, as

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56 Art. 3(4) EEAS Council Decision.

57 Art. 4(5) EEAS Council Decision.

58 Art. 3(3) EEAS Council Decision. The terms 'offices' and 'inter-institutional bodies' leave room for coordination and cooperation between the EEAS and the office (cabinet) of the President of the European Council, the Publications Office, the European Personnel Selection Office, the European Administrative School and others.

59 G Avery, 'The EU's External Action Service: new actor on the scene', *EPC Commentary*, 28 January 2011.

60 See the High Representative's *Report on the Implementation of the European Security Strategy—Providing Security in a Changing World*, doc 17104/08 (S407/08), endorsed by the European Council, Presidency Conclusions, doc 17271/08 (CONCL 5), 2 (hereinafter: ESS 2008).

61 S Duke, 'Parameters for Success', in Drieskens and van Schaik (eds.), *The European External Action Service*, 35.

62 European Security Strategy: A Secure Europe in a Better World (Brussels, 2003).

63 See Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus' [2006] OJ C 46/1.

64 See the European Commission's 2009 review of the 2001 EU Strategy for Sustainable Development, eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0400:FIN:EN:PDF.

65 See DG Trade's 'Trade Policy as a Core Component of the EU's 2020 Strategy', trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146955.pdf. The strategy aims to enhance the position of EU economy by getting new opportunities for trade and investment, deepening the existing trade and investment links, helping EU businesses access global markets, gaining foreign investment, implementing enforcement measures, and enhancing the 'spirit of multilateralism and partnership' in trade. These aims, no doubt, entail political consequences.

the challenges posed by the security-development nexus have taught us.[66] Tackling the coordination issue therefore calls not only for better institutional coordination (see the previous section), but also for more strategic decision-making.[67]

Since the entry of the Lisbon Treaty, the onus has been on the European Council, which, according to Art. 22(1) TEU, 'shall identify the strategic interests and objectives of the Union' that relate to the CFSP and to other areas of EU external action. 'Such decisions may concern the relations with a specific country or region or may be thematic in approach.' The President of the European Council, Herman van Rompuy has started off the long-overdue and necessary debate on the EU's strategic priorities. Unfortunately, the first European Council Summit to that effect was not a great success.[68] The analyses prepared by HR Ashton's team at the time (September 2010) have been described as 'rather disappointing'.[69] It is here that a fully-fledged European External Action Service could prove instrumental in supporting the HR and the President of the European Council with a well-thought-out medium and long-term analytical approach for the Union's foreign and security policy.

Under the terms of Art. 22(2) TEU, the HR – for the area of CFSP – and the Commission – for other areas of external action – may submit joint proposals to the Council. A recent example has been provided by the Commission with its report 'Towards a new Energy Strategy for Europe 2011-2020', adopted by the Council in 2010.[70] Elements thereof made it on to the European Council strategic agenda and were then bounced back to both Commission and the HR

> 'There is a need for better coordination of EU and Member States' activities with a view to ensuring consistency and coherence in the EU's external relations with key producer, transit, and consumer countries. The Commission is invited to submit by June 2011 a communication on security of supply and international cooperation aimed at further improving the consistency and coherence of the EU's external action in the field of energy. The Member States are invited to inform from 1 January 2012 the Commission on all their new and existing bilateral energy agreements with third countries; the Commission will make this information available to all other Member States in an appropriate form, having regard to the need for protection of commercially sensitive information. The High Representative is invited to take fully account of the energy security dimension in her work. Energy security should also be fully reflected in the EU's neighbourhood policy.'[71]

The organisational chart of the EEAS includes 'strategic planning' and 'training', but – at the time of writing – adequate resources had not yet been allocated to these important functions. The High Representative is expected to take decisions by mid-2011 on the training of the EEAS personnel.[72] As for strategic planning, one of the successes of Javier Solana's team was the development of the European Security Strategy as an over-arching concept. One of the weaknesses of the Commission in external relations was its lack of overall planning capacity.[73] This is where the hybrid HR/VP position, supported by the EEAS composed of Commission and Council staff, plus seconded national experts from the Member States, is expected to make a difference. However, we have still to see the first

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66 See C Ashton, 'Foreword' in S Blockmans, J Wouters and T Ruys (eds), *The European Union and Peacebuilding: Policy and Legal Aspects* (The Hague: T.M.C. Asser Press 2010) V. See also ESS 2008, 8-9; and Case C-91/05 *Commission v. Council (SALW)* [2008] ECR I-03651.

67 As recognised in the ESS 2008, 8-9.

68 European Council Conclusions of 16 September 2010, Press Release EUCO 21/10, CO EUR 16, conclusion no. 3.

69 See *infra*, note 73.

70 Conclusions of the 3017th Transport, Telecommunications and Energy Council meeting, Brussels, 31 May 2010.

71 European Council, Conclusions on Energy, Press Release PCE 026-11, 4 February 2011, pt. 11.

72 For an analysis of how training can contribute towards fulfilling the EEAS objectives and in nurturing a new EU diplomacy, see J Lloveras Soler, 'The New EU Diplomacy: Learning to Add Value', *EUI Working Papers RSCAS 2011/05*.

73 See Avery, 'The EU's External Action Service: new actor on the scene'.

proposal coming from the HR in the field of CFSP.[74] In the wake of the historical changes in parts of the Arab World, and against the wider background of the rise of the BRICs, both the ENP and the 2003 ESS are obvious candidates for a thorough revision.

A crucial task when establishing the function of the EEAS in achieving overall consistency in EU external action is to identify the policy areas where coordination is necessary. Virtually every EU policy has to it an external dimension that fits into the grander scheme of EU presence in the world and could therefore also fall within the ambit of the EEAS' activities. These policy areas include those with a clear, chiefly external character – CFSP, CSDP, Common Commercial Policy (CCP), development cooperation, humanitarian aid, enlargement, and the European Neighbourhood Policy – as well as those usually classified as internal Union policies – the Area of Freedom Security and Justice, agriculture and fisheries, public health, environment, energy, tourism. The added value of the EEAS' involvement in strategic planning certainly lies at the crossroads of EU external policies, as the nexus between development cooperation and security policy has shown. The overarching development goal in the Lisbon Treaty is the eradication of poverty. The coordination on the level of ensuring consistency of aims between the overall foreign and security policy goals in general and those of development policy in particular – a task specifically entrusted to the EEAS[75] – entails a degree of strategic planning, in addition to the task of eventually coordinating the activities between the institutions implementing the cooperation programmes in the end.

5. Programming

In terms of programming, planning and implementation, the tasks of the EEAS are more or less clear. According to Art. 9(2) of the EEAS Council Decision, the HR 'shall ensure overall political coordination of the Union's external action, ensuring the unity, consistency and effectiveness of the Union's external action, in particular through [a number of thematic and geographic] external assistance instruments'.

These instruments include the Development and Cooperation Initiative (DCI), European Development Fund (EDF), European Neighbourhood and Partnership Instrument (ENPI), the European Instrument for Democracy and Human Rights (EIDHR), the Instrument for Cooperation with Industrialised Countries, the Instrument for Nuclear Safety Cooperation (INS) and part of the Instrument for Stability (IfS). The relevant Article in the EEAS Council Decision states that

> '[...] throughout the whole cycle of programming, planning and implementation of the instruments referred to in paragraph 2, the High Representative and the EEAS shall work with the relevant members and services of the Commission without prejudice to Article 1(3). All proposals for decision will be prepared by following the Commission's procedures and will be submitted to the Commission for adoption'.[76]

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[74] Ashton has been criticized – so far most vocally by the Belgian Minister of Foreign Affairs – for not proposing a well-thought-out medium and long-term analytical approach for the Union's foreign and security policy. See L Maroun, 'Steven Vanackere dit ses quatre vérités à Cathy Ashton', *Le Soir*, 4 May 2011, 14: 'Bien sûr, pour beaucoup de pays, la politique extérieure est au cœur de la souveraineté nationale. Nous, nous avons toujours voulu que le Service d'action extérieure soit l'axe central autour duquel les Etats membres peuvent s'organiser. Mais en l'absence d'un axe central qui répond, fait des analyses et tire des conclusions rapidement, les Allemands aujourd'hui, les Français demain, ou les Anglais, prennent une partie de ce rôle d'axe central, et c'est alors autour d'eux que les autres doivent s'organiser ! Le résultat est centrifuge, pas centripète. (...) Il est normal qu'Ashton ne soit pas partout en même temps. Il faut faire des choix, se concentrer sur les vrais enjeux, éviter de se perdre dans les détails, et une bonne gestion d'agenda. (…)Mais aujourd'hui, je n'ai pas l'impression qu'avec le Service d'action extérieure, on en soit déjà là. On peut accepter que certains réagissent plus vite qu'Ashton, mais à condition qu'elle puisse prouver qu'elle travaille sur le moyen et le long termes – et sur des thèmes hyper-importants, comme l'énergie par exemple. Mais ça, je n'ai pas encore vu non plus.'

[75] See the fourth recital of the preamble of the EEAS Council Decision; Art. 21(2)(d) TEU and Art. 208 TFEU.

[76] Art. 9(3) EEAS Council Decision.

Thus, the EEAS Council Decision entrusts the Action Service with co-responsibility for preparing the Commission decisions on the strategic, multi-annual steps within the programming cycle.[77] More specifically, this covers the first three multi-annual steps within the programming cycle: country and regional allocations; country and regional strategic papers; and national and regional indicative programmes.[78] The objection that the EDF and DCI, which in budget terms represent the largest portion of the overall external action budget, imply a different and essentially long-term approach to programming while much of the programming in other aspects of EU external action is annual or shorter-term appears to have been accommodated by the EEAS Council Decision. In both cases, any proposals 'shall be prepared jointly by the relevant services in the EEAS and in the Commission *under the direct supervision and guidance of the Commissioner responsible for Development Policy* and shall be submitted jointly with the High Representative for adoption by the Commission'.[79] Similar stipulations apply in the ENPI context with reference to the Commissioner for Enlargement and Neighbourhood Policy.[80]

In short, the EEAS Council Decision does not *prima facie* remove either the Commission's 'management functions', its rights of initiative or those of implementation (Art. 17(1) TEU). Art. 210(2) of the TFEU, which permits the Commission 'to take any useful initiative' to promote coordination between the Union and the Member States on development cooperation is seen as further proof that the Commission should continue as the implementer of development policy. However, there is nothing in the *travaux préparatoires* of the EEAS Council Decision to suggest that any such transferral of implementation of development cooperation instruments to the EEAS has been seriously entertained.[81]

Based upon the EEAS Council Decision, substantial management and implementation tasks are retained by the Commission with the EEAS playing a role in the programming aspects. Programming can be conceived of as relating to the political level where strategic goals are connected with more specific policy-making towards a country or region (cf. the competence of the European Council ex Art. 22 TEU), while the actual management of projects (especially their financial aspects) and their execution will be tasks retained by the Commission.

It is only when the President of the European Council, who is backed by the HR/VP's recommendations (prepared by the EEAS), presents the broad priorities of the EU on the international stage – who the key strategic partners are, and how the often difficult dialogue between values and interests should be conducted – that the Action Service's general tasks will become much more clear. In the absence of any such strategy at macro level it is difficult to see how the EEAS will make critical decisions on programming priorities related to financial instruments.

It is important to, once more, make a distinction between the EEAS political role and its legal position. On the first point, the EEAS is potentially vested with significant influence on EU external relations policy-making but so far the Commission has 'goes solo' on several issues with a significant external dimension, e.g. trade, energy security and climate change. As for its legal position, the EEAS has not been formally conferred with competences to adopt legally binding instruments.

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77 To be sure, actions undertaken under: the CFSP budget; the Instrument for Stability (other than the part referred to in Art. 9(2) EEAS Council Decision); the Instrument for Cooperation with Industrialised Countries; communication and public Diplomacy actions, and election observation missions, are under the responsibility of the HR/EEAS. The Commission is responsible for their financial implementation under the authority of the HR in his/her capacity as Vice-President of the Commission. The Commission department responsible for this implementation shall be co-located with the EEAS. See Art. 9(6) EEAS Council Decision.

78 Art. 9(3) EEAS Council Decision.

79 Art. 9(4) EEAS Council Decision (emphasis added).

80 Art. 9(5) EEAS Council Decision.

81 See further S Duke and S Blockmans, 'The Lisbon Treaty stipulations on Development Cooperation and the Council Decision of 25 March 2010 (Draft) establishing the organisation and functioning of the European External Action Service', *CLEER Legal Brief*, 4 May 2010, www.asser.nl/upload/documents/542010_121127CLEER%20Legal%20Brief%202010-05.pdf.

6. Concluding Remarks

Beyond the support for the exercise of the powers conferred by the Lisbon Treaty to its political masters, the main task of the EEAS is to create synergies between these 'external action heroes' and the instruments they employ. This essay has shown that in terms of coordination, strategic policy planning and programming, the role of the EEAS has been limited in at least three ways. First, the service's scope for action is curtailed by the elasticity of the term 'normal tasks' of the General Secretariat of the Council and those of the relevant departments of the Commission. This term was introduced in the Council Decision setting up the EEAS. Practice has shown that the solidarity among the Union's external action heroes is not boundless. The pre-emptive moves by European Commission President to carve out substantial chunks of EU foreign policy-making from the HR/VP's mandate and to tie the latter down in forms of cooperation over which Barroso can preside, are illustrative in this respect. Second, the organisational structure does not foresee the bureaucratic linkages to allow for great inter-institutional coordination in the development of medium- and long-term strategies. The tension between external competence delimitation in two Treaties and the need to speak with one voice to the world seems to have been structurally engrained into the structures of the EEAS.[82] And thirdly, the Action Service's success is also dependent on the Member States' willingness to cooperate by sharing relevant information and by seconding their 'brightest minds' to the Union's diplomatic service. So far, the signals sent from several Member States' ministries of foreign affairs have been rather sobering in this respect.

However important the structures and processes are, they are never an end in themselves, but merely instruments. The key question underlying this paper has been whether the new body is fit for its intended purpose. Does it provide essential support to the senior EU posts in external relations? And does it allow the EU to be a credible and coherent diplomatic actor exerting influence on the international scene?

The coordination tasks most likely include information sharing, the EEAS acting as a common source of expertise for any institution dealing with EU external activities, overview of the activities of the different institutions, as well as various representation duties to make the Union speak with a single voice in the direct sense. It remains to be seen though to what extent the EEAS can contribute to the formulation of shared principles guiding the foreign policy not only of the EU, but also of its Member States. In fact, its potential lies in becoming a 'decision-shaping' body. Perhaps a better term for the EEAS would therefore have been the 'European External Policy Coordination Service'.

[82] While it is probably too early to draw firm conclusions on this particular issue in view of the fact that the organisational structure from 1 April 2011 is still being tweaked and thus liable to change, one has been able to observe that the former Second Pillar bodies have remained apart from the former First Pillar units in the whole series of organisational charts which have been floated since March 2010. For further observations on the draft organisational structure, with a particular focus on the development-security nexus, see the contribution by Bart Van Vooren in this edited Working Paper.

The European External Action Service: Avoiding Past Disputes in the Security-Development Nexus?

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Abstract

This contribution explores the potential of the Lisbon Treaty's formal 'de-pillarization' and the establishment of the EEAS to ease the tension inherent in the 'security-development nexus' of EU external action which existed between the former Community's development policy and the intergovernmental Common Foreign and Security Policy (CFSP). As a body that brings together staff from the Council, Commission and Member States both in Brussels and in the Union delegations around the globe, the EEAS could rise to become the central interlocutor between the various actors that formulate EU external action, fostering both coherence and a more unitary representation of the Union. This contribution addresses these developments with a view to examining them in the pursuit of the oft-evoked, yet often absent 'single EU voice'. In the past, the pillar structure caused a number of turf battles, signifying the shortcomings of the legal and institutional configuration pre-Lisbon, which led to judicial disputes, of which the *ECOWAS* case is the most prominent example. Against this backdrop, the present contribution performs the following thought-exercise: Could a conflict such as that which led to the *ECOWAS* judgment on the separation between security and development policies still take place under the post-Lisbon legal-institutional setting?

Keywords

Security-development nexus – de-pillarization – CFSP post-Lisbon – coherence – *Small Arms/Ecowas* judgement

1. Introduction

In a recent contribution, I examined the legal-institutional position of the EEAS as against the current institutional balance in EU external relations.[1] In that article, I defined the EEAS as follows

> 'a body functionally akin to Commission Directorates General, without the legal advantage of being part of an institution with decision-making powers proper, accountable to Parliament, while being placed under the HR's authority with a broad mandate of support within the chalk lines set by the Council and European Council.'

The EEAS is a body which brings together staff from the Council, Commission and Member States both in Brussels and abroad, serving as an interlocutor between the various actors that formulate EU external action. By inserting this new cog into the EU's external relations machinery the drafters of the Lisbon Treaty took another step in the quest towards the ever-elusive single voice for the Union in the world. In the past, that single voice had been stymied – among others – by the existence of the two different pillars on which EU external relations was based: one comprising a set of procedures and instruments to conduct the EU's Common Foreign and Security policy (CFSP), and another comprising procedures and instruments to pursue policies in the field of trade, environment, development, and other pre-Lisbon 'Community' competences. The Lisbon Treaty has now formally

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1 B Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service' (2011) 48 *Common Market Law Review* 475.

collapsed the pillar structure into one organization with legal personality, though in substance the divide remains. This implies that legally the old hierarchical relationship between the CFSP and the Community has disappeared, and while the gloss of the single institutional framework has only been strengthened by the advent of the EEAS, the divide between notably development and security policies remains as strong as ever. This contribution will hone in on these developments, the collapse of the pillar structure and the creation of the EEAS, so as to examine them against the quest of attaining the single EU voice. In the past, the pillar structure led to a number of turf battles which signified the problems inherent to that legal and institutional configuration, and their negative impact on external policy. Most widely known is the conflict concerning the financing of initiatives to combat illegal sales of small arms in Western Africa, which led to the *ECOWAS* Grand Chamber judgment of May 2008. The thought-exercise in this contribution is then the following: could a conflict such as that which led to that prominent judgment on the separation between security and development policies, still take place under the post-Lisbon legal-institutional setting?

2. The Security-Development Nexus: A Testing Ground for Coherence of EU External Relations

The European Security Strategy (ESS) of 2003, the 2006 European Consensus on Development, and the EU's 2008 review of the ESS all state that 'there cannot be sustainable development without peace and security, and without development and poverty eradication there will be no sustainable peace.'[2] While that is indeed a rather intuitive connection, this interconnection cannot veil that achieving that goal requires decisive and clear strategies, which includes choices prioritizing certain objectives and initiatives over others: development and security concerns ought thus to be part of a single integrated political strategy. Legally, the Union is not well-constructed towards that end: Since the Maastricht Treaty the Community has become competent in the area of development policy, a competence which is shared and non-pre-emptive, and is to be exercised in coordination with the Member States' development policies. The scope and depth of this competence has grown over the years (for example: it now includes anti-landmine initiatives where that formerly was a CFSP field of action), alongside a Common Foreign and Security policy which has equally matured since the Maastricht Treaty. With the Lisbon Treaty the EU has committed itself – yet again – to attaining a coherent external policy that intertwines security and development concerns, on the basis of national development and foreign policies as well as the EU's development and foreign policies.

The continued salience of this *problématique* was again underlined during the negotiations on setting up the EEAS in 2009-2010. Both from an institutional and a substantive perspective, many were worried about the impact of the new structures born from the Lisbon Treaty. On the substantive side, many in the development community have been worried that the position of Baroness Ashton in the CFSP and the Commission was a ruse of the Member States to ensure that aid resources previously managed by the Commission would be used for strategically directed objectives rather than long-term structural development objectives.[3] For example, Oxfam International's EU office argued that giving decision-making power to the EEAS over the EU's development budget risked making poverty objectives hostage to foreign policy goals.[4] From an institutional perspective, authors like M. Smith have argued that the new structures would do nothing but 'set back' by a number of years the

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[2] European Parliament, Council, Commission, Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Development Policy: The European Consensus[2006] OJ C 46/1, para 34; *Report on the Implementation of the European Security Strategy, Providing Security in a Changing World*, Brussels, S407/08, 11 December 2008, 8; *European Security Strategy, A Secure Europe in a Better World*, 12 December 2003, 2.

[3] R Youngs, 'Fusing Security and Development: Just Another Euro-Platitude?' (2008) 30 *Journal of European Integration* (2008) 419, 432.

[4] Quoted in Euractiv, *The EU's new diplomatic service - Positions*, 9 July 2010, www.euractiv.com/en/future-eu/eus-new-diplomatic-service-linksdossier-309484.

organically grown interconnections between former EC and ESDP policies.[5] As an example he quotes operation *Atalanta*: to ensure that countries were willing to accept pirates captured by the Member States' navies operating under the EU flag, the Commission proposed to offer development aid as an incentive to African countries in the region. Smith then argues that the Lisbon Treaty has stirred up so much dust that old institutional struggles have been revived, so that each institution has fallen back to old defensive positions to ensure not losing control over respective competences.

In the next section, I succinctly map how the post-Lisbon reshuffle has shaped the EEAS and Commission institutional structures in the field of security and development. This will then serve as the basis for an analysis of how an initiative in the field of small arms and light weapons might be channelled through this set-up.

2.1. Reshuffling the Institutions, and the Impact on External Policy Coherence?

Looking at the organization chart as of 24 February 2011, we can observe that through the transfer of parts of the Council General Secretariat, Commission DG RELEX and parts of DG Development, the EEAS has been organized in region-specific DG's flanked by a single multilateral DG. Additionally, by the time the EEAS reaches its full capacity, staff coming from the Member States, Council Secretariat and Commission will each compose one third of the EEAS' staff both at headquarters and in the delegations.[6] This new configuration is expected to 'create synergies and efficiency gains'[7] yet it also raises a number of issues from the perspective of policy coherence. First of all, at the top of the hierarchy, a number of Commissioners are at least partially involved in aspects of security and/or development, alongside Baroness Ashton: Commissioner for development Andris Piebalgs shares common ground with Commissioner for International Cooperation, Humanitarian Aid and Crisis Response, Kristalina Georgieva. Alongside them is Stefan Fule, responsible for enlargement and neighbourhood policy. These Commission colleagues will have to work very closely with Ashton, the primus inter pares in EU external relations. Secondly, at the civil servant level, it is then notable that in the new EU external policy structure Stefan Fule remains the Commissioner for enlargement *and* the European Neighbourhood Policy (which has a clear security rationale),[8] but that his DG remains organized solely around its enlargement responsibilities. This while current Directorates D, E and F of the former DG RELEX have become part of the EEAS, and those were DG Relex' Directorates that used to fall under Benita Ferrero-Waldner's responsibility, respectively working on: European neighbourhood policy coordination, Eastern Europe, the Southern Caucasus and the Southern Mediterranean. Additionally, the more recently set up Task force on the Eastern partnership will also be transferred to the EEAS.[9] Hence, the implementing staff for the key EU regional security policy will be part of the EEAS, while the top political post for this policy remains within the Commission. At the level of financing, this is interesting in light of Article 9(5) of the Council Decision setting up the EEAS.[10] This article sets out the decision-making in the context of the 'European Neighbourhood and Partnership Instrument' and states that proposals for programming shall be prepared jointly by the relevant EEAS and Commission services under the responsibility of the Commissioner responsible for Neighbourhood Policy, and will be submitted jointly with the HR for adoption by the Commission.

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5 M Smith, presentations at the conference on the EEAS in Maastricht, November 2010, and EUSA conference in Boston, March 2011.

6 European Commission, Draft amending Budget No. 6, COM(2010) 315 final, Brussels, 17.6.2010, 5.

7 European Commission, Draft amending Budget No. 6, COM(2010) 315 final, Brussels, 17.6.2010, 5. At the press conference of the Gymnich-format meeting on foreign affairs of 10 September 2010, HRVP Ashton confirmed that she expects financial efficiency gains of at least 10 per cent.

8 M Cremona and C Hillion, 'L'Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy', *EUI Law Working Paper* 2006/39.

9 Annex to the Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L 201/30.

10 *Idem*.

However, the relevant services of the Commission are now largely located within the EEAS, except for Stefan Fule himself. Thirdly and finally, a similar observation can be made as regards development policy: significant parts of Piebalgs' DG Development have been transferred to the EEAS, with DG DEV since 1 January 2011 having been merged with EuropeAid into 'DG DEVCO'. Two Directorates were transferred to the EEAS in their entirety: Directorate D for West and Central Africa, the Carribean and OCTs (excluding OCTs however)[11] and Directorate E for the Horn of Africa, East and Southern Africa, and the Indian Ocean and the Pacific. Directorate C on general affairs is partially transferred to the EEAS: from DG C1 on Aid programming and management, the programming staff is transferred; and from DG C2 on Pan-African issues and institutions, governance and migration, the staff on Panafrican issues will go to the EEAS. DG C3 on economic governance and budget support thus remains in the Commission. The nature of the new DG Development is therefore one of a purely thematic nature, with a strong focus on aid management. Along with EuropAid, former Directorates A and B constitute the new slimmed down DG: Directorate A on horizontal issues of development covered forward looking studies, policy coherence, aid effectiveness, and relations with international organizations; Directorate B on thematic issues covered issues such as: infrastructure development, sustainable management of natural resources and human development.

To summarize, from an institutional perspective, policy coherence in security and development will require synergies between the following substructures of the EU's external relations machinery: first the CSDP structures which are something of an outlier within the EEAS; second, DG Africa and DG North Africa of the EEAS; third, within the EEAS' DG on global and multilateral issues, the desks on Human Rights & Democracy and Conflict Prevention & Security Policy will need to be involved; fourth, the EEAS has a separate service (DG?) for Foreign policy instruments, including a separate desk for CFSP operations and a desk for Stability Instrument operations; fifth, on the Commission side, coordination will be required with the thematic desks of DG DEVCO – to the extent that they remain in place, as well as its important function in administering aid; sixth and finally, the Union delegations will take instructions from EEAS headquarters and the Commission in the exercise of each of their competences:[12] Such is the EU's institutional recipe for coherence in the security – development nexus.

2.2. The Small Arms Dispute: Origins in Policy and Impact of the European Court of Justice Judgment Under the Nice Treaty

The rationale of the Lisbon Treaty for the position of Baroness Ashton and the EEAS as a whole was to reduce inter-institutional strife to a minimum so as to attain a single EU external voice.[13] To examine whether the EEAS will over time provide the EU the capacity to deliver on the promise of policy coherence, the much-publicized dispute over the provision of financial support to the Economic Community of West African States (ECOWAS)[14] serves as a useful basis for a hypothetical scenario of guiding an initiative through the EU's new institutional set-up. Before doing so, a brief introduction to the policy setting of that conflict is necessary.

In the European Union's Strategy to combat small arms and light weapons ('SALW') adopted in 2005,[15] it is explained that current day wars are conducted by opportunistic factions whose main tools are small arms and light weapons rather than traditional armies using heavy weaponry. The abundant

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11 OCT's are overseas countries and territories connected to the Member States.

12 Art. 5(3) EEAS Council Decision.

13 For the discussion on the different options and reasons for the new position of High Representative / Vice Presendent see: The European Convention, Final Report of Working Group VII on External Action, CONV 459/02, Brussels, 16 December 2002, (Detailed Report of the discussions), 16.

14 Case C-91/05 *Commission v Council (SALW)* [2008] ECR I-03651.

15 Council of the European Union, *EU Strategy to combat illicit accumulation and trafficking of Small Arms and Light Weapons and their Ammunition*, 5319/06 (13 January 2006).

presence of these light weapons has grave consequences in a wide array of fields: weakening of State structures, displacement of persons, collapse of health and education services, declining economic activity, damage in social fabric, and in the long term the reduction or withholding of development aid; all trends which significantly affect sub-Saharan Africa.[16] Thus, in 1998, ECOWAS had adopted a Moratorium on the Importation, Exportation and Manufacture of Light weapons, renewed in 2001. That initiative had, however, significant weaknesses, the principal reason for its limited success being its non-binding, voluntary nature.[17] At a summit in Dakar on 20 January 2003, there was thus a decision by the ECOWAS heads of State and government to transform this Moratorium into a legally-binding Convention. Subsequently, on the part of certain Member States with strong interests in the region, there was the desire to follow up on this decision and ensure that they be seen to actively support this initiative. Subsequently, the Council Decision of 2 December 2004 was adopted, an instrument which has since provided a contribution of 515.000 Euro towards setting up a technical secretariat within ECOWAS to convert this moratorium into a binding convention between ECOWAS member states.[18]

However, in parallel, the Commission was also active in this area.[19] Pursuant to Arts. 6 to 10 of Annex IV to the Cotonou Agreement, 'Implementation and Management Procedures', a regional cooperation strategy and a regional indicative programme were laid out in a document signed on 19 February 2003 by the Commission on the one hand, and by the ECOWAS and the West African Economic and Monetary Union (WAEMU) on the other. This document made note of the existing moratorium, and further stated that support could be given by the Community to support in implementing this moratorium. Following a request from ECOWAS, in 2004, the Commission started preparing a financing proposal for conflict prevention and peace-building operations.[20] According to the Commission, the largest single block of this financing was to be allocated to the ECOWAS Small Arms Control Programme.

Against that background, an EU-internal dispute arose between the Commission and the Council running along the security–development competence fault line. Consequently, at the time of the adoption of the CFSP Decision, the Commission made the following declaration which targeted not just the validity of the Decision taken with regard to ECOWAS, but also the 2002 Joint Action[21] which provided a broad basis for other CFSP actions with regard to small arms:

> 'In the view of the Commission this Joint Action should not have been adopted and the project ought to have been financed from the 9th [European Development Fund (EDF)] under the Cotonou Agreement. This is clearly borne out by Article 11(3) of the Cotonou Agreement which specifically mentions the fight against the accumulation of small arms and light weapons as a relevant activity. It is also reflected in the annotation to the relevant CFSP budget line (19 03 02) in the 2004 budget, which excludes CFSP financing of such projects if they "are already covered by the provisions of the Cotonou Agreement […]. The Joint Action for financing under CFSP would have been eligible under the 9th EDF and fully coherent with the regional indicative programme with ECOWAS. This is demonstrated by the fact that the Commission is already

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16 Council of the European Union, *EU Strategy to combat illicit accumulation and trafficking of Small Arms and Light Weapons and their Ammunition*, 4.

17 I Berkol, *Analysis of the ECOWAS Convention on Small Arms and Light Weapons and recommendations for the development of an Action Plan*, Note d'Analyse - Groupe de Recherche et d'Information sur la Paix et la Sécurité (April 2007) 1.

18 Council Decision 2004/833/CFSP of 2 December 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons [2004] OJ L359/65, Art. 1.

19 Opinion of Mr Advocate General Mengozzi, Case C-91/05, paras. 7-9.

20 Opinion of Mr Advocate General Mengozzi, Case C-91/05, para. 8.

21 Council Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilizing accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP [2002] OJ L 191/1, 1.

> preparing a financing proposal for an indicative amount of EUR 1.5 million to support the implementation of the ECOWAS moratorium on small arms and light weapons (SALW).Finally, the Joint Action falls within the shared competences on which Community development policy and the Cotonou Agreement are based. Such areas of shared competences are just as much protected by Art. 47 [EU] (now Art. 40(1) TEU) as the areas of exclusive Community competence; otherwise Art. 47 would be deprived of a large part of its useful effect. The Commission reserves its rights in this matter.'[22]

From a legal perspective, the Commission thus opined that should such action be undertaken, this ought not to be done as a CFSP measure but rather by the Community within the framework of the Cotonou Agreement. It argued that the Council had violated Art. 47 TEU (Nice version), which stated that nothing in the Treaty on European Union shall affect the Community Treaty. The Council went ahead with the Council Decision because mainly the French Government and to some extent the British Government were keen on acting immediately.[23] To that end a Council Decision was adopted on the basis of a previously adopted Joint Action of 2002. Subsequently, the Commission brought proceedings challenging the validity not only of that particular Council Decision,[24] but also of the foundational 2002 Joint Action relating to operations designed to discourage dissemination of SALW.[25] Through this infringement action, it sought 'annulment for lack of competence' on the basis of Art. 47 TEU-Nice, since 'the impugned CFSP decision […] affects the Community powers in the field of development aid'.[26] The resolution of the conflict thus revolved around the interpretation given to Art. 47 TEU-Nice which stated that '*nothing* in this Treaty *shall affect* the Treaties establishing the European Communities' (emphasis added). In line with previous inter-pillar case law the Court of Justice ruled that a measure with legal effects adopted under Title V infringes Art. 47 TEU-Nice 'whenever it could have been adopted on the basis of the EC Treaty'.[27]

In a contribution discussing the post-Lisbon impact of that judgment, I pointed to the new Art. 40 TEU (Lisbon version), and argued that the new setting has largely invalidated that judgment.[28] Given that the Lisbon Treaty setting accords equal legal value to CFSP and former EC competences, such disputes could no longer arise. Or rather, they would take on a different form, and hence the hypothetical in this contribution: how might this dispute have played out – or would it have occurred at all - under the new legal and institutional structures?

2.3. The Small Arms Dispute Under the Lisbon Treaty: A New Dawn for EU External Relations?

The above overview of the institutional reshuffle has already indicated that the dividing line between development and security persists regardless of the EEAS having been set up to ensure greater

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22 Quoted in Opinion of Mr Advocate General Mengozzi, Case C-91/05, para. 23

23 House of Lords European Union Committee, *Europe in the World*, 48th Report of Session 2005-2006, Oral Evidence of Professor A. Dashwood, October 12th 2006, Question 179 at 45.

24 Council Decision 2004/833/CFSP of 2 December 2004 implementing Joint Action 2002/589/CFSP with a view to a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons [2004] OJ L 359/65.

25 Council Joint Action 2002/589/CFSP of 12 July 2002 on the European Union's contribution to combating the destabilising accumulation and spread of small arms and light weapons and repealing Joint Action 1999/34/CFSP [2002] OJ L191/1.

26 Action brought on 21 February 2005 by the European Commission against the Council of the EU, OJ C115, 14 May 2005, 10.

27 Case C-170/06 *Commission v. Council (Airport Transit Visas)* [1998] ECR I-02763; Case C-176/03 *Commission v. Council (Criminal sanctions for the protection of the environment)* [2005] ECR I–7879; Case C-440/05 *Commission v. Council (Shipsource Pollution)* [2004] ECR I–9097; Case C-91/05 *Commission v Council (SALW)* [2008] ECR I-03651, para. 60.

28 B Van Vooren, 'The Small Arms Judgment in an Age of Constitutional Turmoil' (2009) 14 *European Foreign Affairs Review* 231.

coherence in EU external action. The same can be said of the programming cycle in development: The preamble of the Council Decision setting up the EEAS states in its paragraph four that the EEAS should ensure that in its contribution to EU external cooperation programmes it 'respects' the objectives laid down in Arts. 21(2)(d) TEU and 208 TFEU. The first Article is the general obligation of all EU external policies foster sustainable social, economic and environmental development and poverty eradication. The second Article is the objective of poverty eradication connected specifically to the EU's competence in development policy laid down in the Treaty on the Functioning of the Union. The preamble adds that the EEAS should also promote the European consensus on development and that on humanitarian aid.

Already in the Member States' consensus document under the Swedish Presidency in October 2009, it was clear that Member States wished that the EEAS would play a *strategic* role in the programming and implementation of financial instruments contributing to what has been called 'structural diplomacy'.[29] Namely, the EEAS would not only contribute to tasks taken over by Baroness Ashton which had traditionally fallen to Javier Solana, but also to those which had largely been overseen by Benita Ferrero-Waldner and Louis Michel, the long term engagements of the Union with third countries and other regions in which it seeks to shape the political and socio-economic structures in line with its own values. According to the EEAS Council Decision, the EU diplomatic service is thus to be involved in a number of geographical and thematic instruments on the basis of which the Union programs, plans and implements funding for its external policies. The key article in the Council Decision setting up the EEAS is Art. 9, on 'External Action Instruments and programming'. Paragraph one of that Article starts out with a provision of questionable utility for attaining coherence across the security-development nexus: the management of the EU's external cooperation programmes remains under the responsibility of the Commission, but this is 'without prejudice to the respective roles of the Commission and of the EEAS in programming as set out in the following paragraphs.'[30] Art. 9 of the EEAS Decision continues by stating that: 'The High Representative shall ensure overall political coordination of the Union's external action, ensuring the unity, consistency and effectiveness of the Union's external action, in particular through the following external assistance instruments.' Thereafter it enumerates these instruments:

> '– the Development Cooperation Instrument,
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> – the European Development Fund,
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> – the European Instrument for Democracy and Human Rights,
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> – the European Neighbourhood and Partnership Instrument,
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> – the Instrument for Cooperation with Industrialised Countries2,
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> – the Instrument for Nuclear Safety Cooperation3,
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> – the Instrument for Stability, regarding the assistance provided for in Article 4 of
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> Regulation (EC) No 1717/20064.'[31]

The third paragraph of Art. 9 is then essential for the present purposes, where it sets out how the EEAS shall collaborate with the Commission. Specifically, the diplomatic service will 'contribute' to the programming and management cycle for the instruments referred to above, 'on the basis of the policy objectives set out in those instruments'.[32] Its responsibility is to prepare decisions of the Commission regarding the strategic, multi-annual steps within the programming cycle at three specific stages:

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[29] S Keukeleire, M Smith and S Vanhoonacker, 'The Emerging EU system of diplomacy: How fit for purpose?', *DSEU Policy Paper 1*, 1.

[30] EEAS Council Decision Art. 9(1).

[31] EEAS Council Decision Art. 9(2).

[32] EEAS Council Decision Art. 9(3).

> '(i) country allocations to determine the global financial envelope for each region, subject to the indicative breakdown of the multiannual financial framework. Within each region, a proportion of funding will be reserved for regional programmes;
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> (ii) country and regional strategic papers;
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> (iii) national and regional indicative programmes.'[33]

The Article then adds: 'In accordance with Article 3, throughout the whole cycle of programming, planning and implementation of the instruments referred to in paragraph 2, the High Representative and the EEAS shall work with the relevant members and services of the Commission without prejudice to Article 1(3).' In keeping with the institutions' and Member States' insatiable need to delineate competences, the reference to Art. 1(3) is a reminder that the EEAS is placed under the authority of the High Representative, separate from the Council and the Commission. The reference to Art. 3 is a reference to the duty of cooperation existing between the EEAS and the Council.

Let us assume now that the EU should wish to support ECOWAS financially in rendering a moratorium on the sale of illegal arms legally binding. The date is 1 January 2012. The EEAS has been working for one year, the relevant personnel transferred, nothing in the implementation of the CFSP is to affect development policy and vice-versa (Art. 40 TEU), policy circumstances in Western Africa are as previously described, and the EU wishes to deal with the small arms-ECOWAS issue in a coherent fashion.

To provide funding for such an instrument, a choice would have to be made already early on during the drafting process: should this be taken as a CFSP measure on the basis of the 2002 Joint Action; should it be considered as falling under the general development cooperation with the ACP countries, and therefore be funded through the European Development fund as proposed by the Commission back in 2004; or rather, should this be undertaken on the basis of the Instrument for Stability adopted in 2006, as part of conflict prevention and peacebuilding objectives? The rationale behind the EEAS is then that the integrated institutional framework would provide the forum and necessary institutional interconnections to avoid that this choice become a dispute going to the heart of the EU's legally fragmented nature. The problem is then that because the security-development fault line continues to exist from a competence perspective,[34] there remains much room for what M. Smith called 'falling back to former defensive positions' on part of the rather fragmented institutional framework as outlined above.

The aforementioned Art. 9 then pinpoints the moment in the policy process where a dispute such as that in ECOWAS could, or should, be avoided: the obligation for the EEAS and the Commission to jointly and actively cooperate in completing the first three stages of the development programming cycle. At present, actions to prevent illicit trade in small arms are included in the 2009-2011 multi-annual indicative programme implementing Art. 4 (the long-term component) of the Instrument for Stability.[35] More specifically, such actions are included in Priority 2 on trans-regional threats, under project area 11.[36] As to the institutional management of the Instrument for Stability, the short term and long term component were managed differently: The short term has in the past been managed by DG RELEX staff, which now moved to the EEAS; whereas of the long term component of priorities 1 and 2 have been managed by EuropeAid, and priority 3 of the long-term component by DG Relex. In the current institutional set-up, DG DEVCO remains responsible for management of development aid, therefore including small arms initiatives under the Instrument for Stability. However, the Commission decision whether to include small arms in the post-2011 indicative programme under the instrument for stability will from now on be 'prepared' by the EEAS, in line with Art. 9 of the EEAS Council Decision. It is this clustering of the strategic or thematic decision-making that is meant to

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[33] EEAS Council Decision Art. 9(3).

[34] See B Van Vooren, 'The Small Arms Judgment in an Age of Constitutional Turmoil' 231.

[35] The Instrument for Stability, Multi-annual Indicative Programme 2009-2011, Brussels, 8 April 2009, C (2009)2641.

[36] See the Instrument for Stability, Multi-annual Indicative Programme 2009-2011.

avoid disputes such as ECOWAS in the future. However, as seen, the new DG DEVCO has a strong thematic component to it, and thus the divide between CFSP and development competences from the TEU and TFEU remains mirrored in the institutional structures of the EU. On the one hand, where EuropeAid formerly fell under the responsibility of the Commissioner for external relations, this has now been moved to the portfolio of Commissioner Piebalgs for development. Hence, within the Commission there remains in place a DG DEVCO with strong development expertise. On the other hand, EuropeAid's former colleagues from the geographic desks at DG DEV are now part of the EEAS, with responsibility for the strategic multi-annual planning aspects. The present multi-annual indicative programme on the Instrument for Stability runs until 2011. That instance could thus provide the ideal moment at which the EEAS and the Commission could reach agreement on avoiding conflicts related to small arms. Notably if drawn up in the context of broader inter-service discussions on the new interrelationship, this should aid in alleviating or even resolving the deep disagreement on the develop-security nexus, which as the instance of the revision of the Instrument for Stability shows, still remains problematic. However, legally and institutionally, the pillars remain firmly in place in the security-development nexus. As a consequence, coherence as avoiding conflicts in matters such as small arms will not depend on legal rules, but squarely on the willingness to compromise of all involved – and avoiding falling back to old defensive positions.

No hypothetical exercise can speculate on the concrete effect of novel legal rules and a new institutional set-up. However, sufficiently illustrative of the willingness to reach across the pillar rift have been discussions on the Stability Instrument following the ECOWAS judgment. Namely, in April 2009 the Commission proposed to revise the instrument for stability in line with the ECOWAS Judgment. In the words of that institution: 'The Court found that measures against the proliferation of small arms and light weapons *may be implemented* by the Community under its development policy.'[37] On the basis of a joint statement made in 2006 when the Instrument for Stability was adopted, the Commission wishes to see Arts. 3(2)(i) and 4(1)(a) revised to refer explicitly to small arms and light weapons. Art. 3 concerns assistance in response to crisis situations or emerging crises, and Art. 4 concerns assistance in the context of stable conditions for cooperation.

Hence, according to the Commission, the Community is now competent to undertake initiatives such as in the case of small arms and ECOWAS on the basis of the Stability Instrument. Translated to the post-Lisbon situation this now means that such action is to be undertaken under the TFEU development competences rather than the TEU CFSP competence. However, it is clear that even after that ruling, the Council and the Commission are in thorough disagreement on the interpretation of the ECJ judgment. Even now, it is unclear who is responsible for initiatives in relation to small arms. The key point of interpretative contention between Council and Commission has been ever since the statement towards the end of the judgment which read that 'the contested joint action which the contested decision aims to implement does not itself exclude the possibility that the objective of the campaign against the proliferation of small arms and light weapons *can* be achieved by Community measures'.[38] The inter-institutional debate then revolved around whether 'can' is to be read as optional, in that it leaves a choice; or whether it means that from then onwards SALW initiatives always fall within the remit of development competence. In past contributions this author has argued that the answer is the first, and at the time of writing there has been no movement on this revision to the Stability Instrument and the dossier remains on the desk of Baroness Ashton.[39]

Would this initiative be undertaken on the basis of the Instrument for Stability, this would be done on the basis of Art. 4, which allows for assistance in the context of stable conditions for cooperation such as is the case with ECOWAS. Given that the EEAS is involved in the strategy of regional and country allocations over one year or longer, such concrete conflicts are not necessarily avoided through the

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[37] Proposal for a Regulation of the European Parliament and of the Council amdending Regulation (EC) NO 1711/2006 establishing an Instrument for Stability Brussels, 21.4.2009 COM (2009) 195 final 2009/0058 (COD).

[38] Case C-91/05 *Commission v Council (SALW)* [2008] ECR I-03651, para. 107 (emphasis added).

[39] See B Van Vooren, 'The Small Arms Judgment in an Age of Constitutional Turmoil' 231.

new structures. When all is said and done, a decision still needs to be made on whether such an initiative falls within the sphere of development policy, or whether it falls within the sphere of the CFSP. This is so because Art. 40 TEU states that nothing in the EU Treaty is to affect competences in the TFEU, and vice-versa. Hence, if no agreement at service level is attained, the Council could still adopt it on the initiative of the High Representative, without the Commission's support (Art. 30 TEU). It is then exactly the double-hatted role of Baroness Ashton which should avoid such a potentiality, since it would be rather schizophrenic to submit it as High Representative, in conflict with her role as vice-president of the Commission. It would also put her in a tense relationship with her colleagues (notably Commissioner Piebalgs), generally considered a heavyweight Commissioner who in the past has been quite active in external relations as energy Commissioner. The political undesirability of a strained relationship between Mr. Piebalgs and Baroness Ashton is then the means through which the new institutional structures are supposed to provide a greater guarantee to avoid conflicts such as that seen in the small arms dispute. The individual services may not have been fully integrated, but due to the links at the political echelons of the Commission, between the HRVP and the other Commissioners, deep rifts may indeed be avoided where previously they would not have been. That, of course, is speculation on the working relationships of actors fulfilling newly created positions, and does not detract from the fact that, given the formulation of the Stability Instrument as it stands, and with the present case law on EU Treaty law, there is still no clarity on the exact dividing line in case of blurred security-development objectives. As such, institutional divisions and fragmented competences across the TEU and TFEU remain as potential breeding ground for such conflicts in the post-Lisbon era.

3. Conclusions

No inter-institutional reconfiguration is perfect, as it is a necessary compromise between the many different institutional and Member State interests involved. Significant divisions remain between policy areas that are undoubtedly interconnected: trade was always seen as separate from the EEAS;[40] parts of development go to the EEAS, parts remain with the Commission; energy remains with the Commission, though of a clear security concern for the Union as a whole. EU external relations have always developed in a piecemeal fashion, as a Harlequin's costume of failed or successful initiatives, institutional and political innovations, *ad hoc* resolutions in response to geopolitical and socio-economic stimuli within and outside the Union. This is exactly the case with the EEAS as well. In many areas the new diplomatic service has merged elements that used to function separately, the Council Decision apportions responsibility in a relatively clear yet flexible fashion, and the EEAS does provide a good basis for further cooperation. The example of small arms has shown that coherence in EU external relations now lies beyond the realm of legal and institutional tinkering: without willingness to collaborate and compromise, the ever-present calls for increased coherence and effectiveness in EU external relations will never reach beyond the point of rhetoric. The role of the EEAS as an interlocutor between various desks, services and institutions, and the merger of staff from the three key spheres of authority in EU external relations does provide good ground for avoiding conflicts, but several years of practice will be necessary before that is true.

[40] See on the separateness of trade the contributions by Valeria Bonativa and Boris Rigod in this edited Working Paper.

Restraints on Member States' Powers Within the EEAS: A Duty to Form a Common Position?

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Abstract

Although the coming into being of the European External Action Service (EEAS) does not have any impact on the distribution of competences between the EU and the Member States in matters of foreign policy, cooperation within the framework of the EEAS could nevertheless lead to significant procedural restraints on the Member States in the Common Foreign and Security Policy (CFSP) area flowing from the duty of sincere cooperation. Drawing on case law of the Court of Justice from the former first pillar, the paper seeks to argue that special procedural duties exist in situations governed by inter-institutional agreements aimed at ensuring cooperation between the European Union (EU) and the Member States on the international scene. Similar restraints, it will be argued, can apply within the framework of the EEAS by analogy. In practice, this could lead to a more significant role for the Commission in the EU decision-making process concerning foreign policy.

Keywords

Duty of sincere cooperation – duty to adopt a Union position – Common Foreign and Security Policy (CFSP) – EEAS – inter-institutional arrangements

1. Introduction

Two non-legally binding Declarations on the Common Foreign and Security Policy (CFSP) inserted in the Final Act concluding the Lisbon Treaty strike a rather cautious note on the part of the Member States vis-à-vis the European External Action Service (EEAS).[1] The first stresses that the provisions on CFSP including the creation of the post of the High Representative and of the EEAS will not

> 'affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct of their foreign policy nor of their national representation in third countries and international organisations'.[2]

The second affirms that they will

> 'not affect the existing legal basis, responsibilities, and power 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 organisations, including a Member State's membership of the Security Council of the United Nations'.[3]

This emphasis on the retention by the Member States of their foreign policy powers reflects the Member States' unwillingness to relinquish their prerogatives of sovereignty in the area of CFSP.

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1 Final Act, conference of the Representatives of the Member States, CIG 15/07, 3 December 2007, Declarations concerning provisions of the treaties, Declaration no. 13 and 14 concerning the CFSP.

2 Final Act, conference of the Representatives of the Member States, CIG 15/07, 3 December 2007, Declarations concerning provisions of the treaties, Declaration no. 13.

3 Final Act, conference of the Representatives of the Member States, CIG 15/07, 3 December 2007, Declarations concerning provisions of the treaties, Declaration no. 14.

However, as far as the Member States' participation in the EEAS is concerned, fears of diminishing foreign policy powers appear unfounded. Fundamentally, neither the Lisbon Treaty nor the setting-up of the EEAS have changed the decision-making procedures relating to EU external policy. Matters which until now were the reserve of the Union are still mainly driven by the Commission, while CFSP policy matters generally continue to be decided by unanimity in the Council.[4] Since the EEAS does not streamline the distribution of competences or the differences in decision-making procedures, all initiatives prepared by the EEAS, therefore, still require the approval of the appropriate decision-making authorities of the Union.

In view of the fact that the changes brought about by the establishment of the EEAS are mainly of a procedural nature, the question arises whether the institutionalised cooperation between the staff of the Member States, the Commission and the Council that have hitherto acted more in competition than in cooperation, will in itself be able to generate a more efficient and better coordinated EU external action. This contribution seeks to argue that it is precisely the fact that the cooperation between the Member States and the EU institutions has become institutionalised which opens up new ways of imposing an enhanced duty of cooperation on the different actors within the EEAS.

The aim of the present paper is therefore to assess the impact of the EEAS on the Member States' freedom to exercise their foreign policy powers. Drawing on case law of the Court of Justice from the former first pillar, it will be argued that special procedural duties exist where cooperation between the Member States and the EU institutions on the external scene has been institutionalised. In such a setting, the Union's international commitments are of an ongoing nature, requiring strict procedural conduct from the Member States from the moment in which a common strategy has been formed at the level of one of the EU institutions. Similar restraints, it is submitted, can apply within the framework of the EEAS by analogy, with the result that a strategy or policy developed by the EEAS which has not yet been adopted in a Council Decision imposes an obligation on the Member States to act in conformity with the Union position adopted. In practice, this could lead to a more significant role for the Commission in the EU decision-making process concerning foreign policy.

To that end, section two will seek to establish a framework for the analogous application of the duty of sincere cooperation to the EEAS by addressing the question whether we can characterise the EEAS as an inter-institutional arrangement for our purposes. Section three will then look at how the Court of Justice has shaped the duty of sincere cooperation in areas of institutionalised cooperation into a duty to form a common position. The question then arises to what extent the Court's interpretation of the duty of sincere cooperation from the former first pillar can be transposed to the area of CFSP which remains intergovernmental in nature.[5] This question will be addressed in section four. The final section will attempt an assessment of the impact of the establishment of the EEAS on the Member States' duty of loyalty in the area of CFSP.

2. The Framework of Restraints – The EEAS as an Inter-institutional Arrangement

As already noted, the EEAS does not significantly affect the distribution of competences between the Member States and the Union and the decision-making procedures relating to CFSP. However, the mere fact that no transfer of competences has taken place does not allow for the conclusion that the Member States' freedom to act is not subject to any legal restraints. As Dashwood has put it, ‘duties or

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4 According to Art. 31(2) TEU, recourse to qualified majority voting is only foreseen for the adoption of a Decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council, made on its own initiative or that of the High Representative.

5 According to Art. 24(1) TEU, the CFSP remains ‘subject to specific rules and procedures’. Similarly, the ‘mutual non-affectation clause’ of Art. 40 TEU emphasizes the distinction between the CFSP and other EU policies. See further e.g. P Van Elsuwege, ‘EU External Action after the Collapse of the Pillar Structure: In Search of a new Balance between Delimitation and Consistency’ (2010) 47 *Common Market Law Review* 987, 1013.

disabilities for the Member States do not imply correlative powers for the [Union]'.[6] The starting point for any analysis of such duties is the duty of loyalty to the Union in CFSP- related matters laid down in Art. 24(3) TEU,[7] a *lex specialis* provision of the duty of sincere cooperation found in Art. 4(3) TEU (ex Art. 10 EC)[8] governing the exercise of Member State powers under the former first pillar. The duty of loyalty under Art. 4(3) TEU is generally considered a constitutional principle of Union law and has been subject to a wide-ranging application and development by the Court of Justice in a multitude of different settings and levels.[9] The same cannot be said of the CFSP specific obligation contained in Art. 24 TEU. The Court's fundamental role in vesting the vague notion of Union loyalty with content has virtually been absent as far as Art. 24 TEU is concerned, due to the limited jurisdiction granted to the Court in matters relating to the CFSP.[10] In order to assess the operation of the CFSP loyalty obligation in a given setting, the most substantial guidance is provided by the Court's jurisprudence on the related obligation from the former first pillar.

However, even within the former first pillar the scope of the loyalty obligation and the precise legal obligations it gives rise to may differ significantly depending on the specific legal context[11]. As we will see below, an inter-institutional arrangement between the Commission and the Council may be considered a "start of concerted action" at Union level, imposing strict procedural constraints on the Member States, even in fields in which the Member States have retained competence. Where such concerted action is initiated within an institutionalised setting, i.e. within a framework establishing *ongoing* obligations for all the parties involved, such constraints appear to be even more stringent.

For our purposes, the EEAS can be considered an inter-institutional arrangement established with a view to ensuring uniform representation of the Union and the Member States on the international

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6 A Dashwood, 'The Limits of European Community Powers' (1996) 21 *European Law Review* 113, at 114: '[T]he objectives of the Treaty are not exclusively pursued through actions of the Community institutions: the Member States, too, have a part to play through the observance of rules that require them sometimes to take action, but more often to refrain from exercising, or from exercising fully, powers that would normally be available to them as incidents of sovereignty'.

7 Art. 24(3) TEU provides: 'The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council and the High Representative shall ensure compliance with these principles'.

8 Art. 4(3) TEU: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

9 See e.g. J Temple Lang, 'Article 5 of the EEC Treaty: the emergence of constitutional principles in the case-law of the Court of Justice' (1987) 10 *Fordham International Law Journal* 503; K Mortelmans, 'The principle of loyalty to the Community (Article 5 EC) and the obligations of the Community institutions' (1998) 5 *Maastricht Journal of European and Comparative Law* 67; A Hatje, *Loyalität als Rechtsprinzip in der Europäischen Union* (Baden-Baden: Nomos 2001); J Temple Lang, 'Developments, issues, and new remedies – The Duties of National Authorities and Courts under Article 10 of the EC Treaty' (2004) 27 *Fordham International Law Journal* 1904.

10 The Court's jurisdiction in the area of CFSP is limited to the monitoring of Art. 40 TEU (the non-affect clause) and a review of legality of Decisions taken on the basis of Art. 275(2) TFEU (sanctions). See further, M G Garbagnati Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) *International and Comparative Law Quarterly* 77.

11 For more on the duty of loyalty in the field of external relations, see, for example, M Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in M Cremona and B De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart Publishing 2008) 163; E Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' (2010) 47 *Common Market Law Review* 323; C Hillion, 'Mixity and Coherence in EU External Relations: the Significance of the "'Duty of Cooperation"' in C Hillion and P Koutrakos (eds) *Mixed Agreements Revisited – The EU and its Member States in the World* (Oxford: Hart Publishing 2010) 87.

scene, comparable to arrangements governing the coordination of Member States' and Union interests under mixed agreements concluded under the former first pillar.[12] While the TEU itself, in Art. 27(3), merely states that the Service

> 'shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the [European] Council and of the Commission as well as staff seconded from national diplomatic services of the Member States',

the EEAS Council Decision[13] is more forthcoming. It provides in Art. 1 that the Service establishes a functionally *autonomous* body of the Union under the *authority* of the High Representative. The Decision, therefore, leaves no doubt that the EEAS is an autonomous body, operating separately both from the Council and the Commission. The Service has been described as an arrangement 'bringing together the various actors in the field of external relations [in order to] ensure that [the Union's] relations with the outside world are clear, coherent and driven by a single set of policy goals'[14]. Indeed, the EEAS is composed of representatives from the Commission and the Council and Member State diplomats representing the interests of their home country. Therefore, the EEAS is not an *intra*-institutional body responsible for attaining consensus among the Member States, but an *inter*-institutional body, all under the authority of the High Representative. In other words, the Service is not an auxiliary body to the EU institutions. Neither does it have any powers delegated to it by the Union institutions. The new Diplomatic Service can be considered to be partly a preparatory organ to the institutions, and partly a forum for the international representation of the Union.

We can thus identify two principal characteristics that are significant for the present discussion. On the one hand, the EEAS is based on a tripartite structure, bringing together representatives from the Member States, the Council and the Commission in an institutionalised setting. On the other hand, the Service is not attached to any of the institutions. Instead, it is an explicitly autonomous body of an inter-institutional nature, aimed at establishing structures for the inter-institutional coordination in foreign policy-making. Against this background, it can be argued that the EEAS establishes a similar framework for the operation of the duty of loyalty to that governing the duty of sincere cooperation concerning the joint participation of the Union and the Member States under mixed agreements. It is firmly established in the case law of the Court of Justice that the Union and the Member States have an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they conclude a mixed agreement.[15] One aspect of such duty is to strive for common positions.

3. The Duty to Adopt a Union Position

The Court of Justice has repeatedly emphasised that in situations in which the subject-matter of a given agreement falls partly within the competence of the Union and partly within that of the Member States, it is

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[12] For a detailed discussion of the classification of the EEAS, see B Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service', CLEER Working Paper 2010/7 (The Hague: T.M.C. Asser Instituut).

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

[14] Benita Ferrero-Waldner, former EU commissioner for external relations, www.euractiv.com/en/future-eu/eu-s-new-diplomatic-service-linksdossier-309484

[15] See e.g. Case C-459/03 *Commission v Ireland* (MOX Plant) [2006] ECR I-4635, para. 175.

> 'essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into'.[16]

To that end, the Union institutions and the Member States are under an obligation to take 'all necessary steps to ensure the best possible cooperation in that regard'.[17]

3.1. Concrete Union Law Obligations Before the Adoption of a Common Position – The Start of Concerted Action

Until recently, the case law of the Court of Justice on the duty of sincere cooperation between the Union institutions and the Member States remained rather general. The only guidance on the legal restraints as a result of a start of concerted action at Union level was provided by two cases, *Commission v. Luxembourg* and *Commission v. Germany*, concerning the negotiation, ratification and bringing into force of, as well as the refusal to terminate, by two Member States, bilateral agreements with third countries on inland waterway transport.[18] The Court had held in these cases that the adoption by the Council of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Union marked the 'start of a concerted [Union] action at international level'.[19] This required

> 'if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the [Union] institutions in order to facilitate the achievement of the [Union] tasks and to ensure the coherence and consistency of the action and its international representation'.[20]

It follows from *Commission v. Luxembourg* and *Commission v. Germany* that in the context of negotiation of international agreements in areas of shared competence, the Member States are subject to special obligations only *after* the Council has adopted a decision.[21] In other words, the submission of a Commission proposal is not sufficient to mark the start of concerted Union action.

Recent case law, however, suggests that these obligations become even more stringent where such cooperation between the Commission, the Council and Member State representatives takes places within an institutionalised setting. In fact, within the framework of institutionalised cooperation, concrete Union law obligations have been found to exist even *before* the adoption of a common position, on the ground that a common strategy had been initiated.

In the *Swedish PFOS* case[22] which concerned the Union's participation in the Stockholm Convention on Persistent Organic Pollutants, a mixed agreement regulating substances that are harmful to the environment, the Court was asked to rule on the extent of the Member States' obligations under Art. 4 (3) TEU in an area of shared competence. While work was still ongoing at EU level concerning the same subject-matter, Sweden had unilaterally submitted a proposal to include a particular chemical substance (PFOs) in the annex of the Stockholm Convention. After an unsuccessful attempt at

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16 Ruling 1/78 *re Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports* [1978] ECR 2151, paras. 34-36; Opinion 2/91, *Convention No. 170 of the ILO* [1993] ECR I-1061, para. 36; Opinion 1/94 *re WTO Agreement* [1994] ECR I-5267, para. 108.

17 Opinion 2/91 *Convention No. 170 of the ILO* [1993] ECR I-1061, para. 38.

18 Cases C-266/03 *Commission v Luxembourg* [2005] ECR I-4805 and C-433/03 *Commission v Germany* [2005] ECR I-6985.

19 Case C-266/03 *Commission v Luxembourg*, para. 60.

20 Case C-266/03 *Commission v Luxembourg*, para. 60.

21 This is true only in areas of shared competence. Where Union competence is exclusive, by contrast, Member States are subject to 'special duties of action and abstention' once the Commission has submitted to the Council 'proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action', see Case 804/79 *Commission v United Kingdom* [1981] ECR I-1045, para. 28.

22 Case C-246/07 *Commission v Sweden*, Judgement of 20 April 2010, not yet reported.

encouraging Sweden to comply with the formal notice alleging a breach of Art. 4(3) TEU, the Commission decided to start infringement proceedings before the Court of Justice.

In the present case there was no formal decision regarding a proposal to include PFOs in the annex of the Stockholm Convention. Nevertheless, this did not mean that no concerted Union action had been initiated. In the view of the Court, the mere existence of a Union 'strategy' not to propose the listing of the substance in the context of the Convention was sufficient to impose special procedural obligations on the Member States.[23] Examining whether such a strategy had already been adopted at the time when Sweden submitted its unilateral proposal, the Court found that there was 'no "decision-making vacuum" or even a waiting period equivalent to the absence of a decision', because it had been intended *not* to reach a decision not to add PFOs to the list of proposed substances.[24] There was, therefore, a 'concerted common strategy' within the Council not to propose the addition of PFOs to the Stockholm Convention, which Sweden 'dissociated' itself from by unilaterally submitting such a proposal.[25]

In this case, we see a committee structure imposing significant restraints on the Member States. Within a specialised Council working group, the Member States and the Council agreed that no action was to be taken concerning this substance, because work was ongoing on the identification of control measures at EU level. In the specific context of institutionalised cooperation, a strategy adopted within the framework of a committee structure had the effect of precluding all unilateral national action.

What emerges from the Court's case law is a broadly-framed procedural duty on the Member States once a concerted action has been initiated aimed at the adoption of a common Union position. Where cooperation between the Member States, the Commission and the Council in an institutionalised setting is concerned, however, the duty of sincere cooperation is more stringent in comparison with the way it operates in the context of the conclusion of international agreements.

3.2. The Legal Effect of Inter-institutional Initiatives

In a different case, moreover, such inter-institutional strategies have been found to have binding effect, imposing on the Member States a duty not to adopt conflicting positions. This question was addressed in the *FAO* case[26] which concerned the exercise of voting rights by the EU and the Member States within the UN Food and Agriculture Organization (FAO). In order to facilitate voting within the FAO, the Council and the Commission had adopted an arrangement setting up a coordination procedure between the Commission and the Member States. In accordance with the arrangement, the Commission submitted a proposal to the Council providing for the exercise by the Union of the right to vote in respect of a particular topic. In spite of the Commission proposal, the Council proceeded to give the Member States the right to vote.

Asked by the Commission to annul the Council's decision to conclude the draft agreement, the Court found that in the specific case, the duty flowed directly from the arrangement concluded between the Council and the Commission:

> 'In the present case, section 2.3 of the Arrangement between the Council and the Commission represents fulfilment of that duty of cooperation between the Community and its Member States within the FAO'.[27]

In other words, as Heliskoski notes, 'it was through the concept of the duty of co-operation that the Arrangement […] was vested with normative content'.[28] As a result, the Council decision to conclude

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[23] Case C-246/07 *Commission v Sweden*, para. 76.

[24] Case C-246/07 *Commission v Sweden*, para. 87.

[25] Case C-246/07 *Commission v Sweden*, para. 91.

[26] Case C-25/94 *Commission v Council* (FAO) [1996] ECR I-1469.

[27] Case C-25/94 *Commission v Council*, para. 49.

the draft agreement was annulled. The Court's judgement in the *FAO case*, thus, left no doubt that the start of an informal Union initiative within an institutionalised framework can have binding effect on the Council and restrain the latter in its freedom to adopt a position of its own. Any such arrangement is considered a *fulfilment* of the duty of sincere cooperation.

4. The Duty of Loyalty in the Context of CFSP

As the previous section showed, the Members States are subject to strict procedural obligations once a Union initiative has been started in the context of mixed agreements under what used to be the first pillar. In order to assess the impact these findings could have for restraints within the framework of the EEAS, the question needs to be addressed to what extent the restraints flowing from the duty of loyalty under Art. 4(3) TEU can be transposed to the CFSP.

The Treaty does not provide much guidance on the binding nature of Decisions taken within the CFSP context, and neither is the Court of Justice in a position to take it upon itself to develop guiding principles, due to its limited jurisdiction. Nevertheless, it has been argued that the language found in the relevant Treaty provisions suggests that the adoption of CFSP decisions does indeed limit the Member States' freedom to pursue their foreign policy-making as they wish.[29] In particular, CFSP decisions 'shall commit the Member States in the positions they adopt and in the conduct of their activity' (Article 28(2) TEU). CFSP decisions can, therefore, be considered 'concrete norms of conduct, demanding a certain unconditional behaviour from the Member States'.[30] As a result, the Member States are not allowed to adopt national positions or to act in violation of CFSP Decisions in any other way.

Notwithstanding substantive obligations, the question is whether the Member States' freedom of action on the international scene can be subject to procedural restraints even before a CFSP Decision is adopted. The key provision concerning procedural restraints in the CFSP is constituted by Art. 32 TEU which lays down that 'Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach'.[31] This obligation forms part of the concept of systematic cooperation referred to in Art. 25 TEU. In the CFSP area, it still serves as the key notion, in the absence of which it would be impossible for the Union to define and implement a foreign and security policy.[32] The systematic cooperation referred to in Art. 25 TEU is to be established in accordance with Art. 32 TEU, which contains the actual procedural obligations. In principle, the scope of issues to which the systematic cooperation applies is not subject to any limitation, but Art. 32 TEU immediately qualifies the obligation by adding the words 'of general interest'. The European Council has not provided any further specification of 'general interest' in Art. 32 TEU. This seriously limits the information and

(Contd.)

[28] J Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague: Kluwer 2001) 65.

[29] See further, A Dashwood, 'The Law and Practice of CFSP Joint Actions' in M Cremona and B De Witte (eds), *EU Foreign Relations Law – Constitutional Fundamentals* (Oxford: Hart Publishing 2008) 53; C Hillion and R Wessel, 'Restraining External Competences of EU Member States under CFSP' in M Cremona and B de Witte (eds), *EU Foreign Relations Law - Constitutional Fundamentals* (Oxford: Hart Publishing 2008) 83.

[30] Hillion and Wessel, 'Restraining External Competences of EU Member States' 83.

[31] The provision reads as follows: 'Before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity. When the European Council or the Council has defined a common approach of the Union within the meaning of the first paragraph, the High Representative of the Union for Foreign Affairs and Security Policy and the Ministers for Foreign Affairs of the Member States shall coordinate their activities within the Council'.

[32] R Wessel, 'The Multilevel Constitution of European Foreign Relations' in N Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (Cambridge: Cambridge University Press 2007) 160, 179.

consultation obligation in the first part of this Article. On the one hand, the Member States are obligated to inform and consult one another, while on the other hand they are given the individual discretion to decide whether or not a matter is of 'general interest'. Indeed, although there is an obligation to try and reach a Union policy, in case of failure, the Member States remain free to pursue their own national policies.

Nevertheless, it can be asserted that the Member States are indeed under a general obligation to inform and consult one another. Through the information and consultation obligation in Art. 32 TEU, the Member States ordered themselves to use it as one of the means to attain the CFSP objectives in Art. 24 TEU. This assumption is supported by Art. 24(3) TEU which lays down a more general loyalty obligation. This obligation is not further defined. A possible interpretation could be found in the duty of sincere cooperation under Art. 4(3) TEU. Like Art. 4(3) TEU, the CFSP provision contains a *positive* obligation for the Member States to actively develop the Union's policy, including the obligation to 'work together to enhance and develop their mutual political solidarity'. Moreover, the *negative* obligation not to undertake 'any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations' is also comparable to the negative obligation contained in Art. 4(3) TEU.

Given the similarities between Art. 4(3) TEU and Art. 24(3) TEU which virtually echoes the wording of the former provision, there are no obvious reasons not to interpret the former in the light of the jurisprudence on the latter. However, the limited jurisdiction of the Court of Justice concerning CFSP-related matters turns the question of whether the restraints attributed to Art. 4(3) TEU by the Court could also apply to Art. 24(3) TEU into a discussion on a primarily theoretical level.

The limited jurisdiction notwithstanding,[33] the Court of Justice has repeatedly made it clear that the duty of loyalty is of general application and reaches beyond limitations imposed by Treaty provisions and questions of competence. Thus, Member States are bound by a duty of loyalty even when operating in spheres of national competence[34]. As the Court held in *Commission v. Luxembourg*, the 'duty of genuine cooperation is of general application and does not depend either on whether the [Union] competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries'.[35]

The broad construction of the duty of loyalty by the Court does not, however, necessarily imply the extension of the Court's findings concerning Art. 4(3) TEU to other areas of Union law, such as the CFSP. Yet, it has become apparent that the Court relies on its interpretation of provisions from the first pillar in order to interpret corresponding provisions from other areas of EU law. Thus, the Court suggested in the *Pupino*[36] judgement that the duty of loyalty expressed in (current) Art. 4(3) TEU was not limited to the first pillar:

> 'It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not

[33] With the coming into force of the Lisbon Treaty, the High Representative has assumed an important role in ensuring compliance by the Member States of their CFSP duty of cooperation. According to the last indent of Article 24(3) TEU, the HR, together with the Council, is entrusted with the enforcement of the loyalty principle, a highly important role given the absence of the Court's jurisdiction over CFSP matters. Considering that, according to Art. 11(2) TEU (Nice), the supervision of compliance was formerly assigned only to the Council, the fact that this duty has been partly delegated to the 'double hatted' High Representative, who unites both Union and intergovernmental interests in one position, can only contribute to increasing the effectiveness of such supervision.

[34] See e.g. Case C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* [1997] ECR I-81, paras. 24-25; Case C-235/87 *Annunziata Matteucci v Communauté Française de Belgique* [1988] ECR 5589, para. 19.

[35] Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, para. 58.

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

> also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions [...]'.[37]

In the view of the Court, recourse to legal instruments with effects similar to those provided for by the by the former EC Treaty was necessary in order to 'contribute effectively to the pursuit of the Union's objectives'.[38] The Court thus suggested that the principle of sincere cooperation has a binding effect on the Member States in relation to the Union as a whole. This broadly-framed reasoning has led commentators to deduce that the principle of sincere cooperation should also, a fortiori, apply in the context of CFSP.[39]

Another argument brought forward in support of the applicability of the Court's interpretation of Art. 4(3) TEU across all areas of EU law relates to the principle of consistency and coherence of the Union's external action laid down in Art. 13 TEU. The duty of loyalty under Art. 4(3) TEU, in fact, plays a key role in ensuring such coherence.[40] A failure to comply with the requirement of consistency and coherence could thus be considered a breach of the duty of sincere cooperation.

5. The Duty of Sincere Cooperation Within the EEAS

On a general basis, there is no reason to doubt that a general duty of loyalty between the EU institutions and the Member States also applies within the EEAS, especially considering the inclusion of a specific duty of cooperation in Art. 3(1) of the Council Decision, emphasising that the EEAS shall cooperate with, *inter alia*, the diplomatic services of the Member States. However, the precise scope and content of such a loyalty obligation within the framework of the EEAS depends on the extent to which the Court's findings from the former first pillar can apply within the EEAS context.

5.1. Common Strategies in the EEAS - A Duty to Adopt a Common Position?

As we saw in the previous section, the Member States are subject to a loyalty obligation similar to the duty of sincere cooperation under Art. 4(3) TEU even when acting in areas of CFSP competence. Nevertheless, it does not follow that the Member States' obligation to adopt a common position once concerted Union action has been initiated can be transposed to the EEAS. The cases discussed earlier, in fact, are specific to the context of legally binding international agreements, while the EEAS does not generally operate in the framework of international agreements, being primarily internal in its functioning. An external dimension requiring certain commitments by the Member States *towards* the Union is, therefore, absent in the EEAS. Indeed, in the *Swedish PFOS* case, the Court of Justice expressly refers to the unity in the international representation of the Union and its Member States and the fact that a unilateral proposal would weaken their negotiating power with regard to the other parties to the Convention concerned.[41] As a consequence, it could be argued that the different institutional structures concerned make it impossible to transfer the principles established in the context of international agreements to the EEAS.

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37 Case C-105/03 *Pupino*, para. 42.

38 Case C-105/03 *Pupino*, para. 36.

39 See A Dashwood, 'The Law and Practice of CFSP Joint Actions' in M Cremona and B De Witte (eds), *EU Foreign Relations Law – Constitutional Fundamentals* (Oxford: Hart Publishing 2008) 53, 56; C Hillion and R Wessel, 'External Competences of EU Member States under CFSP' in M Cremona and B de Witte (eds), *EU Foreign Relations Law - Constitutional Fundamentals* (Oxford: Hart Publishing, 2008) 79, 93.

40 See also CW Hermann, '*Much Ado about Pluto*? The "Unity of the Legal Order of the European Union" revisited', *EUI Working Papers, RSCAS 2007/05*; C Hillion, '*Tous pour un, un pour tous!* Coherence in the External Relations of the European Union' in M Cremona (ed), *Developments in EU External Relations* (Oxford: Oxford University Press 2008) 10.

41 Case C-246/07 *Commission v Sweden*, Judgement of 20 April 2010, *nyr*, para. 104.

These structural differences notwithstanding, it is submitted that the decisive point in the Court's reasoning in the *Swedish PFOS* case is not so much the impact of unilateral action on the unity of international representation as it is the fact that within the framework of inter-institutional cooperation, it had been agreed *not* to take action, which, in turn, was based on a number of relevant factors, including economic ones, which had led the Council committee to postpone further action.[42] The Court thus makes it clear that the duty of sincere cooperation operates on *two* levels in this case. As we saw in the *Commission v. Germany* and *Commission v. Luxembourg* cases,[43] considerations of external representation and the fulfilment of international obligations alone are not sufficient to justify compliance restraints once a strategy had been initiated by a single institution. Such a strategy was only found to create compliance obligations for the Member States, once accepted as 'concerted action' at Union level. It thus becomes apparent that in the *Swedish PFOS* case, the institutional framework created for the cooperation between the Commission, the Council and the Member States gave rise to additional procedural obligations.

A similar reasoning, in fact, can be found in the *FAO* case.[44] On the one hand, the Court of Justice criticised the false impression that the Member States were representing the Union created by their exercise of the voting rights, but on the other hand, it emphasised the fact that the Union was prevented from having any effective say in the in the deliberations preceding the final decision on the text of the Agreement.[45] Moreover, the Court argued that the exercise by the Member States of the right to vote also had effects as regards competence to implement the Agreement and to conclude subsequent agreements on the same question.[46]

In both cases, therefore, the Court's considerations go beyond questions of external representation in specific instances. What is at stake is the Union's freedom to assume and carry out commitments and adopt strategies within the same framework in the future. Since in an institutionalised setting, rules and regulations are adopted with a view to creating an *ongoing* obligation for the EU institutions and the Member States, the latter are under strict procedural duties which go beyond the general duty to facilitate the achievement of the Union's tasks laid down in Art. 4(3) TEU that we find, for example, in the case of the *negotiation* of an agreement, as in the *Commission v. Germany* and *Commission v. Luxembourg* cases. While in these two cases, there was no ongoing obligation and no rules of conduct in place, Member State action in the *Swedish PFOS* and the *FAO* cases affected a Union *strategy* concerning the fulfilment of an *ongoing* commitment. Compared with the notion of 'start of concerted Union action' which we find in the context of negotiation and ratification of an international agreement, the obligations imposed on the Member States once a 'Union strategy' has been adopted have an additional dimension, both in a temporal as well as in a normative sense. Rather than being a force for negotiation, in this context the duty of cooperation becomes a force for convergence**.**

5.2. Restraints Within the EEAS in Practice

In light of the fact that the Member States are under a duty not to jeopardise a Union strategy by adopting conflicting national positions, the establishment of the EEAS may entail significant restrictions for the Member States' freedom to act on the international scene. As we saw above, when

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42 Case C-246/07 *Commission v Sweden*, paras. 87-90: As the Court pointed out, the committee's decision was motivated by the fact that work was ongoing on the identification of control measures at Union level. Once the Commission had submitted a proposal on those control measures, PFOS were intended to be proposed for inclusion in the annex of the agreement. In addition, the Court noted that the Presidency drew the attention of that group to the economic consequences of a proposal to include might result in a call for additional financial aid on the part of developing countries which are parties to that convention.

43 Cases C-266/03 *Commission v Luxembourg* [2005] ECR I-4805 and C-433/03 *Commission v Germany* [2005] ECR I-6985, see above.

44 Case C-25/94 *Commission v Council (FAO)* [1996] ECR I-1469, see above.

45 Case C-25/94 *Commission v Council*, paras. 33 and 34.

46 Case C-25/94 *Commission v Council*, para. 36.

acting within the framework of the CFSP but outside the EEAS, the Member States are merely bound by a limited procedural obligation under Art. 32 TEU, under which they are given the individual discretion to decide whether or not a matter falls within the scope of application of that provision or not. Moreover, such procedural obligations only arise once a 'common approach of the Union' has been defined (Art. 32, second indent, TEU). More restrictive procedural duties relating to the start of concerted Union action, as they exist in the context of the former first pillar, have consequently been absent.

This absence can be explained by the significantly less prominent role which the Commission plays in CFSP. The Commission's influence remains far from that the one it enjoys in the former first pillar. In fact, the Council generally does not depend upon the Commission to make proposals in order to initiate the law-making process.

Its limited competences in the CFSP field notwithstanding, the Commission has various non-binding instruments at its disposal to influence the Council's policy choices at the agenda-setting phase: the Commission can submit 'communications', give 'recommendations' and communicate non-papers to the Council. Containing conceptual proposals and Commission initiatives, such documents are aimed at the policy initiating stage.[47] Nevertheless, the Commission's prospects of making the Council accept its initiatives are very much limited by intergovernmentalism. If the Member States, acting within the Council, refuse to take the Commission's proposals into account, their lack of political will prevent the adoption of any kind of Commission initiative at EU level in the CFSP sphere.

With the creation of an institutionalised framework for foreign policy-making in the form of the EEAS, however, the Member States are no longer merely representatives of the national interest. Although their national diplomatic identity continues to be important, the Member States now form part of a tripartite structure aimed at establishing a consistent and coordinated foreign EU policy. In view of the particular procedural duties imposed on the Member States where a Union strategy has been adopted within the framework of such institutionalised cooperation, a case can be made for a stronger position of Commission initiatives in foreign policy. Whilst still not legally binding on the Member States, Commission initiatives, such as policy or strategy papers, may now be considered a 'strategy' or 'start of a concerted action at EU level', which would impose on the Member States strict procedural restraints to endeavour to adopt a common position in that regard and not to take conflicting national action. In those cases where a common position between the Community and the Member States is not possible, however, Member States will ultimately be able to express their own national views and exercise their national powers.

6. Concluding Remarks

With the establishment of the EEAS outside the Council Secretariat and with an important representation of Commission officials, the Member States have created a body capable of becoming a powerful and influential actor in European external policy. In this respect, the tripartite structure created by the EEAS is of particular importance, not only in political terms, but also legally speaking. From a political point of view, the Member States *have, by including Art. 27(3) in the Treaty, consented to the establishment of a framework for the coordination of their external policies. From a legal perspective, the EEAS has the potential of imposing significant procedural restraints on the Member States' freedom to conduct their foreign relations.* The application of the duty of sincere cooperation under Art. 4(3) TEU and the interpretation it has been given by the Court of Justice in relation to the requirement to form a common position once an inter-institutional strategy has been initiated at EU level may create obligations in areas which were previously merely subject to general and vaguely defined information and consultation obligations. As a result, initiatives submitted by the Commission

[47] See A Krause, 'The European Union's Africa Policy: The Commission as Policy Entrepreneur in the CFSP' (2003) 8 *European Foreign Affairs Review* 221; further, e.g., L Cram, *Policy-Making in the EU: Conceptual Lenses and the Integration Process* (London: Routledge 1997).

may be given a significantly higher legal status, even if the final role played by the Commission within the framework of the EEAS ultimately depends on how the EEAS will develop and operate in practice.

The EU Strategy Towards WTO Commercial Disputes After the Lisbon Reform

Valeria Bonavita*

Abstract

Over the years, decisions taken by the European Union (EU) political institutions and judicial positions expressed by the European Court of Justice (ECJ) – directly or indirectly – concerning the settlement of commercial disputes within the WTO have come to form part of a coherent EU strategy. This paper discusses whether innovations brought about by the Lisbon Treaty in relation to trade policy and to EU external action will trigger a rethinking of the EU strategy towards WTO disputes. The analysis focuses on whether conditions for a strategy revision are met as a result of the recent changes undergone by the EU trade policy and, more generally, by the Union's external relations. To this end, three issues will be taken into account: first, the broader framework of objectives that the Common Commercial Policy (CCP) is to serve following the Lisbon reshuffling; secondly, the role of fundamental rights; thirdly, the creation of coordination mechanisms with other EU external policies and policy-makers. It is submitted that, although they have so far enjoyed a wide scope for manoeuvre, EU political institutions will be faced with a demanding juggling exercise as their strategy towards commercial disputes must be fine-tuned so as to ensure full consideration of both trade and non-trade objectives of EU external action.

Keywords

WTO dispute settlement strategy – Lisbon Treaty – Common Commercial Policy (CCP) – fundamental rights – policy coordination

1. Problem Definition

Decisions taken over the years by the Commission and the Council concerning the settlement of commercial disputes within the WTO with a view to avoiding actual compliance (choice to bear retaliations, pay compensations, enter into agreements outside the WTO legal framework, etc.) and positions expressed by the ECJ in this regard (denial of direct effect to WTO law, including to the reports of the Dispute Settlement Body (DSB) panels and those of the Appellate Body (AB), denial of EC extra-contractual liability for breach of WTO law) form part of a coherent EU strategy towards commercial disputes, which applies particularly – although not exclusively – when the EC/EU acts as defendant.[1] These policy decisions and judicial positions respond to a *ratio* that goes beyond the immediate objective of avoiding that the CCP be over-constrained by WTO obligations. This rationale concerns internal and international standard setting as well as with the protection of vested Union interests.[2]

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1 It is to be mentioned that the number of defensive cases involving the EU marginally exceeds the number of offensive actions. However, the strategic features of the Union's approach to commercial disputes are more evident in defensive cases, where the EU strategy can be observed not only before the WTO panel or AB but also outside the WTO jurisdictional context, namely in relation to Commission negotiations practices and ECJ's judicial activity.

2 In view of the entry into force of the Lisbon Treaty and the formal succession of the EU to the EC in the WTO arena, for the purpose of the present analysis, unless further specification is offered, the term Union will hereinafter replace the

A strategy is a set of decisions, actions and means put in place in order to pursue one or more predetermined objectives. An actor may decide to modify its strategy for the following reasons: first, the previous strategy becomes obsolete as result of a change in circumstances; secondly, a reshuffle of the objectives that the strategy was designed to pursue occurs, so that a swift adjustment of the means becomes necessary; thirdly, means employed prove to be unsuitable to achieve the final aims or, more generally, the cost/benefit ratio of the strategy proves to be unbearable.

The assertion whereby the EU has so far enacted a proper strategy towards commercial disputes is founded on the observed connection between means and objectives. As to the former, on the one hand, the EU has made offensive use of the WTO Dispute Settlement Understanding, by systematically challenging measures adopted by commercial partners that were deemed to impair EU benefits resulting from the WTO agreements. On the other, when allegations of unfair trade practices against the EC[3] were proven founded, the Union reacted by denying direct effect of adverse DSB rulings;[4] by choosing to bear commercial retaliations or to pay compensations to the initiators of the dispute; by concluding bilateral or plurilateral agreements outside the WTO legal framework in order to accommodate the commercial requests of the adverse party so as to protect the Community interest while defusing the threat of a formal dispute.

Such means were often devised in order to shield specific manufacturing sectors of the European economy from foreign competition, as was the case for the interests of producers and importers of agricultural products in the bananas disputes. In some cases, however, the objective of the Community was not, or at least not only, the defence of certain economic interests, but also the need to protect internally agreed standards and, ultimately, its regulatory autonomy. This is particularly the case of commercial disputes which arose from Community violations of the SPS and TBT Agreements, such as the *hormones beef* and *GMOs* cases.

Will the Lisbon reform lead to a revision of the EU strategy towards commercial disputes by inducing a rethinking of the relation between objectives and means? This paper aims to verify whether at least one of the three which may prompt a strategy revision has been met following the recent changes undergone by the EU's trade policy and more generally by the Union external relations. For the purpose of answering this question, one is forced to tackle the issue from a broader perspective. No specific mention of dispute settlement in the WTO can be found in the reformed Treaty, just as it was the case in the previous Treaty regime. The lack of direct connections requires that the analysis focus on the ways in which the Lisbon reform indirectly impacts on the Union's strategy in the settlement of

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term Community so that the former will be employed also when referring to legal circumstances and case-law pertaining to the scope of the former EC law, such as the participation in the WTO dispute settlement mechanism, the denial of direct effect of WTO law or of non-contractual liability for breach of the latter.

3 Following the changes brought about by the Lisbon Treaty, and still at the time of writing, no dispute was settled in which the EU as such took part as defendant. Thus no formal incompatibility of Union legislation with WTO law has yet been found. This is despite the fact that some disputes against the Union have actually been launched in the post-Lisbon era. See WTO DS405, *European Union — Anti-Dumping Measures on Certain Footwear from China*; WTO DS408, *European Union and a Member State* [The Netherlands] — *Seizure of Generic Drugs in Transit*, (India complainant); WTO DS409, *European Union and a Member State* [The Netherlands] — *Seizure of Generic Drugs in Transit*, (Brazil complainant).

4 Such direct reaction by the Court of Justice had been anticipated by the political institutions when they inserted in the Decision concluding the WTO Agreement a clause ruling out the direct effect of the WTO law within the EU legal order. The Court itself used this argument to back up it's reasoning in *Portugal v. Council*, where it refferred to the final recital in the preamble to Decision 94/800, according to which 'by it's nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts'. See Case C-149/96 *Portuguese Republic v Council of the European Union* [1999] ECR I-8395, para. 48; and Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ L 336, 23.12.1994, 1, preamble final recital. See also A Ciampi, 'Il Preambolo di una Decisione del Consiglio preclude al "GATT 1994" gli effetti diretti nell'ordinamento comunitario?' (1995) 78 *Rivista di Diritto Internazionale* 407.

commercial disputes. To this end, three issues will be taken into account: firstly, the broader framework of objectives that the Lisbon Treaty sets for the CCP;[5] secondly, the role of fundamental rights following the conferral of binding force to the EU Charter of Fundamental Rights (CFR) and the Union's prospective accession to the European Convention of Human Rights and Fundamental Freedoms; thirdly, a subsidiary element of discussion, relating to the creation of mechanisms for coordination between the CCP and other EU external policies, will be dealt with in the final section of the paper.

It is submitted that both the first and the second element might have a significant impact on the EU strategy in commercial disputes since, even if to different extents, they will both affect the context and the objectives of CCP policy-making, eventually influencing the cost/benefit ratio of adhering to the strategy devised so far. The third element concerning the coordination between trade and other external policies, which, as the first two sections of the paper will demonstrate, appears to be more pressing than before Lisbon, will equally play a crucial role in developing the EU's strategy towards commercial disputes.

2. Issue I – The CCP in the Broader Framework of the Union's External Action

The CCP is now placed under the overall heading 'External Action' and its objectives appear to be broader than in the past. Will this new set of CCP objectives (Art. 206 TFEU; Art. 205 TFEU juncto *Art. 3(5) TEU and 21(2) TEU, particularly points (d) to (f) and (h)) place any real constraint on the considerably wide scope for manoeuvre so far enjoyed by the institutions in the conduct of the CCP, particularly insofar as compliance with WTO obligations is concerned?*

2.1. CCP Principles and Objectives Under the Community Treaty

2.1.1. Uniformity Principle

Aiming to protecting the uniformity of the Common Market by avoiding distortions in competition and risks of trade deflection that could arise if Member States pursued their individual external trade policies,[6] the principle of uniformity required the adoption of common rules throughout the EC in the field of the CCP.[7] Besides the need to accommodate Internal Market concerns also beyond Community frontiers, the ECJ considered that uniformity was necessary to preserve the unity of the EC's position with respect to third countries in order to enhance the Community's ability to defend common interests.[8]

The *a priori* exclusive nature of the Community competence in the field of trade arose as a result of the application of the principle of uniformity. However, uniformity comes to the fore only in areas of the Internal Market where full harmonisation has already been achieved, so that common external rules are necessary for the functioning of the Market itself. The fact that the need for uniformity results from internal harmonisation is clearly apparent in areas such as trade in services and trade related aspects of intellectual property rights, where internal harmonisation existed to a limited extend.

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5 On the necessity to make a distinction between the objectives of the CCP and those of the Union's strategy towards WTO commercial disputes, see *infra*, fn 13.

6 Opinion 1/78 [1979] ECR 2871, para. 45 ff. See also Joined Cases 37 and 38/73 *Social Fonds voor de Diamantarbeiders v. NV Indiamex et Association de fait De Belder* [1973] ECR 1609.

7 M Cremona, 'The External Dimension of the Internal Market' in C Barbard and J Scott (eds), *The Law of the Single European Market* (Oxford: Hart Publishing 2002) 354.

8 A Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 *European Foreign Affairs Review* 153, 154.

Uniformity not being an imperative, such trade areas fell within shared EC-Member States competence for the purpose of concluding the Marrakech agreement establishing the WTO.

The relation between internal harmonisation and the need to ensure uniformity of external trade policies did not entail that the CCP was meant to pursue externally the same objectives of the Internal Market, namely non-discrimination and elimination of all trade barriers. The Court clearly recognised the lack of a community obligation under EC law to grant non-Member States equal treatment in all respects. As a consequence, the Community was allowed to discriminate, firstly, between domestic and third country products, producers and service providers; secondly, between products coming from different third countries. Although the latter kind of discrimination was to be driven by the Community interest,[9] its application by the EC was nonetheless subject to the requirements enshrined in WTO and other international obligations applicable to the Community.

Therefore, the principle of uniformity had only instrumental value, since the uniformity of trade policies was only required for the sake of protecting internal harmonisation. Where this was not the case, uniformity was only an additional tool for Community institutions (see shared trade competences).[10]

Finally, the instrumental nature of such a principle is also highlighted by its neutrality in terms of content.[11] Uniformity explains how the EC trade policy should be but not what it should include. It did not provide any substantial orientation to the CCP, thus leaving the Community institutions with a quasi-absolute discretion for shaping trade policy so as to best serve the Community interest.

2.1.2. The Objective of Liberalising Trade and Non-Trade Aims

Art. 131 of the Treaty Establishing the European Community (TEC) contained the only substantive objective to be ascribed to EC trade policy and, therefore, capable of affecting CCP policy making, namely the liberalization of world trade through the progressive abolition of restrictions to international commerce. Although substantial, such aim was also nothing more than aspirational in nature.[12] In fact, the Court stated the non-binding character of the liberalization objective, emphasizing that the provision at issue should be confined to establishing an objective rather than imposing an obligation.[13] In other words, the EC might adopt trade measures pursuing liberalisation but it was not compelled to do it: trade measures adversely affecting such objective were not to be deemed incompatible with Art. 131 TEC.

That being so, the concept of the Community interest has long been pivotal in shaping the CCP. Whereas liberalization represented a guideline to Community institutions in charge of trade policy-making, they enjoyed considerable discretion in assessing whether a liberalising policy would be suitable to advance the Community interest. Should the Community interest not coincide with the prospected outcomes of liberalisation, the former would nonetheless take precedence over the latter. This allowed policy objectives other than liberalisation as such to influence the content of the CCP.

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9 M Cremona, 'Neutrality or Discrimination? The WTO, the EU and External Trade' in G de Búrca J Scott (eds), *The EU and the WTO – Legal and Constitutional Issues* (Oxford-Portland: Hart Publishing 2001) 165 ff.

10 Cremona, 'The External Dimension' 374.

11 Dimopoulos, 'The Effects of the Lisbon Treaty' 156.

12 Dimopoulos, 'The Effects of the Lisbon Treaty' 156.

13 Case C-150/94 *United Kingdom v. Council (Chinese Toys)* [1998] ECR I-7235, para. 67; Case C-112/80 *Dürbeck v. Hauptzollamt Frankfurt* [1982] ECR 1251, para. 10 ff; see also Case C-51/75 *EMI v. CBS United Kingdom LtD* [1976] ECR-811.

From an international point of view, while pursing non-trade objectives, CCP-related actions occasionally resulted in restrictions of international trade, thus openly contradicting the aim of liberalisation and possibly giving rise to commercial disputes.

Internally, the Treaty lacking a clear-cut definition of the content of the CCP, the circumstance whereby trade measures pursued objectives other than trade liberalisation gave rise to numerous disagreements regarding the scope of such a policy and the types of measures that could fall under the Community trade competence. As a matter of fact, when a more specific legal basis was lacking in the Treaty, the CCP has been used for the adoption of trade measures which pursued objectives other than regulation of trade flows and trade restrictions, which were linked for example to environmental protection and development cooperation.

When specific legal bases allowing the Community to undertake external actions in the above-mentioned fields were eventually inserted into the Treaty, legal battles concerning the choice of the most appropriate legal basis ensued. The Court reaffirmed in most instances the role of the CCP in the adoption of measures pursuing non-trade objectives, particularly in cases where Community measures had more than one purpose or a twofold component. As it is well known, the choice of the legal bases upon which to found a prospected policy measure profoundly affects the exercise of the relevant competence. Within this framework, the Court recognised the possibility to adopt trade measures pursuing other objectives without however clarifying the interaction between trade and non-trade objectives, their respective legal value and criteria for prioritisation. In this way, the Court avoided interfering with the substantive policy choices made by legislative and executive Community institutions.

2.2. CCP Principles and Objectives Under the Reformed EU Treaty

The Lisbon Treaty has modified the scope and nature of the CCP and has reformed the principles and objectives[14] governing it. To start with, the Lisbon Treaty groups all EU external policies, including the CCP, under a common heading (Arts. 3(5) and 21 TEU) containing principles and objectives of general application. Moreover, specific attention being paid to the CCP, the reform touches upon the nature and the role of the objective of liberalisation, as shown in Art. 206 TFEU (ex Art. 131 TEC).

Will such changes also affect the EU's strategy towards commercial disputes within the WTO? Various considerations can be advances in this respect, particularly concerning a possible narrowing of the scope for manoeuvre enjoyed by EU institutions. It is submitted that the different nature of the objective of liberalisation and the broader framework of CCP goals will make EU positions regarding, first, the effect of DSB and AB reports and, second, the EU extra-contractual liability for breach of WTO law more difficult to bear.

[14] For the purpose of this paper the term 'objective' is employed in relation to different contexts, which should however not induce any ambiguity as to the argument presented hereinafter. It is therefore appropriate to clarify that the term 'objective' points at both the goals that the CCP as such is intended to achieve according to the relevant Treaty provisions, and the aims that the Union's strategy towards commercial disputes is designed to pursue. It is important to underline that, whereas the Lisbon reform touches upon CCP goals, particularly by changing their nature, the same cannot be said with regard to the aims of the Union's strategy. The latter, which have been identified earlier as the protection of European key economic interests and of the Union's regulatory autonomy, remain in fact largely unmodified. It is interesting to note that the two sets of objectives do not necessarily point in the same direction and are not easy to organise in a consistent strategy, in that often the objectives of protecting economic interests and regulatory autonomy can only be pursued at the expenses of further liberalisation.

2.2.1. Uniformity Principle

The principle of uniformity remains of utmost importance for the nature and exercise of the EU competence in external trade and has undergone no substantial modifications. Art. 207 TFEU reiterates that 'the CCP shall be based on uniform principles'.

Moreover, uniformity seems to continue having a mere instrumental interest for trade policy-makers. In fact, it has correctly been noted that the extension of the Union's exclusive competence to all areas of the CCP, including trade in services, trade aspects of IP and FDI, somehow diminished the instrumental function of the principle of uniformity and its role as a link between internal harmonisation and the nature of the external competence.[15] As a matter of fact, not all aspects of trade in services, trade aspects of IP and FDI have already been subject to harmonisation. Whereas in the past this would have led to the maintenance of a shared competence, the extension of the EU's exclusive competence to cover such trade sectors softens the link between harmonisation in the internal market and the nature of the trade competence. It follows that the uniformity principle may be vested with more than a mere instrumental function.

However, such rethinking must however be balanced by further considerations. Even though the EU becomes a single trade actor in the abovementioned fields, different national interests remain sheltered from undesired policy actions. When deciding on issues concerning trade in services, commercial aspects of intellectual property rights and FDI, the Council will continue acting according to the unanimity rule as long as unanimous actions are still required for the adoption of internal rules.[16] Unanimous decision-making is also required for the adoption of trade measures pertaining to trade in cultural and audio-visual services, on the one hand, and trade in social, education and health services, on the other.[17] The lasting pivotal role played by Member States in these trade areas is probably not sufficient to bring the instrumental role of uniformity back into the spotlight, as in fact Member States can no longer adopt different approaches to trade with third countries in such areas,[18] but surely makes the assessment of the new degree of exclusivity of the EU's trade competence more nuanced.

2.2.2. The Reformed Objective of Liberalisation

The Lisbon Treaty alters the role of liberalisation as an objective of the CCP. In terms of scope, Art. 206 TFEU adds a reference to *foreign direct investments* (FDI) and to *other barriers* to trade in order to mirror the substantive expansion of the EU's exclusive trade competence.

The main change, however, stems from the new wording of the provision. Whereas prior to the Lisbon reform liberalisation enjoyed just an aspirational value on the ground that, according to Art. 131 TEC, the Member States only *aimed to* contribute to such objective, Art. 206 TFEU uses a more assertive language and states that the EU as such, not just its Members, *shall* now contribute to the liberalisation of international trade, namely to the harmonious development of world trade, the progressive abolition of restrictions to international trade and on FDI, and the lowering of customs and other barriers.

What used to be an option now seems to have turned into a proper legal obligation. In fact, the drafters of the Lisbon Treaty did not reiterate the qualification of liberalisation as a non-binding objective of the reformed Treaty, whose pursuance lies in the hands of the EU institutions and depends on their

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15 Dimopoulos, 'The Effects of the Lisbon Treaty' 159.

16 Art. 207(4) TFEU, second alinea.

17 Art. 207(4) TFEU, third alinea. Provisions contained in both the second and third alinea justify the need for unanimous action in the respective trade fields in the light of the imperative to defuse any risk of prejudicing Member States' cultural and linguistic identities on the one hand, and national peculiarities with regard to the organisation of social, education and health services, which Members States are solely responsible to deliver, on the other.

18 Dimopoulos, 'The Effects of the Lisbon Treaty' 159.

assessment of the Community interest.[19] On the contrary, they have opted to upgrade the objective of trade and FDI liberalisation to the rank of compulsory aims, as the true and main target of all CCP measures, to which other – both commercial and non-commercial – objectives must give way.

The mandatory nature of the objective of liberalisation becomes even more apparent if Art. 206 TFEU is compared to other provisions having a similar wording and which the Court has already interpreted. In *Portugal v. Council*,[20] for example, the ECJ confirmed the compulsory nature of the objective of promoting democracy and the rule of law in the Community competence in the field of development cooperation (as enshrined in then Art. 177(2) TEC). The binding character of the relevant provision was acknowledged based precisely on its wording.[21] Applying such a reasoning to Art. 206 TFEU, would make it difficult to deny the mandatory nature of the objective of liberalisation. Consequently, proven incompatibilities of EU trade measures with such an objective may compromise their very lawfulness and could result in them being declared void.

Nor does the commitment to a *gradual* liberalisation of international trade lessen the binding nature of the obligation contained in Art. 206 TFEU. On the contrary, such a commitment may be interpreted as precluding any step back from the achieved level of liberalisation and as prohibiting the adoption of restrictive measures,[22] which would in practice disregard the mandatory objective of pursuing progresses, however gradual, in liberalisation.

It should be noted that EU institutions retain discretion as regards the determination of the timeframe and means for fostering liberalisation. However, the Lisbon Treaty narrows their margin of appreciation as it forbids the adoption of commercial measures that might hamper the aim of further reducing barriers to trade and, possibly, that negatively affect the existing levels of liberalisation.

2.2.3. The CCP Under a Common Constitutional Framework of EU External Relations

Previously placed under different and autonomous headings of the Community Treaty,[23] external policies are now found under a single framework of principles and objectives governing EU external action as a whole. Mainly consisting of Arts. 3(5)[24] and 21 TEU[25] and later reiterated in Art. 205 TFEU,[26] such a single framework encompasses a set of common rules which are intended to provide

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19 M Cremona, 'A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty' *EUI Working Paper Law* 2006/30, 29; see also Dimopoulos, 'The Effects of the Lisbon Treaty' 160.

20 Case C-268/96 *Portugal v. Council* [1996] ECR I-6177, para. 23.

21 The Court interpreted the expression 'shall contribute' contained in Art. 177(2) TEC as conferring binding force upon the objectives at issue, the result being that the Treaty would compel EU institutions and Member States to their attainment. See Case C-268/96 above.

22 Dimopoulos, 'The Effects of the Lisbon Treaty' 161.

23 Cremona has noticed that the current list of principles and objectives of EU external action incorporates principles and objectives that were found in specific policy fields under the TEC. See Cremona, 'A Constitutional Basis' 5.

24 While providing an overall glimpse at the final aims of the European integration process, Art. 3 TEU acknowledges an autonomous role to some general external goals. Paragraph 5 thereof points at '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 […] as well as […] the strict observance and the development of international law' as the objectives that the Union is called upon to pursue while acting on the international scene.

25 Art. 21 TEU complements and further specifies Art. 3(5) TEU by indicating both the principles inspiring EU external action (para. 1) and the specific objectives it is intended to pursue (para. 2).

26 Art. 205 TFEU creates a functional linkage between the General Provisions on the Union's External Action contained in the TEU and the specific external competences laid down in the TFEU in that it prescribes that the Union's action on the international scene shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Art. 21 TEU. Moreover, it is to be noted that the drafters of the Treaty took care of establishing a one-to-one functional linkage between the relevant provisions of the two Treaties. The requirement that the

guidance in the exercise of EU external competences, irrespectively of their nature and of whether they have been conferred by the TEU or the TFEU.

The Union's trade policy is henceforth to be conducted according to the principles and objectives of the EU's external action. On the one hand, this raises the question as to whether there will be any increased tendency for the EU to use trade policy as an instrument for the achievement of other external policy objectives, such as the ones inherent to the CFSP, environmental or development policy.[27] On the other hand, one might wonder if such broader range of objectives, besides offering new opportunities to enhance the consistency of external relations, will also pose major legal constraints to trade policy-making as such.

Art. 3(5) TEU mentions free and fair trade as one of the basic objectives of the Union's international action. Therefore, the creation of a single constitutional framework for EU external relations affects the CCP given that the latter is not only bound by the principles and objectives expressed in trade-related provisions of the Treaty but also by the general ones applicable to the Union's external actions, as enshrined in Art. 21 TEU. In other words, the new normative setting indirectly imposes a general need to coordinate the CCP with other external policies, whilst at the same time formally allowing the pursuit of non-trade objectives through the adoption of CCP measures.[28] The new framework determines what can and what cannot be painted on the canvas, by imposing additional constraints to the exercise of the EU trade competence, while at the same time affording previously unexpressed opportunities for the employment of CCP measures. The legal logic enshrined in such provisions is hardly questionable, particularly if looked at from the point of view of consistency advocates.

Whereas Art. 3(5) TEU gives a glimpse of the principles governing the Union's external action, Art. 21 TEU contains a detailed list of principles and objectives that are relevant for the exercise of the Union's external competences, including the CCP.

The Treaty emphasizes the application of those general principles in the field of the CCP more than once. The connection between Art. 21 TEU and the CCP is reaffirmed in the TFEU, particularly in Arts. 205 and 207, with the former providing a functional link between Art. 21 TEU and the external policies under the TFEU and the latter explicitly incorporating the general principles and objectives of Art. 21 into the CCP.[29]

In conclusion, under the Lisbon Treaty, objectives and means previously applicable to more distinct external competences become of general and interchangeable application. Specifically referring to trade concerns, they are to be extended to all areas of EU external action, so that trade objectives are to be duly taken into account when drafting both CCP and non-CCP measures. Similarly, CCP measures are to be designed with a view to serve, or at least not to hamper, both trade and non-trade objectives.

(Contd.)

development and implementation of the different areas of the Union's external action covered both by the CFSP, by Part Five of the TFEU and by the external aspects of its other policies respect the principles and pursue the objectives contained in the first two paragraphs of Art. 21 TEU can already be detected in the third paragraph of the same provisions. Finally, the reference to external aspects of the Union's internal policies extends the scope of Art. 21 TEU principles and objectives to yet another dimension of EU governance, not touched upon by the Treaty provisions on external action but certainly relevant for the definition of the overall EU international conduct. In particular, in the light of the practice whereby virtually all EU policies have acquired an external dimension, it could be inferred that Art. 21 has a significantly wider scope than expected. Decision and treaty-making practice - and possibly judicial control operated by the ECJ - will tell to which extent EU institutions and Member States will be willing to acknowledge such a scope.

27 S Woolcock, 'The Treaty of Lisbon and the European Union as an actor in international trade', *ECIPE Working Paper* 01/2010, 13. For an assessment of the recent practice of concluding bilateral Free Trade Agreements (FTAs), concluding that this focus on trade liberalization leaves other objectives on the sidelines, see the contribution by Boris Rigod in this edited Working Paper.

28 Dimopoulos, 'The Effects of the Lisbon Treaty' 161.

29 The last sentence of Art. 207(1) TFEU provides that 'The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'.

2.2.3.1. Trade Objectives of the EU External Action

Arts. 3(5) and 21 TEU emphasise that general trade objectives such as liberalisation of international commerce, which Art. 206 TFEU defines as being the only CCP aim, are not to be served only by the Union's commercial policy but must be taken into account also when other competences are exercised. In other words, also non-trade policies are to contribute to the achievement of trade-related objectives.

In Art. 3(5) TEU, free trade is identified as a general objective of the EU external action alongside with fair trade. Social concerns therefore become part of European trade policy, and apply in parallel to the more obvious economic ones.

This is confirmed by a close reading of Art. 21(2)(e) TEU, which explicitly recognises the progressive abolition of restrictions to trade as an objective of EU external action, but also puts the aim of commercial liberalisation in perspective, making it instrumental to the promotion of international economic development. The constitutional relevance of liberalisation comes to the fore insofar as such a goal is designed to be the basic tool for the achievement of the broader objective of integrating third countries into the world economy.

2.2.3.2. CCP Non-Trade Objectives

As mentioned earlier, EU external action principles and objectives incorporate values and goals that were previously ascribed to specific Community policies. Following the Lisbon reform, these principles and objectives not only apply to their specific policy field of origin but also to all other fields of the Union's external action, including the CCP. Therefore, both trade and non-trade related aims guide the exercise of the Union's trade-related powers. Although the use of CCP measures in order to achieve non-trade objectives was practiced by EU institutions and recognised by the ECJ prior to the Lisbon Treaty,[30] Art. 21 TEU represents nonetheless an important legal innovation as it provides the legal foundations for the non-commercial use of CCP measures.

More specifically, the operative value of this provision lies in the clarification it provides that the orientation of the CCP will now also depend on non-trade principles and objectives, such as the promotion of democracy, rule of law, respect of human rights, the Union's security and the preservation of international peace and security. Art. 21 TEU thus legitimises the practice of inserting conditionality clauses in trade agreements and granting trade preferences to virtuous third countries which show deference to such values.[31] Besides the objectives mentioned above, Art. 21 TEU also recalls the preservation and improvement of the quality of the environment and the sustainable management of natural resources. This reference enhances the role of environmental goals as non-trade objectives, with which trade measures are nonetheless required to comply. Moreover, the Union's contribution to the achievement of sustainable economic, social and environmental development of third countries is also meant to occur, *inter alia,* via EU trade policy. Finally, the CCP must be conceived and implemented so as to favour the advancement of multilateralism and good governance. The Union shall therefore be committed to multilateral trade negotiations and shall actively play a role in organisations such as the WTO, also by promoting the enhancement of their effectiveness. In this respect, the Union will need to abide by international commercial rules and to avoid unfair trade practices.

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[30] See L Bartels, 'The Trade and Development Policy of the European Union' in M Cremona (ed), *New Developments in the EU's External Relations Law* (Oxford: Oxford University Press 2008) 128-171; J Larik, 'Much More Than Trade: The Common Commercial Policy in a Global Context' in P Koutrakos and M Evans (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart Publishing 2011) 13-46.

[31] On the practice see L Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press 2005).

2.2.4. Legal Consequences

The teleological scope of the EU's trade policy has undergone a twofold reform. On the one hand, the specific goal of liberalisation has gained strength by shedding its aspirational nature and acquiring the character of a legal obligation. On the other hand, the Lisbon Treaty has placed the CCP eventually under the single heading on EU external action, thus including non-commercial concerns in the range of purposes and principles that the Union's trade policy is to serve. The reformed Treaty affects the Union's management of commercial disputes by narrowing the array of CCP policy-options at the disposal of EU political institutions. As a result, a strategy based on the adoption of measures which does not comply with the new CCP constraints becomes internally unbearable, because unconstitutional, in the first place.

Whereas it is apparent that the objective of liberalisation will herein act as a proper constraint on the formulation of the CCP content, the assessment of the legal implications of the reshuffle and 'generalisation' of external action principles and objectives is not so straightforward.

There is indeed no doubt that the strong language used in Arts. 3 and 21 TEU suggests that the values and goals therein contained oblige the Union to implement its external action within the framework they create. Moreover Art. 206 TFEU, if read in conjunction with Art. 205, which in turn refers to the afore-mentioned general provisions, also confirms that the CCP should not only serve the specific objective of liberalisation but should also aim to achieve the general objectives of the EU external action, i.e. political, social and economic development, environmental protection and the promotion of multilateralism. Undoubtedly these are all justiciable obligations which measures adopted by the EU must comply with, on pain of incurring in annulment procedures should they fail to do so.

However, it has been noted that the mandatory nature of the provisions contained in Arts. 3 and 21 TEU, and therefore of the obligations deriving therefrom, is somehow softened by their broad formulation.[32] Both Articles leave a great deal of discretion to policy-making institutions, which therefore still enjoy a considerable leeway in choosing the appropriate course of action, both in terms of means and content, to pursue the prescribed objectives.

Moreover, consistency problems may arise from interactions between the trade and non-trade objectives which the reformed CCP is bound by. The reason lies in the absence of a prioritisation rule which could be applied whenever different objectives point in opposite directions as regards the content of a trade measure. As mentioned, the aim of liberalisation as redefined in the Lisbon Treaty contains a no-step-back obligation regarding the abolishment of commercial and non-commercial barriers to trade. Therefore, conflicts between trade and non-trade objectives could arise should the latter be pursued by means of restrictive measures. Such a scenario is perfectly conceivable. For instance, restrictive measures could be used on the ground that they serve the objective of fair trade – i.e. equitable trade as opposed to lawful trade – contained in Art. 3(5) TEU. The promotion of equitable trade conditions could be used to justify the adoption of protectionist measures. Whereas this would not be compatible with the prohibition of adoption of new restrictions resulting from the liberalisation objective, it is arguable that the pursuance of other and more general objectives makes trade restrictions a viable policy option. The contrary would entail that the acknowledgement of the EU external action general objectives be *de facto* disregarded to the extent that the pursuance of them would be severely limited when it comes to commerce.[33]

Of course, the limit of such use of trade restrictions lies in the demonstration, on the basis of elements amenable to justice, of the functional connection between the restrictive trade measure and the general objective that it is intended to pursue. In this respect, the requirements of a two-tier test must be fulfilled in order for a protectionist measure to be justified and declared lawful: it must not only pursue

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[32] Dimopoulos, 'The Effects of the Lisbon Treaty' 165; see also Cremona, 'A Constitutional Basis' 5-6.

[33] Dimopoulos, 'The Effects of the Lisbon Treaty' 167.

a general – and forcibly legitimate – objective but also be proportional to the achievement of the declared aim.[34] In the case of equitable trade, the EU can adopt protectionist measures insofar as the link with the goal of promoting socio-economic development is sufficiently proven and the proportionality test is satisfied.

3. Issue II – Commercial Disputes and Fundamental Rights: A Real Constraint?

In the FIAMM judgment,[35] the ECJ suggested the possible contrast between non-compliance with WTO obligations and the respect of fundamental rights related to private business. With a fully binding Charter of Fundamental Rights (CFR) in force, the respect of rights such as the freedom to conduct a business (Art. 16 CFR) and the right to property (Art. 17 CFR) bind EU institutions in the conduct of the CCP, including the shaping of the EU's strategic approach to commercial disputes. How and to what extent will this affect the EU's approach to inter alia *direct effect of DSB and AB reports and to EU liability for breach of WTO obligations?*

In the *FIAMM* case the Court was confronted with the need to balance the scope for manoeuvre of the EC institutions in the settlement of commercial disputes within the WTO with the protection of fundamental rights, such as the right to property and the right to pursue a trade or profession, as general principles of law applicable within the EU legal order. Having been victims of the retaliation enacted by the United States following EC non-compliance with the WTO DSB adverse ruling in the *hormones* case, FIAMM and others asked the Court to declare the EC liable for the losses they had incurred and demanded compensations thereof on the ground of, *inter alia*, an alleged breach of certain general principles of EC law. In the 2008 judgment issued on a request for the cross-appeal, the Court affirmed that a Community measure whose application leads to restrictions that impair the substance of the right to property and the freedom to pursue a trade or profession in a disproportionate and intolerable manner, could give rise to non-contractual liability on the part of the Community.[36] The ruling of the Court in this case is on the fact that no provision has been made for compensation to avoid or remedy the aforementioned impairment. In other words, a right to compensation might arise if the omission of the Community to balance the loss incurred by individuals as a consequence of the EC's continued WTO infringement was in breach of general principles, including property-related rights.[37]

The Court recalled its previous case-law whereby property-related rights do not constitute absolute entitlements, but must be viewed in relation to their social function.[38] It thus held that the exercise of the right to property and to pursue a trade or profession freely may be restricted on condition that those restrictions correspond to objectives of general interest pursued by the Community and that, with regard to the aim pursued, they do not constitute a disproportionate and intolerable interference which infringes the very substance of the rights guaranteed.[39] Called upon to assess FIAMM's request, the

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34 Dimopoulos, 'The Effects of the Lisbon Treaty' 167.

35 Joined cases C-120/06 P and C-121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (C-120/06 P), Giorgio Fedon & Figli SpA and Fedon America, Inc. (C-121/06 P) v Council of the European Union and Commission of the European Communities* [2008] ECR I-06513.

36 Joined Cases C-120/06 P and C-121/06 P *FIAMM*, para. 184.

37 A Thies, 'The impact of general principles of EC law on its liability regime towards retaliation victims after *FIAMM*' (2009) 34 *European Law Review* 889, 899.

38 Case 4-73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491, pt. 2 and 3 of the summary; Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para. 17-20; Case 265/87 *Schräder HS Kraftfutter* [1989] ECR 2237, pt. 3 of the summary.

39 Joined cases C-120/06 P and C-121/06 P *FIAMM*, para. 183 and, *inter alia*, Case 265/87 *Schräder HS Kraftfutter* [1989] ECR 2237, para. 15; Case C-295/03 *P Alessandrini and Others v Commission*, [2005] ECR I‑5673, para. 86.

Court would have needed to address the questions as to whether the temporary acceptance of retaliation was in the general interest and whether the resulting restriction of trade for retaliation victims constituted a proportionate and tolerable interference.

Earlier in its judgment, the Court did recognized the potential right to compensation where no provision has been made for compensation to avoid or remedy the impairment of the very substance of those rights in a disproportionate and intolerable manner. However, it concluded that Community law as it stood did not provide for a regime enabling the liability of the Community for its legislative conduct to found an action in a situation where, account being taken of the denial of direct effect to WTO rules within the EU legal order, any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts.[40] Besides the analysis of the existence and applicability of the liability regime,[41] the Court based its founding on settled case-law whereby an economic operator cannot claim a right to property in a market share which he may have held at any given time, since such a market share constitutes only a momentary economic position which is exposed to the risks of changing circumstances.[42] Moreover, the guarantees accorded by property-related rights cannot be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.[43] The Court stated that an economic operator whose business mainly consists in exporting goods to the markets of non-Member States must be aware that the commercial position which he has at a given time may be affected and altered by various circumstances, including the possibility that one of the EU's trading partners may adopt measures suspending concessions within the framework of the WTO as a result of EU non-compliance with WTO decisions and may for this purpose select in its discretion the goods to be subject to those retaliatory measures, as provided for in Arts. 22(3)(a) and (f) of the DSU.[44]

Some time after the much debated *FIAMM* judgment, the European Charter of Fundamental Rights entered into force, thus allowing for a possible change in the Court's attitude *vis-à-vis* the possibility to rely on fundamental rights when challenging the Union's conduct in the context of international trade disputes and when demanding compensation in case of losses resulting therefrom.

Art. 6(1) of the reformed Treaty confers upon the CFR the same legal value as the founding Treaties. With the entry into force of the Lisbon Treaty, the rights codified in the Charter therefore acquire constitutional value within the European legal order. Even though the Court of Justice had consistently stated that fundamental rights form an integral part of the general principles of Community law whose observance the Court must ensure already before the entry into force of a binding Charter,[45] the provision above entails the obligation for European institutions to respect the rights, freedoms and prohibitions contained therein. A breach of such obligations will in turn result in the annulment of the relevant acts by the Court.[46] Therefore, the Charter acts as a parameter of legality also in relation to measures adopted under the CCP.[47]

Art. 17 CFR recognises the right for everyone to own, use, dispose of and bequeath his or her lawfully acquired possessions. Deprivations of possessions are prohibited, except if operated in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation

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40 Joined cases C-120/06 P and C-121/06 P *FIAMM*, para. 188.

41 Joined cases C-120/06 P and C-121/06 P *FIAMM*, para. 162-176.

42 Joined cases C-120/06 P and C-121/06 P *FIAMM*, para. 185.

43 Joined cases C-120/06 P and C-121/06 P *FIAMM*, para.185; see also Case 4/73 *Nold*, para. 14.

44 Joined cases C-120/06 P and C-121/06 P *FIAMM*, para. 186.

45 Joined cases C-120/06 P and C-121/06 P *FIAMM*, para. 182.

46 LS Rossi, 'Il Rapporto tra Trattato di Lisbona e Carta dei Diritti Fondamentali dell'UE' in G Bronzin, F Guariello, V Piccon (eds), *Le Scommesse dell'Europa. Istituzioni, diritti, politiche* (Rome: Ediesse 2009).

47 V Bonavita, 'The EU Charter of Fundamental Rights and the social dimension of international trade' in G Di Federico (ed), *The EU Charter of Fundamental Rights. From Declaration to Binding Instrument* (Berlin: Springer 2011).

being paid in good time for their loss. This article is based on Art. 1 of the First Protocol to the European Convention on Human Rights (ECHR). Notwithstanding the slightly updated wording, in accordance with Art. 52(3) CFR, the meaning and scope of the right are the same as those guaranteed by the ECHR and the limitations may not exceed those provided for therein. Moreover, this is a fundamental right common to all Member States' constitutions which has been recognised on numerous occasions and which is part of settled ECJ case-law having its origins in the *Hauer* judgment.[48]

Whereas Art. 17 CFR specifically protects the right to peaceful enjoyment of one's possessions, it nonetheless affords Member States – and EU institutions - considerable scope to interfere with individual property rights, as resulting from the aforementioned conditions for a lawful State-operated deprivation of a person's possession. Moreover, States are responsible only for interferences affecting the economic value of property.[49]

A 'fair balance test' will be applied in order to determine whether a fair balance has been struck between the demands stemming from the general interest of the Community and the need to protect individuals' fundamental rights.[50] The level of justification required will depend on the extent of the interference on the individual's enjoyment of the right in each case. The precise weight to be given to the different interests will, in most cases, involve a wide range of policy considerations and, indeed, matters of political judgment. Accordingly, courts are likely to afford States and institutions a wide margin of appreciation[51] when determining whether the Community interest outweighs individual interests in any particular case involving the right to property.

As it should be recalled, the State is required to demonstrate that the deprivation of property under Art. 17 CFR is in the public interest. In particular, the State must identify the interest in question, how the deprivation is rationally connected to it, and show that the interference is proportionate. However, it seems difficult to conceive circumstances in which the Court would dispute the purpose alleged by the government or contest its assertion that a measure pursued a public interest. Moreover, the requirement that conditions provided by law must be respected means that the State must have a basis in national law for its act of deprivation and that the law concerned must be both accessible and sufficiently certain. In particular, the law should contain sufficient safeguards against arbitrariness. Finally, Art. 17 CFR clearly states that individuals are entitled to fair compensation in good time for their loss, except when the deprivation is in the public interest and in the cases and under the conditions provided for by law. The payment of compensation will be a highly relevant factor determining whether a 'fair balance' has been struck between the community at large[52] and the rights of the individual in question[53].

Art. 16 CFR acknowledges the freedom to conduct a business in accordance with Community law and national laws and practices. This provision is based *inter alia* on the ECJ case-law recognizing the

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48 Case 44/79 *Hauer*, para. 17-20.

49 *Sporrong and Lonnroth v Sweden*, ECHR Series A no. 52, (1983) 5 EHRR 35.

50 *Sporrong and Lonnroth v Sweden*, ECHR Series A no. 52 (1983) 5 EHRR 35; *Stran Greek Refineries and Stratis Andreadis v. Greece*, ECHR Series A no. 301-B, (1994) 19 EHRR 293.

51 *Sporrong and Lonnroth v Sweden*, ECHR Series A no. 52 (1983) 5 EHRR 35; *James and Others v. United Kingdom*, Series A no. 98, (1986) 8 EHRR 123; *Edoardo Palumbo v. Italy* (2000) ECHR 640.

52 *Holy Monasteries v. Greece*, ECHR Series A no. 301 (1994) 20 EHRR 1; *Stran Greek Refineries and Stratis Andreadis v. Greece*, Series A no. 301-B (1995) 19 EHRR 293; Joined Cases C-20 and 64/00, *Booker Aquacultur Ltd. and Hydro Seafood GSP Ltd. v The Scottish Ministers* [2003] ECR I-7411.

53 *Jahn and Others v. Germany*, ECHR, 22 January 2004.

freedom to exercise an economic or commercial activity.[54] in line with such case-law, the enjoyment of such right is subject to the limitations provided for in Art. 52(1) of the Charter. In particular, the freedom to run a business includes protection for one of the essential principles of free-market economics, which is the freedom of competition. This requirement means that the activities of the EU should include a system ensuring that competition in the Internal Market is not distorted. On this basis, Art. 16 CFR protects the right of each person within the EU to start-up or continue a business without being subject to either discrimination or unnecessary restriction.

Besides the restrictions to the above rights provided by the Charter itself, the impact of such provisions on the *FIAMM* case-law is to also be considered in the light of their very nature and origin. The issue is whether acknowledging a legally binding value for the Charter makes a substantial difference. CFR rights are mainly a codification of obligations previously recognised by the ECJ as being part of the EU legal order and/or derived from the ECHR. From the start, the Charter has been conceived as a catalogue that formally recognises rights *de facto* already in force through different sources of the Union's legal order, such as international law, the constitutional traditions common to all Member States, the European Convention on Human Rights, Community and Union acts and judgements of the Court of Justice, rather than an instrument codifying new rights and prohibitions. [55] Therefore, it is debatable whether the Charter will be a real watershed[56] *vis-à-vis* the ECJ's approach to the relation between the protection of fundamental property rights and the Union's scope for manoeuvre in the management of commercial disputes.

Although it adds further pieces to the puzzle of fundamental rights protection within the EU, the Union's prospected accession to the ECHR does not clarify the issues in so far as the protection of property-related rights under the Convention suffers from the same constraints highlighted in relation to the CFR given that, as mentioned above, the latter is inspired to the former.

4. Issue III – The Impact of the External Relations Institutional Reform on the Strategic Management of Commercial Disputes and the Need for Coordination

Are organisational arrangements in the management of the CCP and trade disputes foreseen in order to better accommodate the institutional reform that EU external relations has undergone? Is there a need to establish a mechanism of coordination with the HRVP and the EEAS?

The extent to which the Lisbon reform will affect the management of the CCP and of trade disputes will also depend on what use the institutions and institutional figures directly – or indirectly – involved will make of the new opportunities afforded by the Treaty itself.

On the one hand, from the point of view of specific trade-related provisions, Art. 207 TFEU confirms the consolidated practice whereby, in relation to trade, the core of EU policy-making has been the relation between the Commission and Member States, sitting either in the Council or in its 'Article 133 Committee', now renamed as 'Trade Policy Committee'.[57] The latter institution remains formally charged with the legislative responsibility in the field of trade. However, one of the main novelties put forth by the recent reform consists in the fact that the Council is now joined by the Parliament, which, as co-legislator in the ordinary legislative procedure (OLP), for the first time enjoys equal decision-making powers in trade-related matters.

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54 Case 4/73 *Nold*, para. 14; Case 230/78 *SpA Eridania-Zuccherifici nazionali and SpA Società Italiana per l'Industria degli Zuccheri v. Minister of Agriculture and Forestry, Minister for Industry, Trade and Craft Trades, and SpA Zuccherifici Meridionali* [1979] ECR 2749, para. 20 and 31.

55 Rossi, 'Il Rapporto'. See also P Craig, 'Rights, Legality, and Legitimacy' in P Craig (ed), *The Lisbon Treaty. Law, Politics, and Treaty Reform* (Oxford: Oxford University Press, 2010).

56 Bonavita, 'The EU Charter'.

57 S Woolcock, 'EU Trade and Investment Policymaking After the Lisbon Treaty' (2010) 1 *Intereconomics* 22, 24.

On the other hand, and more in general, the inclusion of trade policy under the common heading of EU external action and the applicability to the CCP of the general objectives and principles contained therein, raises questions as to the role that other institutions and bodies may play in relation to trade matters.

First and foremost, there is room for a possible involvement of the High Representative/Vice-President (HRVP) in his/her dual role of head of European diplomacy (High Representative for the CFSP), assisted by the European External Action Service (EEAS), and coordinator of European external policies (Commission Vice-President in charge of the extended 'relex' portfolio).

Moreover, given the acknowledged instrumental value of commercial measures for the attainment of non-trade objectives, a role in the management of the CCP, however non-pivotal, can be envisaged also for the EEAS. The need for the EU to be represented either in multilateral *fora* or in bilateral negotiations *inter alia* for the sake of dispute settlement may result in coordination issues arising.

Finally, looking at the judicial aspect of EU governance, it is submitted that both the Union's renewed commitment to fundamental rights and the broader orientation of the CCP towards general objectives create new parameters for the ECJ to apply when reviewing the legality of trade measures.

4.1. The HR/VP, the EEAS and the Need for Coordination

The HRVP is in a position to influence the conduct of the CCP by virtue of his/her institutional ubiquity. The dual function of Vice President of the Commission charged of external affairs and of the institutional figure responsible for the conduct of the CFSP enables the HRVP to influence policy making in trade-related matters both by participating in the work of the Commission and by taking autonomous actions.

It has been maintained that Art. 18(4) TEU prioritises between the two roles of the HRVP so that, in case of conflict of interests, his/her role as head of the Union's diplomacy and director of the CFSP must prevail (nota). The question could therefore be raised as to whether this may cause the CCP to be more CFSP-oriented because of the HRVP's influence. In this respect, an reasonable position is that the High Representative should not be expected to affect the focus of the CCP more than is necessary for the sake of ensuring coherence with the CFSP.[58] Avoiding inconsistencies between different external policies and turf battles amongst different services in charge of external relations is precisely the aim of endowing the HRVP with a 'double hat'. The possibility of autonomous action foreseen by Arts. 215(1) and 218(9) TFEU does not affect this evaluation. Arguably, he/she will therefore not interfere with the tasks of the remaining 'relex' Commissioners, such as for instance the Trade Commissioner, who keep their posts and their prerogatives over the competence portfolio they are entrusted with.

As regards the role the HRVP will need to play in striking the balance between trade and non-trade objectives, much will depend on how the relationship develops between the HRVP, the EEAS, the Commission and the Council. One indicator of how things might develop is where Commission staff dealing with trade issues will sit. As it is known, this is not going to be in the EEAS, which will thus not have autonomous know-how in trade matters. DG Trade will stay where it has been for decades,

[58] Dimopoulos, 'The Effects of the Lisbon Treaty' 168.

therefore retaining – arguably with limited intention to share[59] – the institutional memory and the technical expertise that is central to trade policy.[60]

The conclusion that could been drawn is that the High Representative and the Council will continue to make key-political decisions, concerning for instance trade negotiations (who? where? when? with whom?), but DG Trade is likely to continue to develop the content of trade policy measures for the foreseeable future.[61] However, such a conclusion is nuanced by the fact that, following the Lisbon Treaty, trade is not just about trade. Before the reform the equation applied by Community trade policy-makers was the following: depending on the community interest, reduction of trade barriers equals achievement of liberalisation objectives, which is to say that liberalisation is affordable to the extent that it does not conflict with Community interests. The relation between the content of a trade measures and its objectives is now much more complex. For the sake of ensuring the legality of trade measures, DG Trade is now obliged to stick to the objective of liberalisation without declining it according to the Community interest and to consider other variables, i.e. the other general objectives of EU external action. In order to fulfil these uneasy tasks, institutional memory and technical expertise may not be sufficient. However time-consuming, coordination efforts with other Commission services, the HRVP and the EEAS might become a crucial instrument.

It has been argued that the exclusion of DG Trade from the EEAS is a result of the exclusive nature of EU competence in this policy-area.[62] It is to be noted that under the current legal framework – or better, legal network – of EU external policies, exclusivity is not in itself a gateway to consistency. Moreover, consistency is not an end in itself. Consistency as absence of contradictions between trade measures and non-trade objectives becomes crucial under the reformed Treaty because the very legality of trade measures is at stake. Legality in this respect can be achieved only through a trade policy-making exercise that takes a variety of objectives into account by means of coordination mechanisms.

Once again the challenge of coordination is of utmost importance, even more so insofar as trade disputes are concerned. Employed in the past as powerful instruments of foreign policy *lato sensu*, trade disputes involving the EC have represented battles of standards and interests, particularly when the EC was summoned as defendant before the DSB. The question today is who will dispose of the power to use such a powerful instrument? Who will decide what purposes the EU strategy in commercial disputes is to serve? Who will be determine such strategy?

So far, the Commission has been the unchallenged authority in this filed. In particular, the legal service of DG Trade has to date been entrusted with WTO dispute settlement and the TBR. They possess the technical expertise to assess interests and set positions in the midst of a controversy. They retain historic memory of past and ongoing WTO disputes involving the EC and now the EU. It should therefore be concluded that they represent the more qualified institutional subject and, arguably, they will retain their monopoly over dispute settlement management.

Whereas it appears to be the most reassuring option, two problems may arise in relation to path-dependency in the management of commercial disputes. First of all, trade disputes would remain a field of self-referential policy-making, where priorities are autonomously set by Commission. DG Trade may fail to take into account what are the current non-commercial objectives that trade

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59 Such reluctance acquires particular relevance if looked at in the light of the concept of 'institutional jealousy', which is extensively employed in institutional regimes-related literature, including in studies regarding intra and inter-institutional relations at the EU level. See for instance, A Vitorino, 'Steering the right course through unchartered waters' in *The next Commission: doing more and better* (2009) 19 EPC - Challenge Europe 10, 10. On the integration of Market Access Teams in the Union delegations see the contribution by Joanna Miska in this edited Working Paper.

60 Woolcock, 'EU Trade' 25.

61 Woolcock, 'EU Trade' 25.

62 S Duke, 'The Lisbon Treaty and External Relations' (2008) 1 *Eipascope* 13, 16.

measures, including those relating to the settlement of disputes, must pursue. The need for coordination comes to the fore once again.

One may argue that the problem of ensuring coordination and consistency is not really new, particularly when it comes to EU external relations. Such a need has always been perceived at the policy level. The difference between the present and the past, namely between the pre- and post-Lisbon era, lies precisely in the governance sphere to which such coordination needs can be ascribed. During the pre-Lisbon era, coordination and consistency were desirable for the sake of policy effectiveness. The reformed Treaty adds a further dimension by indirectly making them crucial for the legality of policy measures. Should a trade measure, for instance the decision to suffer retaliation or to pay compensations as result of an adverse DSB report, be at odds with other 'relex' objectives, such as environmental protection or development cooperation, it can be now formally sanctioned by the ECJ.

Secondly, as discussed below, a further potential inconvenience of path-dependency may derive from the reinvigorated role of the European Parliament in trade policy.

4.2. The European Parliament

The role of the European Parliament (EP) in trade policy is formally enhanced by the Lisbon reform. Firstly, Art. 207 TFEU confers upon the EP and the Council the power to adopt the measures defining the framework for implementing the CCP, in accordance with the ordinary legislative procedure. The EP now shares co-decision powers with the Council to adopt measures relating to anti-dumping, safeguards, the Trade Barriers Regulation (TBR) and the EU's GSP scheme. Secondly, the EP is granted a greater – however not crucial – say in trade negotiations. Although the EP is not given powers to be directly involved in negotiations or to authorize them, the Commission is now obliged (Art. 207(3) TFEU) to regularly report to the specialised EP International Trade Committee (INTA) and to provide it with information concerning the conduct of negotiations. Finally, the EP will have an enhanced role in ratifying trade agreements through its power to consent to their adoption. Art. 218(6)(a) TFEU lists the cases in which the consent of the EP is a mandatory requirement for the conclusion of an agreement by the Council. Since such cases include *inter alia* the conclusion of agreements covering fields to which the OLP applies, the EP is granted the power to consent to practically all trade agreements by virtue of the extension of the ordinary legislative procedure to trade matters.

In view of the above, questions arise concerning possible EP attempts to be involved in the management of trade disputes, particularly since trade disputes may relate to issues that are sensitive to public opinion. Consumer health and environmental protection, for example, are of particularly important for democratically elected institutions such as the EP, whose members inevitably tend to work for their own re-election throughout their mandate.

Moreover, the enhanced role of the Parliament *via* the application of the OLP for the revision of trade measures might add new means to the EU strategy in commercial disputes. As in most two-level games[63], the EP veto can be used as a bargaining tool during the diplomatic phase of WTO dispute settlement procedures or during the negotiation of *extra-legem* agreements with complainant WTO members. The subtle threat of an uncooperative Parliament, that retains a power of veto over ongoing negotiations, could be used by EU negotiators as a device to obtain a softening of the counterparts' requests.

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[63] For a compherensive theory of multilevel games, see R Putnam, 'Diplomacy and Domestic Politics: The logic of Two-Level Games' (1988) 42 *International Organization* 427.

4.3. The ECJ

The broader perspective in which the CCP is placed under the reformed Treaty might also affect the jurisdiction of the Court of Justice. Indeed, the latter could now be called upon to apply additional new parameters when reviewing the legality of trade and non-trade measures, in what could be defined as 'cross-policy' judicial control. Different scenarios can result in such a judicial control. On the one hand, the content of a trade measure could be such as to hamper the achievement of further liberalisation of the world market, which is a stated objective of the CCP. This is likely to result in the annulment of the measure by the Court. Moreover, still concerning trade measures, legality review can now be conducted also in the light of general external objectives such as the promotion of political and social development, the enhancement for multilateralism and so on. On the other hand, non-trade measures might in turn negatively affect trade objectives, namely liberalisation.

As it has been shown earlier,[64] the incompatibility between trade and non-trade concerns enshrined in the last two scenarios is a perfectly conceivable ground for a legality challenge. Particularly relevant for the evolution of dispute management by the EU is the case of alleged inconsistencies of a CCP measure with objectives of the Union's external action other than those inherently related to the commercial policy – i.e. liberalisation. In this case, the Court would plausibly adopt a three-step approach.[65] It would establish the alleged *incompatibility* in the first place. The Court would then clarify whether a legitimate *justification* to such incompatibility exists. In other words, the existence of a *necessary* functional relation between, on the one hand, the challenged measure's content, which had been previously established as detrimental to some other external action objective and, on the other, the pursuance of a declared objective of the challenged measure itself must be proven. The Court would eventually apply a *proportionality* test in order to ascertain whether or not the content of the measure does exceed what is necessary for the pursuance of its declared objective. Should this be the case, the measure would result disproportionate with respect to its aim, however justified, which would lead the Court to declare the measure void.

The question remains as to whether the Court has got the technical expertise to assess the adverse impact of trade actions on other 'relex' objectives, account being taken of the technical nature of such measures, whose non-commercial side effects are not always easy to detect.

A further limit might arise in relation to those subjects, both institutional and not, who might at once be legally capable of and politically interested in challenging a trade measure on the ground of its incompatibility with other external action objectives. As regard the institutions' position as privileged applicants in actions for annulment, the issue is whether they retain a political interest in challenging a trade measure, be it an agreement concluded under Art. 207(3) TFEU or a piece of CCP-implementing secondary legislation adopted under Art. 207(2) TFEU, whose coming into being they have contributed to in the first place. Having regard to this aspect, the major change with respect to the TEC regime can be found in the different relative positions of the institutions involved in trade-related decision-making. Both applicable to the conclusion of trade agreements and to the adoption of implementing legislation, the ordinary legislative procedure put the EP on an equal footing with the Council, which makes the two institutions equally responsible for the content of the act and therefore unlikely inclined to challenge it before the ECJ. As for the Commission, its position is more nuanced in that, although it holds a right to initiate the procedure, it does not share legislative responsibility with regard to the content of the eventually adopted measure.[66] The same can be stated with regard to

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64 See above.

65 It mirrors the two-fold reasoning mentioned in para. I.4 regarding the case of a non-trade measure negatively affecting liberalisation.

66 From the legal point of view, this consideration holds true even in the light of the Commission's right to modify the legislative proposal at any stage of the procedure and in the light of its role as negotiator on behalf of the Council. On the one hand, the Commission's right to modify the proposal is said to confer to the institution a significant bargaining power during the procedure, particularly *vis-à-vis* the Council; see R Adam and A Tizzano, *Lineamenti di Diritto dell'Unione*

the Member States. The fact that each of them sits in the Council does not prevent possible disagreements to arise with respect to the adopted measures to the extent that the rule of qualified majority voting is applicable, with the result that dissenting opinions within the Council might be disregarded. Finally, having regard to non-privileged applicants, judicial actions are obviously the sole possibility for legal and physical persons to challenge trade measures whose content is deemed to hamper the achievement of other external goals. In this respect, not only political reluctances resulting from decision-making are of no concern since individuals are the recipient and not the actors of the legislative procedure, but also the reform of the admissibility requirements for annulment proceedings brought about by the Lisbon Treaty points in the direction of an enhancement of the chances for non-privileged applicants to resort to legality actions.[67]

The above shows how concrete the hypothesis of judicial review being conducted by the Court is for the purpose of assessing the legality of trade measures in the light of their compatibility with non-commercial external objectives. Notwithstanding the wide margin of discretion enjoyed by political institutions in striking the balance between trade and non-trade objectives of the CCP, the potential for ECJ intervention should not be underestimated on the ground that the Court has so far chosen to interfere only marginally in trade-related matters for the sake of not tying the hands of political institutions. After all, it was the Court itself that suggested that the incompatibility of EU trade measures with objectives other than commercial ones, such as the protection of fundamental rights, could serve as ground for alleging the illegality of such measures.

Although the initiation of an action for annulment based on the above grounds is both conceivable from the theoretical point of view and actually likely to occur in practice, attention must nonetheless be paid to the difference between the action in itself, and the grounds thereof, as well as the solution that the Court could devise in order to decide such a case. In particular, caution should be used when thinking about what could be expected from the Court. Since the Treaty does not contain any prioritisation rule to be applied to different and potentially conflicting external objectives, the Court would not be in a position to do much more than acknowledging that a trade measures might negatively affect other 'relex' objectives. Striking the balance between those must be left to the political institutions.[68] The Court is therefore unlikely to go as far as to criticise the balance that the latter have chosen, simply because there is no rule of prioritisation upon which the European judicature could base any such condemnation.

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Europea (Torino: Giappichelli 2010) 177. The existence of such power of modification of the proposal might actually induce the Commission to make use of it for the purpose of obtaining the desired content of the measure before the end of the legislative procedure, instead of resorting to the ECJ afterwards. However plausible, this scenario does not in fact hamper the capacity of the Commission to challenge the legality of the measure after its adoption. On the other hand, the same can be said with regard to the role of negotiator of trade agreements enjoyed by the Commission. As foreseen in Art. 207(3) TFEU, second and third alinea, such role is played on behalf of the Council, within the framework of the directives issued by the latter and under the strict control of its specialised committee (formerly known as 'Article 133 Committee'). Therefore the Commission's discretion is not unlimited and the Council is ultimately responsible for the conclusion of the agreement. This leaves some room for disagreement with the Commission as regards the content of the agreement itself.

67 Under Art. 263 TFEU, fourth alinea, natural and legal persons who intend to initiate an action for annulment can do so to the extent that the contested measure is an act addressed to them or is of direct and individual concern to them or that the measure consists of a regulatory act which directly concerns the applicant and which does not entail implementing measures. This is different from the previous admissibility regime, in which individuals were required to prove their interest in the annulment of the challenged measure by means of a demonstration that the latter was of both direct and individual concern to them. The requirement of the individuality of the measure was particularly cumbersome, all the more in relation to trade measures whose scope is often too general to accommodate such condition for admissibility, which therefore represented a concrete constraint on individuals' actions against the legality of trade measures.

68 For a comparative institutional analysis argument in this respect, see the contribution by Boris Rigod in this edited Working Paper.

5. Concluding Remarks

This paper attempted to assess whether innovations brought about by the Lisbon Treaty in relation to the Union trade policy and to EU external action will cause a rethinking of the Union's strategy in the management of trade disputes.

The arguments presented herein lead to the conclusion that such a rethinking of the Union's strategy for the management of commercial disputes is likely to take place insofar as the previous strategy will no longer prove suitable for the achievement of the current objectives of the EU trade policy. This is for three reasons. First, the objectives themselves have changed in number and nature, now encompassing both trade and non-trade goals. Secondly, the circumstances of EU trade action have changed and additional constraints might arise to the extent that the EU constitutional architecture has come to encompass a legally binding Charter of Fundamental Rights and the Union itself is bound to eventually join the European Convention for Human Rights and Fundamental Freedoms. Finally, if considered in the light of both the new objectives and the new context of the Union's trade policy, the current strategy appears too risky and therefore unbearable, as its exposure to adverse judicial review has now become more likely.

What is next then? Whereas they have previously enjoyed a wide scope for manoeuvre, EU political institutions are now in for a quite demanding juggling exercise as their strategy towards commercial disputes must be fine-tuned so as to ensure full consideration of both trade and non-trade objectives of EU external action. The number of balls to throw in the air and catch again has suddenly grown. Bearing in mind the broader orientation of the CCP towards general and potentially conflicting external objectives, the task of balancing between liberalisation and other objectives acquires a new crucial dimension. Long established practices and orientations in policy-making are not likely to change overnight. Commercial strategies, particularly when it comes to international disputes, are no exception in this respect. Time will tell whether political institutions, particularly the Commission, the Council and the HRVP will be up to the task by means of coordination efforts, or whether the ECJ will be called to play a more active – although not necessarily corrective – role in strategy-making.

The 'New Generation' of EU Free Trade Agreements and the Duty of Consistency

Boris Rigod*

Abstract

Since its foundation, the EU has concluded about 30 free trade agreements (FTAs) with countries all over the world. Notwithstanding this huge number of agreements, the EU launched a new series of FTA negotiations in 2006. This paper, first, delineates the policy shift from strict multilateralism in trade policy to the launch of new FTA negotiations and identifies four reasons for that development: the refocusing of the common commercial policy on economic goals, the inaptitude of existing FTAs to serve them, the stalemate of negotiations within the WTO and the EU's main competitors' trade policies. Having set the framework, the paper briefly sketches out the content of the first FTA concluded under the new trade strategy. Part three then turns to the duty of consistency in EU external relations and the question of how EU FTAs may be accommodated with other EU policies. Whereas some commentators try to define 'consistency' in substantive terms, the paper argues that the decisive question is not the term's abstract meaning but rather who decides on EU policy 'consistency'. This, in turn, has repercussions on how to assess the role of FTAs in the general framework of EU external affairs.

Keywords

Common Commercial Policy (CCP) – free trade agreements – EU-Korea FTA – consistency/coherence – comparative institutional analysis

1. Introduction

Currently, there are about 30 free trade agreements between the European Union and third states, which are in force or in the process of ratification. This web of treaties covers countries in Europe, Asia, and Africa and the Americas. Notwithstanding this broad coverage, the EU launched a new series of FTA negotiations in 2006 and concluded its first FTA from this series, after a seven-year *de facto* moratorium on FTAs, with the Republic of Korea in 2010. This treaty is, however, only the first of a long list of prospective agreements. Apart from ongoing negotiations with Canada, India and Singapore, FTAs are planned with a wide range of countries all over the world.

The re-engagement in bilateral trade negotiations followed a lengthy *de facto* moratorium on activities outside the WTO framework, which aimed at sustaining the current multilateral negotiations.[1] The question hence arises: what has changed to make the Union re-embark on bilateral negotiations despite ongoing efforts within the WTO? In what follows, I shall first explain the inducements leading to the launch of new FTA negotiations. Second, I will give an overview on the EU-Korea FTA as the first tangible result of the 2006 policy shift and point out how it reflects the EU's renewed priorities. The third part puts the 'new generation' of FTAs into the broader context of the duty of consistency of the EU external action.

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1 European Commission, *Report on Progress Achieved on the Global Europe Strategy 2006-2010*, SEC(2010) 1268/2, Brussels 9 November 2010, 3.

2. Why New FTAs?

The motivations to establish preferential trading arrangements outside the WTO framework are manifold. Economists and political scientists offer various explanations why states seek to conclude trade agreements in general and FTAs in particular. The classical economic inducement is enhanced market access.[2] Based on *Ricardo's* model of comparative advantage and economies of scale, FTAs which liberalize trade increase welfare of all participants in comparison to a situation where trade barriers exist. By contrast, *Bagwell* and *Staiger* stress the function of trade agreements to discipline governments, which may, due to their country's economic ponderosity, exploit its market power, in particular to inhibit the setting of tariffs and other border measures so as to influence a state's terms-of-trade, that is the quantity of imports it can buy through the sale of its exports.[3] However, this approach is highly contested, first, because it does not seem to either explain the question why states under real-world conditions do not manipulate their terms-of-trade, or why trade agreements rarely contain rules on export duties, which are one of the few pure 'terms-of trade' instrument.[4] A third approach considers trade agreements as a means for long term government commitments, which ensure time consistency of trade policies and allow governments to resist the protectionist pressure of domestic interest groups by referring to their international obligations.[5] Others, in turn, have emphasized the role of FTAs for non-economic foreign policy goals[6] but also governments' motivations to satisfy domestic constituencies, whose interest in foreign markets and political influence has shifted the political economy equilibrium in favour of free trade.[7] Finally, FTAs are regarded as a means to put political pressure on other WTO members, in order to accelerate negotiations and deepen commitments.[8]

The inducements for the launch of the 'new generation' FTAs were, as will be shown, based on economic considerations and corresponded largely to the explanations outlined above except for the 'foreign policy' and 'terms-of-trade' arguments. The specific incitements of the EU to embark on new bilateral trade negotiations are comprehensively summarized in the Commission's 2006 'Global Europe' communication[9] and endorsed in the most recent 2010 'Trade, Growth and World Affairs' communication.[10] From these two documents, one may identify four main reasons for the launch of new FTA negotiations: first and foremost, domestic economic policy considerations; second, the inaptitude of existing trade agreements to be conducive to the EU's economic objectives; third, the stalemate of the Doha Development Round; and finally, the trade policy of the EU's main competitors.

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2 On the EU's market access strategy beyond treaty conclusion, see Joanna Miksa's contribution in this edited Working Paper.

3 K Bagwell and R Staiger, *The Economics of the World Trading System* (Cambridge, Mass.: MIT Press 2002) 18 *et seq*.

4 D Regan, 'What are Trade Agreements for? Two Conflicting Stories Told by Economists, with a Lesson for Lawyers' (2006) 9 *Journal of International Economic Law* 951, 969-82.

5 G Maggi and A Rodriguez-Clare, 'The Value of Trade Agreements in the Presence of Political Pressures' (1998) 106 *Journal of Political Economy* 574.

6 See the references in B Hoekman and M Kostecki, *The Political Economy of the World Trading System* (Oxford: Oxford University Press 2009) 480-81.

7 R Baldwin, 'A Domino Theory of Regionalism' in R Baldwin, P Haaparanta and J Kiander (eds), *Expanding European Regionalism: The EU's New Members* (Cambridge: Cambridge University Press 1995); W Ethier, 'The Theory of Trade Policy and Trade Agreements: A Critique' (2007) 23 *European Journal of Political Economy* 605.

8 Hoekman and Kostecki, *The Political Economy of the World Trading System* 480.

9 Commission of the European Communities, *Global Europe: Competing in the World' – A Contribution to the EU's Growth and Job Strategy*, COM(2006)567 final, Brussels, 4 October 2006.

10 European Commission, *Trade, Growth and World Affairs – Trade Policy as a Core Component of the EU's 2020 Strategy*, COM(2010)612, Brussels 9 November 2010.

2.1. Domestic Policy Considerations

The first and foremost objective is to stimulate economic growth. Finalizing all ongoing negotiations would result in a 1% increase of the EU GDP. Economies of scale and comparative advantage through the establishment of free trade areas would most likely foster also employment opportunities and consumer welfare and thereby create tangible results for European citizens.[11] In the words of a recent Commission communication,

> '[t]he latest generation of competitiveness-driven Free Trade Agreements (FTAs) is precisely inspired by the objective of unleashing the economic potential of the world's important growth markets to EU trade and investment.'[12]

The thereby acquired welfare gains are, however, accompanied by efficiency pressure on all producers within the free trade area. While tariffs and other import barriers may allow inefficient producers to remain in the market, the logic of the free trade area is to force these producers either to adapt to the stronger competition by becoming more productive or to give way to more efficient producers. The establishment of new free trade areas has hence (presumably) the important domestic effect of fostering innovation and efficiency through competition.

Moreover, concluding FTAs locks in domestic policy reforms. The external and the internal dimensions of trade are intrinsically linked. FTAs will increase competitive pressure on EU market actors and, arguably, promote efficiency. The establishment of free trade areas is, accordingly, a way to encourage domestic reforms and even to foster the completion of the Internal Market by creating incentives for higher economies of scale and accompanying comparative advantages in international competition. This holds true, in particular, for sectors which are not yet wholly liberalized, such as the services sector. In the same vein, by binding itself externally the Union may overcome collective action problems[13] and reject claims of domestic interest groups for protectionist measures by tying its hands *ex ante*.

Political support for a European free trade agenda, however, does not depend on economic criteria alone. Apart from 'adjustment' costs caused through competitive pressure and detrimental effects on social justice,[14] trade policy has to take into account wider policy concerns, primarily in order to ensure support by that part of the domestic constituency that has only an indirect interest in free trade. Whereas opposition to free trade has traditionally been expected from import-competing industries, nowadays resistance is broader. It ranges from worried consumers and workers to plain citizens who are worried about non-economic virtues such as labour standards, environmental protection or cultural diversity, which they feel are threatened by the forces of free trade.[15] Since these worries are not fully addressed within the multilateral framework, FTAs may be a tool to secure that these aspects are taken into account and strengthen the social legitimacy of trade policy.

In sum, the first reason for the launch of new FTA negotiations reposes on there are three domestic policy considerations: commercial interests, the lock-in of the open market model domestically and linkage issues concerning the social acceptance of trade policy. These objectives, however, also have a more far-reaching goal, which is to contribute to the Union's 'output' legitimacy.[16] This pursuit of

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[11] European Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, COM(2010)2020, Brussels, 3 March 2010, 22 *et seq.*; and European Commission, *Trade, Growth and World Affairs*, 5.

[12] European Commission, *Towards a Comprehensive European International Investment Policy*, COM(2010)343 final, Brussels, 7 July 2010, 7.

[13] Cf. M Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Mass.: Harvard University Press 1971).

[14] European Commission, *Global Europe*, 4.

[15] J Pauwelyn, 'New Trade Politics for the 21st Century' (2008) 11 *Journal of International Economic Law* 559, 563.

[16] 'Output legitimacy' can be described in terms of Lincoln's famous description of the main elements of democracy as 'government for the people', which requires 'no more than the perception of a range of common interests that is

legitimacy is brought home in the 'Global Europe' communication, which states: '[E]conomic prosperity, social justice and sustainable development […] are a core criterion by which citizens will judge whether Europe is delivering results in their daily lives.'[17]

2.2. Inaptitude of Existing FTAs

The next reason to embark on new bilateral trade accords is that existing FTAs do not fully serve the current EU trade policy's objectives.[18] While they promote the EU's security and development policy interests quite well, they have a low impact on trade, mainly because the respective FTA partners are of relatively little importance for EU trade. The inducements for many FTAs were mainly political. The Union's exclusive competence in the field of external trade (Art. 207(1) *juncto* Art. 3(1)(e) TFEU) has made FTAs susceptible to the use of purposes other than commercial interests, i.e. in this case, to meet general foreign policy concerns.[19] The constant struggles for the common commercial policy's accurate scope between Commission and Council provide illustrative examples for this susceptibility.[20] Therefore, existing EU FTAs can be subdivided into two broader groups: those which are motivated primarily by foreign policy considerations, such as development, security and the promotion of regional integration and those which aim at commercial objectives.[21]

The first group comprises three kinds of agreements with either developing countries or countries in transition. First, European Partnership Agreements with regional groups of the African, Caribbean and Pacific (ACP) countries which aim at development and poverty reduction through trade and provide for political dialogue.[22] Secondly, agreements within the framework of the neighbourhood policy, i.e. the Euro-Med Agreements with the Mediterranean states that promote economic integration and democratic reforms within these countries and the Partnership and Cooperation Agreements with the eastern neighbours such as Ukraine. Finally, the Stabilisation and Association Agreements with the Western Balkan Countries, which intend to ensure peace and stability within the region by providing support by, *inter alia*, establishing a free trade area among the respective countries and the Union, and primarily aim at preparing these countries for prospective membership in the Union.

Apparently, these agreements are less commercially motivated and make no claim to have a huge impact on economic welfare in the Union, at least not at the moment. That these agreements serve other purposes, too, is strongly reflected in the broadness of issues addressed, which reach far beyond trade, as, for instance, rules on illegal immigration,[23] on nuclear safety[24] or on illicit drugs.[25] All these

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sufficiently broad and stable to justify institutional arrangements for collective action'. F Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press 1999) 12.

17 European Commission, *Global Europe*, 2.

18 European Commission, *Global Europe*, 9.

19 O Cattaneo, 'The Political Economy of PTAs' in S Lester and B Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge: Cambridge University Press 2009) 28, 44-5.

20 Cf. P Eeckhout, *External Relations of the European Union: Legal and Constitutional* Foundations (Oxford: Oxford University Press, 2005) chapters 2-4; P Koutrakos, *EU International Relations Law* (Oxford: Hart Publishing 2006) chapters 1-3 both with references to the relevant case-law.

21 For a similar distinction see M Cremona, 'The European Union and Regional Trade Agreements' (2010) 1 *European Yearbook of International Economic Law* 245 and 249. For an analysis of most of these agreements see M Maresceau, 'Bilateral Agreements concluded by the European Communities' (2004) 309 *Collected Courses of the Hague Academy of International Law* 311-450.

22 L Bartels, 'The Trade and Development Policy of the European Union' (2007) 18 *European Journal of International Law* 715, 733 *et seq.*

23 Art. 57 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part [2000] OJ L147/3.

24 Art. 103 of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84/13.

fields clearly exceed the conventional coverage of trade agreements. Even though one may be tempted to explain the inclusion of non-trade issues by the inference that the Union would use its trading power as leverage to pursue non-trade objectives,[26] the actual normative value of the provisions contradicts this view. About 92% of all the provisions beyond the scope of traditional FTA coverage are unenforceable.[27] Moreover, trade under all of these arrangements accounts for only 5,2% of all EU imports and 8,4% of its exports.[28] A further argument for the 'mixed' motivations to conclude these agreements is their non-reciprocal phase-in period, i.e. the amount of time until tariffs are fully abolished. Whereas goods from these countries may be imported duty free from the entry into force of the respective agreement, tariffs on goods originating in the EU are abolished only in successive annual steps.[29] FTAs as a means to foster economic prosperity in the Union are hard to justify against this backdrop. The first group of agreements must, therefore, be assessed as a foreign policy tool, which utilizes trade as leverage.[30] Nevertheless, these treaties represent nearly two thirds of all EU FTAs.

The second group of more commercially motivated FTAs comprises agreements with European countries either under the Agreement on the European Economic Area[31] or under separate agreements establishing customs unions such as with San Marino[32] and Andorra[33] and the agreements with Chile,[34] Mexico[35] and, arguably, South Africa.[36] All these agreements are, however, either with countries whose markets are rather static and do not hold for fast growth or with countries which only account for a small share of EU trade (see also Figure 1).

In view of this analysis, the main objective of contributing to the 'Europe 2020' strategy by creating growth through trade is not well served by existing FTAs. In particular trade relations with the emerging market economies in Asia and South-America are neglected under established agreements. In order to contribute *via* trade policy to the 'Europe 2020' goals of sustainable, intelligent and inclusive growth, new FTAs are necessary.

(Contd.)

25 Art. 79 of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part [2005] OJ L26/3.

26 S Meunier and K Nicolaidis, 'The European Union as a Conflicted Trade Power' (2006) 13 *Journal of European Public Policy* 906.

27 H Horn, P Mavroidis and A Sapir, 'Beyond the WTO: An Anatomy of EU and US Preferential Trade Agreements' (2010) *The World Economy* 1565, 1583.

28 European Commission, *Trade, Growth & World Affairs*, 20.

29 E.g. Art. 11 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/2.

30 Cf. also A Winters, 'EU's Preferential Trade Agreements: Objectives and Outcomes' in P Van Dijck and G Faber (eds) *The External Economic Dimension of the European Union* (The Hague: Kluwer 2000), 196.

31 Agreement on the European Economic Area [1994] OJ L1/3.

32 Agreements on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino [2002] OJ L84/43.

33 Agreement between the European Community and the Principality of Andorra [2005] OJ L135/14.

34 Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part [2002] OJ L352/3.

35 Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part [2000] OJ L276/45.

36 Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part [1999] OJ L311/3. The agreement with South Africa is not clear cut. While the initiation of the agreement followed a commercial logic and was induced by DG Trade, the actual negotiations were carried out by DG Development with a significant impact on the final result. See M Frennhoff Larsén, 'Trade Negotiations between the EU and South Africa: A Three-Level Game' (2007) 45 *Journal of Common Market Studies* 857.

Figure 1: EU Preferential Trade Agreements Concluded

'Political' Trade Agreements	Enlargement Policy: Stabilisation and Association Agreements	Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia
	European Neighbourhood Policy: Euro-Med Agreements / Partnership and Cooperation Agreements	Algeria, Egypt, Israel, Jordan, Morocco, Lebanon, Occupied Palestinian Territory, Syria, Tunisia, Armenia, Azerbaijan, Georgia, Moldova, Ukraine
	Development Policy: Cotonou-Convention / European Partnership Agreements	ACP countries
'Pure' Trade Agreements	European Economic Area	Iceland, Liechtenstein, Norway
	Customs Union / FTAs with European Countries	Andorra, San Marino, Turkey / Switzerland
	FTAs with Countries outside Europe	Chile, Mexico, South Africa, South Korea

Figure 2: EU Preferential Trade Agreements Under Negotiation

'Pure' Trade Agreements	North-America: Comprehensive Economic and Trade Agreement	Canada
	Far East: Free Trade Agreements	India, Singapore, ASEAN
	Middle East: Free Trade Agreement	Gulf Cooperation Council
'Political' Trade Agreements	South-America: Free Trade Agreement	Colombia & Peru, Mercosur
	Middle East: Deep and Comprehensive Free Trade Agreements	Amendments Euro-Med Agreements
	Eastern Europe: Deep and Comprehensive Free Trade Agreement	Ukraine

Consequently, the criteria for the launch of FTA negotiations have changed. Whereas broader policy considerations will still be taken into account, it is now primarily market potential and the level of protection against EU export interests that will be decisive to embark on new negotiations.[37] In line with these requirements, the EU has identified its potential treaty partners.

2.3. Stalemate of the Doha Round

A third reason to embark on new FTA negotiations has been the stalemate of the Doha Development Round (DDR). The DDR is the current trade negotiations round of the WTO, which commenced in 2001. Its main goal has been to implement the WTO development objectives, as set out in the preamble of the Marrakech Agreement establishing the WTO,[38] i.e., in particular, to secure developing countries a share in the growth of world trade commensurate to their needs of economic development. Although the EU has reiterated its commitment to the multilateral system on several occasions, the slow progress completing the round has been one of the crucial motivations for the shift towards selective bilateralism.

The Union embarked on the round with a highly ambitious agenda. It aimed at deepening existing commitments, in particular in the services sector but also brought up a range of new matters extending the ambit of the WTO, in particular the four so-called 'Singapore Issues'[39] (i.e. investment, competition, transparency in government procurement and trade facilitation). Moreover, the quest for clarification of the role of environmental and labour standards in the WTO legal order was on the Union's agenda.[40] However, after two rounds of negotiations the EU realized that it could not find enough support among WTO Members and negotiations collapsed during the Cancun Ministerial Meeting. Developing countries, in particular, rejected attempts to extend the coverage of WTO obligations rather than addressing their interests and needs under existing rules. Eventually, three of the four issues were taken off the agenda with trade facilitation being the only one still under negotiations in the WTO. After the breakdown of the talks and the formal suspension of the negotiations in 2006 the Commission launched the 'Global Europe' strategy, which illustrates the tight linkage between failed efforts in the WTO and the shift towards bilateralism.

It is noteworthy that the Singapore issues were not pursued out of mere commercial interest.[41] The establishment of a regulatory framework 'beyond tariffs and quotas' formed part of the Union's broader agenda to 'harness' globalization.[42] The failure to integrate these new and, arguably, important issues into the multilateral framework, led the Union to look for 'second-best' solutions. Accordingly, the 'Global Europe' communication states that key issues, including the 'Singapore Issues', should be addressed through FTAs[43] and the Union has thenceforth included rules on competition, transparency in government procurement and investment in its trade agreements and in particular in EPAs with developing countries.[44]

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37 European Commission, 'Global Europe' 9.

38 WTO, 'Ministerial Declaration adopted on 14 November 2001', WT/MIN(01)/DEC1, para. 2 *et seq.*

39 The term 'Singapore Issues' refers to four working groups set up during the 1996 WTO Ministerial Meeting in Singapore.

40 Council of the European Communities, 'Preparation for the Third WTO Ministerial Conference – Draft Council Conclusions', Document 12092/99 WTO 131, Brussels 22 October 1999.

41 D De Biévre, 'The EU Regulatory Trade Agenda and the Quest for WTO Enforcement' (2006) 13 *Journal of European Public Policy* 851, 853 *et seq.*

42 P Lamy, 'Europe and the Future of Economic Governance' (2004) 42 *Journal of Common Market Studies* 5.

43 European Commission, 'Global Europe' 8.

44 Cf. e.g. Art. 65 *et seq.* (Investment); Art. 125 *et seq.* (Competition); Art. 165 *et seq.* (Public Procurement) Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part [2008] OJ L289/I/3.

2.4. Trade Policy of the EU's Main Competitors

Lastly, the EU was inspired to shift its trade policy in view of the strategies followed by its main competitors, notably the USA and Japan, which also engaged in FTA negotiations with the EU's priority FTA partners.[45] The US, for instance, has already concluded and ratified an FTA with Korea, one of the EU's priority partners, and has further FTAs on its trade agenda. Japan has embarked on negotiations with ASEAN countries, another high-listed EU FTA partner. Under these circumstances the problem of trade diversion becomes urgent. 'Trade diversion' denotes the possibility that with the establishment of preferential trade agreements there is the risk that trade flows are not established between the most efficient traders but, due to the protection of the respective markets through tariffs, are diverted to less efficient traders within the preferential trade area. This may happen when tariff reductions outweigh efficiencies.[46] This was the EU's experience after the conclusion of NAFTA, which resulted in a substantial loss in market share for the EU in Mexico.[47] The example of NAFTA also helps explaining today's move towards FTAs. NAFTA triggered what *Baldwin* coined the 'domino effect' of regionalism.[48] It induced EU exporters who suffered from it to lobby for the conclusion of an FTA with Mexico in order to restore competition. In this vein, today's political economy equilibrium shifted in respect of other FTA partners, too. To launch FTAs is, transposed on the 'new generation' FTAs, hence also a defensive means to maintain a 'level playing field' on emerging markets and to prevent trade diversions to the detriment of EU exporters.[49]

2.5. Interim Conclusion

The launch of a 'new generation' of EU FTAs depicts a further-reaching policy shift. While FTAs have been concluded in the past almost solely within the framework of other policies, the 'new generation' FTAs aim primarily at commercial goals in order to contribute to the 'Europe 2020' strategy.[50] Economic welfare is a strong thread of legitimization for the Union[51] and successful trade policy forms one part of this general approach. Thus, FTAs are nowadays emancipated to a certain extend from other policies and shall operate as a discrete means to achieve economic objectives outside the WTO framework. This is a significant policy change insofar as it redefines the role FTA shall play in EU external relations. Furthermore, it brings home that the political choice for ensuring economic welfare inside Europe has been made in favour of more, rather than less competition by extending the potential sales markets but also the number of competitors.

Nevertheless, one should not overlook the fact that FTAs are only a 'second-best' solution to attain economic objectives and are by no means a panacea. Even if all planned FTAs were concluded, they would, together with preferential systems for developing countries,[52] cover only 50 % of EU external trade. MFN-tariffs would still apply to trade with all EU major trading partners (Australia, China,

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45 European Commission, Staff Working Document, *Global Europe*, 14.

46 J Viner, *The Customs Union Issue* (New York: Carnegie Endowment for International Peace 1950) 43-44.

47 European Commission, Staff Working Document, *Global Europe*, 17.

48 R Baldwin, 'A Domino Theory of Regionalism'.

49 On previous cases of trade diversion: A Dür, 'EU Trade Policy as Protection for Exporters: The Agreements with Mexico and Chile' (2007) 45 *Journal of Common Market Studies* 833.

50 See also C Brown, 'The European Union and Regional Trade Agreements: A Case Study of the EU-Korea FTA' (2011) *European Yearbook of International Economic Law* 297, 308.

51 G Majone, *Europe as the would-be world power: the EU at fifty* (Cambridge: Cambridge University Press 2009) 143 *et seq*.

52 Council Regulation (EC) 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, OJ [2008] L211/1.

Japan, New Zealand, Russia[53] and the United States).[54] Important regulatory issues, by contrast, may be addressed more effectively through FTAs since the Union can more easily trade market access for regulatory issues in bilateral negotiations. Due to the nature of these issues, they may, nevertheless, have a multilateral effect. When an FTA partner decides to adopt competition laws or rules on public procurement, these will most likely not only govern trade with the Union but also be of general application. The same holds true for environmental and labour standards.

3. What is New? The EU-Korea FTA

This part addresses the question of how the policy shift and the new role of FTAs are reflected in actual agreements. The first tangible result of the 'new approach' is the FTA with the Republic of Korea.[55] The agreement, which was concluded on 6 October 2010, is remarkable at first glance for a rather prosaic reason. It is the first EU agreement with a non-European state to be plainly labelled as 'Free Trade Agreement' without any attempt to embed it into a wider political context. However, in the case of Korea this may be explained by the fact that the FTA has been concluded under a broader framework agreement[56] between Korea and the Union and forms an integral part thereof.[57] Nevertheless, apart from the EEA and the WTO-Agreement, it is the Union's first treaty to make clear from the outset that it only addresses trade aspects. Accordingly, the agreement abandons the inclusion of non-trade related issues and its substantive provisions are widely modelled on the WTO-agreements.

The substantive content of the agreement may be subdivided into two broader categories. First, WTO-plus rules, i.e. provisions which correspond to the current mandate of the WTO and where the agreement provides for bilateral commitments beyond those accepted multilaterally. Examples are tariff reductions, additional commitments in services and the extensions of IP-rights. Second, extra-WTO rules, i.e. provisions lying outside the current body of WTO rules, such as, for instance, competition and labour standards.[58] In what follows I will briefly depict some of the FTA's content.

3.1. WTO-plus Rules

3.1.1. Trade in Goods

In the fields of goods, the agreement brings about a substantial reduction of tariffs on industrial and agricultural goods. Industrial tariffs will be phased out within a maximum period of seven years and agricultural tariffs within a maximum of 20 years. However, most tariffs will be abolished long before these dates. While the average MFN-tariff on industrial products was not particularly high prior to the

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53 Even though Russia is not a member of the WTO the MFN tariff applies to trade with it. See Art. 10(1) Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part [1997] OJ L327/3.

54 Trade with these countries accounts for about 50 % of all imports and 39% of all exports. Cf. European Commission, *Trade, Growth & World Affairs*, 20 Table 1.

55 Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, http://trade.ec.europa.eu/doclib/press/index.cfmid=443&serie=273&langId=en.

56 Framework Agreement for Trade and Cooperation between the European Community and its Member States, on the one hand, and the Republic of Korea, on the other hand [2001] OJ L90/46.

57 Art. 15.14 (2) of the EU-Korea FTA.

58 For this categorization see: Horn, Mavroidis and Sapir, 'Beyond the WTO: An Anatomy of EU and US Preferential Trade Agreements' 1567.

FTA (EU average: 5.2%; Korea average: 6.8%), tariffs on agricultural products on the Korean side have been massive and amounted to an average tariff rate of 48% (EU average: 15.4%).[59]

Perhaps even more important are the achievements in the field of non-tariff barriers, which are assessed in many cases as being even more trade restrictive than tariffs. Besides reaffirming the parties' mutual commitments to the TBT and SPS agreement,[60] the FTA provides for the first time ever in an EU FTA for provisions on technical regulations in specific sectors, such as electronics, automotive, pharmaceuticals and chemicals. It provides for both substantive, binding rules (electronics and automotive) and 'best endeavour' provisions (pharmaceuticals and chemicals). The substantial rules stipulate in the field of automobiles that technical safety standards will henceforth be broadly accepted as equivalent ('mutual recognition').[61] Moreover, Korea will align many of its automobile standards to the international UN-ECE standards.[62] Safety standards for electronics must prospectively be based on international standards and will, hence, be broadly harmonized.[63] Furthermore, the supplier's declarations of conformity will be widely accepted as positive assurance of conformity with the respective rules.[64] In sum, innovative means are introduced in the FTA to address the increasingly crucial issue of standards. The achievements in addressing non-tariff barriers are, arguably, the most innovative and far-reaching concerning trade in goods.

3.1.2. Trade in Services

The Korea FTA is the most ambitious services FTA ever concluded by the Union and will bring about large-scale liberalization concerning all modes of services and in numerous sectors such as, for instance, telecommunications and legal services.[65] Regarding trade in services the overview in this paper will, however, be limited to GATS 'mode 3' supply (establishment), i.e. foreign direct investment (FDI). Even though FDI became an exclusive competence of the Union with the entry into force of the Lisbon Treaty (Art. 207(1) *juncto* Art. 3(1)(e) TFEU), the agreement does not fully cover this aspect. It remains confined to market access[66] and non-discrimination[67] of foreign suppliers but does not entail substantial investment protection. Such protection may be included after a review phase of three years. The FTA explicitly provides for the possibility to amend the treaty to include provisions on the protection of investment.[68] However, today substantial protection of foreign investors is provided in bilateral investment treaties (BITs) between Korea and individual Member States. While these agreements provide for a higher standard of protection and most notably investor-state-arbitration,[69] none entails pre-establishment rights, i.e. market entry, but instead state that the contracting parties shall 'admit investments in accordance with their laws and regulations'.[70] The purpose of the FTA in investment is, thus, to complement existing BITs by providing for market

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59 European Parliament, DG External Relations, *An Assessment of the EU-South Korea FTA*, (2010) 78, www.europarl.europa.eu/activities/committees/studies/download.do?language=et&file=32051.

60 Art. 4.1 and 5.4 of the EU-Korea FTA.

61 Art. 3 Annex 2-C of the EU-Korea FTA.

62 Art. 4 Annex 2-C of the EU-Korea FTA.

63 Art. 2 Annex 2-B of the EU-Korea FTA.

64 Art. 3 (b)(i) Annex 2-B of the EU-Korea FTA.

65 The lists of concessions are annexed to chapter 7 EU-Korea FTA.

66 Art. 7.11 of the EU-Korea FTA.

67 Art. 7.12 & 7.14 of the EU-Korea FTA.

68 Art. 7.16(2) of the EU-Korea FTA.

69 E.g. Art. 11 Treaty between the Republic of Korea and the Federal Republic of Germany concerning the promotion and reciprocal protection of Investments, entered into force 15 January 1967.

70 E.g. Art. 2(1) Agreement between the Government of the Republic of Korea and the Government of the Republic of Latvia for the Promotion and reciprocal Protection of Investments, entered into force 26 January 1997.

access.[71] The Korea FTA explicitly acknowledges more favourable rights of foreign investors provided for in BITs and does not limit any of these rights.[72] However, today only 20 of the 27 Member States have concluded BITs with Korea[73] and the standard of protection and access to justice, accordingly, differs depending on the nationality of the respective investor.[74]

3.1.3. IP-Rights

What is salient about the chapter on intellectual property rights (IPR) in the EU-Korea FTA is first of all its impressive level of detail with 69 articles (the TRIPS contains only four articles more). It deviates from all previous EU FTAs, which usually only provided for one or two articles on IP.[75] Despite being based on the TRIPS Agreement,[76] the FTA provides for enhanced protection and enforcement of IPRs. For instance, with regard to patent terms the FTA provides for an effective term that takes account of delays in registering a patent. Patent holders must be compensated 'for the reduction in the effective patent life as the result of the first authorisation to place the product on their respective markets.'[77] Regarding enforcement, the FTA goes well beyond existing FTAs and, concerning criminal enforcement, even beyond domestic rules.[78] The FTA, for instance, provides for the liability of online service providers for IP infringements.[79] The extensive chapter on IP will, hence, most likely be the model for future FTAs.

3.2. WTO-extra Rules

3.2.1. Singapore Issues

The parts on the 'Singapore issues' are kept relatively short in the agreement. The chapter on competition mainly states that the contracting parties shall provide for competition laws within their respective territories and that certain activities restricting competition, such as cartels, the abuse of a dominant position and mergers impeding effective competition, are incompatible with the proper functioning of the agreement.[80] Since both parties have competition laws in place, the FTA's only effect is that none of the parties can abolish its anti-trust laws. Notably, the definitions of anti-competitive practices coincide with the respective EU law provisions (Arts. 101, 102 TFEU & Art.

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71 European Commission, *Towards a Comprehensive European International Investment Policy*, 5.

72 Art. 7.15(a) EU-Korea FTA.

73 Bulgaria, Cyprus, Estonia, Ireland, Luxembourg, Malta and Slovenia have not concluded BITs with Korea.

74 The issue is addressed in a proposal for a regulation. See Art. 9 Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, COM(2010)344 final.

75 Cf. Art. 32 of the EU-Chile; Art. 12 of the EU-Mexico. But see from a more recent agreement Art. 139 - 164 of the EU-Cariforum.

76 Art. 10.2(1) of the EU-Korea FTA.

77 Art. 10.35(2) of the EU-Korea FTA.

78 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 195/16.

79 Art. 10.62 *et seq.* EU-Korea FTA.

80 Art. 11.1 of the EU-Korea FTA.

2(3) Regulation 139/2004[81]). Furthermore, the FTA provides for cooperation between the respective competition authorities.[82]

Since Korea is already a member of the plurilateral WTO Agreement on Government Procurement (GPA), the chapter on public procurement is also rather short. Besides reinforcing the parties' rights and obligations under the GPA, the most notable deviation is that Korea, which has developing country status in the WTO, will not rely on special and differential treatment towards the EU.[83] Concerning substantial coverage beyond the WTO concessions, both parties will have access to public infrastructure procurement ('BOT-contracts').[84]

3.2.2. Sustainable Development

The agreement's 'flanking' policies, which are described in the chapter on sustainable development provide for provisions on environmental protection and labour standards. However, the respective provisions are rather weak. The rules on environmental protection are drafted in a 'best-endeavour' language without concrete obligations. What is new is the reference to the United Nations Framework Convention on Climate Change and the Kyoto Protocol as constituting the ultimate objectives of the parties.[85]

Labour standards are addressed by reference to the relevant International Labour Organization (ILO) conventions. The provision's language is a little stronger, as it provides that the parties 'commit to respecting, promoting and realising' in their laws certain labour-related fundamental rights such as freedom of association and the effective abolition of child labour.[86] The FTA, however, does not oblige the parties to ratify ILO conventions. This seems problematic, since Korea has not ratified important ILO conventions on freedom of association and forced labour (Conventions 87, 98, 29 and 105).[87] The legal force of the sustainable development provisions is further weakened by their exclusion from the regular dispute settlement mechanism. Disputes about labour and environmental standards are only subject to a special dispute settlement procedure, establishing a panel of experts, which may issue non-binding reports.[88]

Grave violations of human rights and democratic principles can, nevertheless, be addressed through the Framework Agreement, of which the FTA forms an integral part.[89] According to Art. 1 of the Framework Agreement: '[r]espect for democratic principles and human rights as defined in the Universal Declaration on Human Rights inspires the domestic and international policies of the Parties and constitutes an essential element of this Agreement'. The infringement of these 'essential elements'[90] allows either party to suspend the Framework Agreement[91] and, hence, also the FTA.

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81 Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

82 Art. 11.6 of the EU-Korea FTA. Note that cooperation between the respective competition authorities is comprehensively regulated in the Agreement between the European Communities and the Government of the Republic of Korea concerning cooperation on anti-competitive activities [2009] OJ L 202/36.

83 Art. 9.1(4)(b) of the EU-Korea FTA.

84 Art. 9.2(2) in conjunction with Art. 1 Annex 9 of the EU-Korea FTA.

85 Art. 13.5 of the EU-Korea FTA.

86 Art. 13.4(4) of the EU-Korea FTA.

87 European Parliament, *An Assessment of the EU-South Korea FTA* 91.

88 Art. 13.14 (2) of the EU-Korea FTA.

89 Art. 15.14 (2) of the EU-Korea FTA.

90 On essential element clauses see L Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press 2005).

91 Art. 23 of the EU-Korea Framework Agreement.

3.3. Interim Conclusion

Already from this cursory overview it has become clear that the EU-Korea FTA differs from all previous EU FTAs. Its structure reflects the new role assigned to FTAs as a discrete trade policy tool. Trade and economic aspects are regulated in a very detailed manner, whereas non-trade issues are reduced to a minimum. In line with the general developments in EU trade policy, the concentration on economic relations is a paradigm shift and the EU Korea FTA a reflection thereof. The motivation to contribute to economic welfare inside Europe is the *Leitmotiv* of current EU trade politics, which is accompanied, but by no means dominated, by flanking policies. Whereas previously the pursuit for 'global governance' objectives or 'harnessing globalization' were the primary incitements of EU trade politics,[92] today commercial goals, interrelated with domestic policy concerns, occupy that place.[93] It goes without saying that this does not mean that normative values no longer play a role in EU trade politics; they are, however, receiving less attention than they used to before the policy shift in 2006.[94]

4. FTAs and the Duty of Consistency in External Action

Interestingly, the paradigm shift in EU trade politics coincides with an adverse primary law amendment. For the first time ever, the common commercial policy ('CCP') is explicitly embedded into the broader framework of EU external relations. According to Art. 207(1) TFEU, which refers to Art. 21 TEU, '[t]he common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'. These objectives and principles mostly refer to 'post-modern' or 'normative' values such as the protection of human rights, the promotion of democracy and the establishment of the rule of law. To be performed in this context, the common commercial policy's principal objective, i.e. international economic liberalization,[95] must be reconciled with these non-economic virtues.[96] The respective provisions, however, entail little substantive guidance and leave wide discretion to the political institutions. Judicial review on grounds of the Union's objectives is, accordingly, limited.[97]

The EU Treaties, furthermore, emphasize the duty of consistency. For instance, Art. 21(3) TEU states 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.'

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92 This holds true in particular for the tenure of former trade commissioner Pascal Lamy. See C Herrmann, 'Die Außenhandelsdimension des Binnenmarktes im Verfassungsentwurf: Von der Zoll- zur Weltordnungspolitik' (2004) *Europarecht* 3 Beiheft 175, 179 *et seq.* with further references.

93 S Meunier, 'Managing Globalization? The EU in International Trade Negotiations' (2007) 45 *Journal of Common Market Studies* 905, 906.

94 M Elsig, 'The EU's Choices of Regulatory Venues for Trade Negotiations: A Tale of Agency Power?' (2007) 45 *Journal of Common Market Studies* 927, 935. Other commentators argue that normative values have never played a decisive role in 'hard cases', see H Zimmermann, 'Realist Power Europe? The EU in the Negotiations about China's and Russia's WTO Accession' (2007) 45 *Journal of Common Market Studies* 813; *idem*, 'How the EU negotiates Trade and Democracy: The Cases of China's Accession to the WTO and the Doha-Round' (2008) 13 *European Foreign Affairs Review* 255.

95 Art. 206 TFEU reads: '[T]he Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.'

96 For a discussion of the possible impact of the restructuring of principles and objectives of EU external action through the Lisbon Treaty with regard to trade dispute settlement, see the contribution by Valeria Bonavita in this edited Working Paper.

97 Case 112/80 *Dürbeck* [1981] ECR 1095, para. 44.

The Treaty text, thus, encourages closer linkages between EU external policies, in particular with regard to non-economic objectives. However, trade politics seem to head in another direction by emancipating from other policies and not serving primarily foreign policy objectives anymore. Whereas pre-Lisbon there was no legal link between trade and other policies, they were, nevertheless, *de facto* connected. Today, in contrast, the CCP is explicitly subject to the framework of EU external relations but attempts *de facto* to refocus on economic concerns, at least in the field of bilateral trade agreements. Reality and normative demands seem, thus, to have developed not in full convergence.

The question arises as to how trade and other EU policies, such as development, are linked. How must, for instance, agricultural policy be taken into account in the course of trade policy making? How can FTAs be accommodated with other Union policies so as to comply with the duty of consistency in EU external relations?

The term 'consistency' is commonly referred to as the absence of contradictions between the different external policy areas. However, due to ambiguities between the different language[98] versions and the overarching Treaty aim to bring about mutual support between all Union policies, consistency should rather be understood as 'coherence', i.e. the positive obligation to ensure synergy between the different external policies.[99] I will follow this proposal and will use henceforth the term ‘coherence’. The objectives this definition of ‘coherence’ is geared to are twofold. On the one hand, it shall ensure efficiency; on the other hand, it shall generate legitimacy by making policy actions amenable to rationally motivated acceptance, which is based on the insight that the respective action is concerted with the EU’s other policies.

By the same token, *Cremona* has elaborated a more differentiated notion of coherence. In the first place, she distinguishes between ‘vertical’ and ‘horizontal’ coherence; the former refers to the relationship between Member States and the Union, whereas the latter concerns inter-policy coherence on the Union level.[100] Secondly, she suggests that ‘coherence’ should be understood as a three-level concept.[101] The first level refers to rules of hierarchy such as the primacy of EU law and the precedence of primary over secondary EU law. The second level denotes rules of delimitation between different actors in order to avoid duplications and gaps. Finally, ‘coherence’ comprises ‘synergy between norms, actors and instruments’, i.e. principles of cooperation and complementarity. My concern will be solely the legal effect of this ‘consistency’ requirement.

In the following I shall deal only with the ‘horizontal’ dimension of coherence and, furthermore, only with the level Cremona has coined ‘rules of delimitation’, i.e. the delimitation of competences between actors. The crucial question in this regard seems to be, however, not how to provide an exact definition of the term in the abstract but to ascertain which is the right institution to assess whether the different external actions are coherent. In other word, who shall decide what is efficient and how to balance different policies against each other? As *Komesar* noted:

> ‘The analyst of legal decisions, [...], should adopt a “comparative institutional approach”, which can be simply stated as follows: the determinants of legal decisions can best be analyzed when

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98 Wheras the English version speaks of ‘consistency’, the French, German, Italian, and Spanish ones use the term ‘cohérence’, ‘Koheränz’, ‘coerenza’, and ‘coherencia’, resepectively, which denotes ‘coherence’.

99 C Hillion, ‘*Tous pour un, un pour tous!* Coherence in the External Relations of the European Union’ in M Cremona (ed) *Developments in EU External Relations Law* (Oxford: Oxford University Press 2008) 10, 12 *et seq.* with further references; P Van Elsuwege, ‘EU External Action after the Collapse of the Pillar Structure: In Search of a new Balance between Delimitation and Consistency’ (2010) 47 *Common Market Law Review* 987, 1013 *et. seq.*

100 M Cremona, ‘Coherence through Law: What Difference will the Treaty of Lisbon Make?’ (2008) 3 *Hamburg Review of Social Science* 11, 16 *et seq.*

101 *Idem*, 14 *et seq.*

> legal decision makers are viewed as though they were concerned with choosing the best, or least imperfect, institution to implement a given social goal.'[102]

The premise is that an objective legal determination of consistency is not feasible because synergy between policy areas is inviolably bound to political preferences, which are contingent in time.[103] Therefore, one can make a political argument that a given policy is inconsistent with another but not a legal one, since there is no objective or inter-subjective criterion to assess it. Perhaps, there should not even be a legal criterion for consistency because it had the repercussion of 'freezing' the political process to the preferences when the criterion was established. If a given set of policies were deemed as 'consistent' at a given moment, this would simply reflect the then prevalent policy preferences. These preferences are, however, not necessarily the polity's future preferences. A substantial legal criterion for consistency would thus result in an impediment to shifts of views and could hinder the evolution of political preferences.

To ensure consistency in legal terms should, thus, be understood as the quest for the best-equipped institution to assume the task. I will presume that the institution, which provides the most inclusive conditions for participation, is generally also the one to be preferred to decide on an issue. This assumption is based on *Habermas'* discourse theory: 'according to the discourse principle, just those norms deserve to be valid that could meet with the approval of those potentially affected, insofar as the latter participate in rational discourse'.[104] In this vein, 'coherence' can be understood as the rigor of an argument in the discourse or, in other words, 'coherence between statements is established by substantial arguments, and hence by reasons that have the pragmatic property of bringing about a rationally motivated agreement among participants in argumentation'.[105] Transposed to the political process 'statements' may be understood as political decisions. The crucial question is, however, where the preconditions for such discourse are ensured, or which of the imperfect alternatives should be chosen. Should it be the judicial or the political 'discourse' that has the last word on 'coherence'?

Whereas the treaties impose the duty of coherence explicitly upon the political institutions,[106] some commentators[107] esteem the courts as being competent to evaluate whether coherence between different external actions prevails. While it is true that the Courts may invalidate a trade policy measure on specific grounds as, for instance, a violation of fundamental rights or non-compliance with procedural requirements, it is less likely that they will do so because of mere incoherence.

That the duty of coherence between the CCP and thus also FTAs and other external objectives is better situated in the political process seems to be reflected in the case-law of the Court of Justice. The Court in most cases concerning external trade upheld the findings of the political institutions and was reluctant to substitute the outcome of political deliberations in the realm of external trade with its own decisions. For instance, in *Denmark v. Commission* (*Grana Padano Cheese*), the ECJ found that it is an obligation of the Commission to balance the competing policy objectives of the common

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[102] N Komesar, 'In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative' (1981) 70 *Michigan Law Review* 1350.

[103] Cf. P Koutrakos, 'Primary Law and Policy in EU External Relations – Moving away from the big picture' (2008) 33 *European Law Review* 666, 675; M Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' (2003) 40 *Common Market Law Review* 1347, 1349, who both stress the political nature of the duty of consistency and the limited effect of primary law in this regard.

[104] J Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (New Baskerville: MIT Press 1996) 127.

[105] Habermas, *Between Facts and Norms* 211.

[106] Cf. Art. 7 TFEU and Art. 18 (4) TEU, which states: The 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.

[107] Van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure' 1012 *et seq.*

commercial policy and other policies so as to ensure consistency.[108] In this case the Community had installed a scheme of export subsidies for Grana Padano cheese, which was, following two decisions of the Commission, only applicable to products from Italy but not to their counterparts from other Member States. Denmark deemed the Commission decisions as contrary to the regulation establishing the scheme, since they discriminated between like products on grounds of origin. The regulation, however, provided that in applying the scheme the Commission had to take account not only of the objectives of the common agricultural policy but also of the CCP's objectives.[109] The Court, following the Commission's reasoning accepted the argument that the extension of the aid could lead to distortions with the Communities trading partners and was, therefore, rightfully restrained to certain disadvantaged producers. To ensure coherence between agricultural and trade policy was, even in cases of discrimination of community producers, the task of the political process but not the Courts.

Even more telling in terms of choice for the appropriate institution to exercise the duty of consistency is, perhaps, *Germany vs. Council* concerning the EC regime for the importation of bananas from ACP countries.[110] In this case many different interests were at stake. Not only development, agricultural and trade policy but also fundamental rights, principles of non-discrimination and, most importantly, the establishment of a common market for bananas. The Community had installed a scheme for the importation of bananas[111] favouring domestic as well as producers from the former colonies in the ACP countries ('traditional producers') over exporters in Central and South America ('non-traditional producers'). In order to establish a common market for bananas, the remaining quotas for the importation of non-traditional bananas were distributed among importers all over the Community, regardless of their previous import channels. The result of this was that traders of non-traditional bananas had to buy import-licenses of traders of traditional bananas to stay in business, which led in fact to a wealth shift from the former to the latter. The Court, nevertheless, upheld the regulation establishing the import scheme on rather dubious grounds but most likely because it did not want to interfere with the findings of the political process. Even though the Court delved into legal scrutiny, the result of acknowledging the other institutions policy space was deference to the political branch. In the words of the ECJ:

> 'It should be pointed out in this respect that in matters concerning the common agricultural policy the Community legislature has a broad discretion which corresponds to the political responsibilities given to it (…).
>
> The Court has held that the lawfulness of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. More specifically, where the Community legislature is obliged, in connection with the adoption of rules, to assess their future effects, which cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question (…).
>
> The Court' s review must be limited in that way in particular if, in establishing a common organization of the market, the Council has to reconcile divergent interests and thus select options within the context of the policy choices which are its own responsibility.'[112]

'Discretion', 'manifestly incorrect' and 'limited review' are all proxies for the Court's decision to abstain from substituting Council's decision with its own. The choice to accept the contemplations of another institution is in itself an institutional choice. To find the right balance between all the competing claims was, again, left to the political institutions, even though their decision resulted in a

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[108] Case 263/87 *Denmark v. Commission* [1989] ECR 1081.

[109] Art. 33 Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products, [1968] OJ, English Special Edition (I), 176.

[110] Case C-280/93 *Germany v. Council* [1994] ECR I-4973.

[111] Council Regulation (EC) 404/93 [1993] OJ L47/1.

[112] Case C-280/93 *Germany v. Council* [1994] ECR I-4973, paras. 88-91.

breach of WTO law[113] and was, hence, in terms of 'coherence' with the EU's other international obligation rather problematic.

Read in conjunction the two cases yield an even clearer picture. In the first case the court justified the privileging of trade policy over domestic agricultural concerns with a reference to the CCP's objective of contributing to the harmonious development of world trade and the threat of possible counter-reactions of the Union's trade partners to any infringement of international trade obligations.[114] By contrast in the so-called 'Banana-case', even though the measure did quite clearly infringe WTO law, the Court did not take into account the possibility of countermeasures by other WTO members.[115] How to balance different policies with trade and the Union's WTO obligation is something the Courts do not see themselves well equipped for. This was reaffirmed in cases such as *Van Parys* and *FIAMM*, where the ECJ stated that

> 'an outcome, by which the Community sought to reconcile its obligations under the WTO agreements with those in respect of the ACP States, and with the requirements inherent in the implementation of the common agricultural policy, could be compromised if the Community Courts were entitled to judicially review the lawfulness of the Community measures in question in light of the WTO rules (…)'.[116]

The balancing act was thus explicitly referred to the political branch, which implied the institutional choice who shall decide. The reasons for the Courts' deference in the realm of trade law can be explained by a comparative institutional analysis, which assesses each institution's advantages and drawbacks. First of all, the duty of coherence is not definable in objective legal terms but is an oscillating one. Coherence, and thus synergy between policy areas is inviolably bound to political preferences, which are contingent in time.[117] If a given set of policies were deemed as 'coherent' at a given moment, this would simply reflect the then prevalent political preferences. These preferences are, however, not necessarily a polity's future preferences. The right balance between trade and development policy in the 1980s might not be the same in 2010. A substantive legal criterion by contrast had to be amenable to judicial review and therefore set out fixed requirements. It had to be certain and static in order to provide for a minimum degree of legal security and would thus 'freeze' the political process to the preferences at the moment when the criterion was established.[118] This in turn, would result in an impediment to shifts of political views over time and could hinder the evolution of political preferences. Pertinently, one can make a political argument that a given policy is inconsistent with another but not a legal one because there is no objective or inter-subjective criterion to assess it. In order to ensure policy flexibility, there should, perhaps, not even be one.

Another drawback courts have in ensuring 'coherence' of trade politics with other policies is that the procedural settings in court proceedings to some extent limit the participation of potentially affected interests through standing rights. Whereas EU traders, consumers and other interest group may lobby Commission, Council or Parliament, they are not necessarily involved in Court proceedings. Neither

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[113] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report adopted 9 September 1997 DS/27/AB/R.

[114] Case 263/87 *Denmark v. Commission* [1989] ECR 1081, para. 19.

[115] The US reacted with the suspension of concessions. See e.g. Case C-120 and 121/06 P *FIAMM* [2008] ECR I-6513; T-383/00 *Beamglow* [2005] ECR II-5459.

[116] Case C-377/02 *Van Parys* [2005] ECR I-1465, para. 50 and Case C-120 and 121/06 P *FIAMM* [2008] ECR I-6513, para. 118.

[117] Cf. P Koutrakos, 'Primary Law and Policy in EU External Relations – Moving away from the big picture' (2008) 33 *European Law Review* 666, 675; M Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' (2003) 40 *Common Market Law Review* 1347, 1349, who both stress the political nature of the duty of consistency and the limited effect of primary law in this regard.

[118] See also the more general critique by De Witte regarding the Constitutional Law governing EU external affairs: B De Witte, 'Too Much Constitutional Law in the European Union's Foreign Relations?' in M Cremona and B De Witte (eds) *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart Publishing 2008) 3.

are foreign governments with which the political institutions may find mutually satisfactory compromises that could be undermined by Court rulings. The review of trade policy measures is all in all an extremely complex undertaking, which may be better undertaking by the administrative and political institutions, which have more and sometimes better resources.

A third, and rather prosaic reason, for the ECJ to abstain from delving to deep into the review of trade policy measures, is the limited scale of the judiciary, which also impacts its competence. The 27 judges at the ECJ have to deal already today with hundreds of cases per year, concerning such diverse issues as the common agricultural policy, competition, or labour law. In view of this, it is practically just not feasible to add to this enormous caseload the task of overviewing the EU's external policy coherence, which would require not only taking account of measures brought before the court but also of potentially all existing trade measures. Scrutinizing measures for their coherence with the whole body of external policy measures would even aggravate this situation because it would open the floodgates and invite plaintiffs to bring potentially any external action measure before the court, in particular because it will not be too difficult to find two acts out of the whole of EU external measures which contravene the coherence-requirement. The limited resources of the court just not allow for that.

Finally, the dynamics of litigation impact the Court's ability to ensure coherence. The ECJ cannot take decisions out of its own motion but is, as any court, depended on cases brought before it. Such cases will, however, only reach it, if there are plaintiffs who have an interest in lodging a claim, which will be the case if their potential benefits outweigh the costs of litigation. For all measures were there is no such setting, the Court will simply not have the opportunity to deal with an issue. The selective treatment of issues appears, however, not to be the most promising approach to ensure coherence.

For all these reasons, the duty of coherence does not impose a legal obligation in the course of FTA-making which could be enforced by Courts. It remains a political notion and the political institutions endowed with trade policymaking must determine its content. Courts will not address trade measures under some kind of 'coherence'-test. What they will do is to scrutinize measures for their formal and substantive legality and so ensure its compatibility with EU law but not under different criteria than 'coherence'. In relevant cases, the duty of coherence will be *lex generalis*, which will be derogated by more specific rules, e.g. rules of procedure or fundamental rights.

5. Conclusion

This contribution has delineated the EU's motives to launch a new generation of FTAs. These motives are commensurate with explanations put forward elucidating why states conclude trade agreements in general and preferential agreements in particular. Enhanced market access, the lock-in of domestic EU policies and 'global domino effects' were driving incitements, which accurately describe the move towards bilateralism. Furthermore, the paper has shown that law and politics of the CCP have emerged into opposing directions. Whereas the Treaties provide for closer links between trade and other policies, the actual developments illustrate an emancipation of the CCP from trade-unrelated areas. The reflection thereof is the first FTA concluded under the new strategy. This agreement is limited to pure trade issues and makes little attempt to animate the Union's new commitment to post-modern values under the Lisbon Treaty. Finally, this does not lead to a lack of 'coherence' of EU external policies, at least not in legal terms. This was the result of the finding that 'coherence' should be understood predominantly as a procedural term, hardly amenable to judicial review. The notion of 'coherence' has been elaborated as a question of well functioning procedures and comparison of institutions. The result thereof has been that in the realm of trade there is little role for courts to ensure such 'coherence' due to their 'comparative disadvantage' *vis-à-vis* the political process.

Post-modern Trade Diplomacy: Trade, Market Access and the Lisbon Treaty

Joanna Miksa*

Abstract

The Lisbon Treaty brought significant changes to the European Union's (EU) trade policy-making in terms of competence definition and decision-making process. This paper looks at them from the perspective of the EU trade policy's offensive agenda of market access. The latter can be divided in two main pillars, market opening (mostly, but not exclusively, through free trade negotiations), and market access enforcement (removal of barriers to trade in the context of existing free trade commitments or in absence thereof). By outlining the policy practice on market access since the Global Europe communication, the paper analyses institutional and policy-making changes under the new Treaty framework that are relevant for future effectiveness of the policy. It argues that, whereas Lisbon Treaty bears a potential to render work on market access enforcement more effective, its impact on the objectives of market opening by means of free trade agreements is rather ambiguous.

Keywords

Lisbon Treaty – Global Europe – Common Commercial Policy (CCP) – market opening – market access

1. Introduction

The Lisbon Treaty (LT) introduced substantial changes to the Common Commercial Policy (CCP) of the European Union (EU), making of it one of the most affected Community policies in this respect. These innovations relate both to the scope of EU trade policy, by clarifying the field of exclusive competence, and to the decision-making process, through a radical overhaul of the European Parliament's (EP) role. In addition, the launch of the European External Action Service (EEAS) created a new institutional context, within which external trade policy is to be pursued.[1] Short of being an institution in the Treaty sense, the creation of the EEAS nonetheless brought about the need to reconsider the existing inter-institutional modes of cooperation. Altogether, the transition, which has not yet been fully completed, not only has had an impact on the way the EU can pursue its objectives in the trade area but also on the effectiveness of these efforts.

Among the main objectives of trade policy there is certainly that of market access: advancing the EU's offensive economic interests on third-country markets, through negotiations of free trade agreements and policy enforcement.[2] This essay purports to look at how the Lisbon Treaty has affected trade policy-making through the lens of work on market access. It also indicates, by means of this example, remaining challenges at both institutional and policy-making level. The paper begins by laying out the rationale behind the EU's offensive interests, followed by a more detailed account on the policy

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1 Notably by virtue of Art. 221 of the Treaty on the Functioning of the European Union (thereafter: TFEU).

2 Objectives of trade policy are defined in Art. 206 TFEU.

practice; these are in turn analysed against the Lisbon Treaty provisions on trade and their potential implications for achieving the market access objectives.

2. Trade Policy's Offensive Angle: Market Access

For many years the objective of ensuring undistorted access to third-country markets for European goods, services and investment has been framed in the context of multilateral trade negotiation rounds in the World Trade Organisation (WTO). However, with time, a regional and bilateral approach to free trade agreements (FTAs) was also adopted by the EU as part of its strategy for a faster and better access to different markets.[3] The launch of the Global Europe communication in October 2006[4] brought the EU's offensive agenda in the spotlight through the explicit focus on advancing EU trade interests by means of bilateral and regional agreements, in addition to the multilateral track. As much as this shift provoked renewed debate whether trade serves as a stepping stone, or rather is a stumbling block for the development of world trade,[5] the EU policy-makers focused on the 'value-added' aspects of free trade agreements with selected key partners. This market access logic is widely based, on the one hand, on an economic paradigm that free and open trade is supportive of growth,[6] and, on the other, on a conviction that stability of the trade environment is best preserved by means of legally binding commitments.

Consequently, the EU's contemporary market access agenda is largely based on the opening of new markets through bilateral/regional free trade agreement negotiations, with parallel existence of multilateral negotiations in the WTO. Yet at the same time, ensuring that new barriers to trade do not nullify the gains of such opening has come to be recognised as a crucial complement of this regional/bilateral negotiating strategy. For, in many respects, free trade negotiations exhaust their role as a market opening tool once an agreement is concluded, without in themselves addressing the tasks of monitoring compliance and market access enforcement activities, for which other trade instruments in turn are more appropriate. Moreover, even though free trade agreements constitute the most fundamental tool to eliminate barriers and ensure commitment to market openness, they may not always be resorted to, i.e. for political (foreign or development policy) reasons.[7] The record of suspended, not implemented or not concluded agreements with a trade component (including non-preferential) that the EU pursued is indicative in this respect. Some examples include the suspension of EU-Libya negotiations for a Framework Agreement or deferral by the EU of the ratification of the Partnership and Cooperation Agreement with Belarus, concluded in 1995. Both decisions were based on similar grounds related to the respect for democracy and human rights, taking precedence over potential economic interests. There is also a wider case of trade relations with countries of fundamental importance for EU trade, where a free trade agreement, to date, has not been considered a

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3 The EU's offensive market access interests focus on developed and emerging economies, while policy towards least developed countries is underpinned by development objectives.

4 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Global Europe. Competing in the world. A contribution to the EU's Growth and Jobs Strategy*, COM(2006)567, 4 October 2006.

5 For an interesting account see K Heydon and S Woolcock, *The Rise of Bilateralism: Comparing American, European and Asian Approaches to Preferential Trade Agreements* (Tokyo: United Nations University Press 2009).

6 It should be stressed however that this conviction is no longer unanimously shared in the academic and practitioners' debate. For a variety of views, compare: J Bhagwati, *Termites in the Trading System. How Preferential Agreements Undermine Free Trade* (Oxford: Oxford University Press 2008) but also, P Low, R Baldwin (eds), *Multilateralising regionalism: challenges for the global trading system* (Cambridge: Cambridge University Press 2009).

7 Art. 207(1) of the Treaty on the Functioning of the European Union (TFEU) clearly states that "The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." Trade policy is also guided by Art. 3 (para. 5 in particular) and Art. 21 of the Treaty on European Union (TEU).

realistic scenario (for instance, with Japan or the United States[8]). Thirdly, preferential trade agreements are not an option in the case of non-members of the WTO, in relation to which the basic multilateral trade disciplines, such as most-favoured nation or national treatment principles, do not apply (Russia, Kazakhstan). Furthermore, free trade agreements as a medium to long-term option to ensure market openness are of limited value in the short term.

Finally, conclusion of a free trade agreement, as much as it provides important channels for dispute resolution and regular dialogues where barriers to trade may be addressed, does not necessarily guarantee effective compliance and certainly does not prevent other 'smart' barriers to trade from occurring. Their nature has been changing since the 1960s, with traditional tariff-based methods of market protection being replaced by more sophisticated ones, such as non-tariff measures (NTMs).[9] Whereas they are frequently motivated by legitimate policy objectives, their intended or unintended consequences on trade may be a source of problems (non-tariff barriers, NTBs). Indeed, contemporary complaints of EU industries that relate to excessive regulatory frameworks on consumer protection, insufficient protection of intellectual property, unjustified use of sanitary and phytosanitary measures as well as complex technical regulations are common.[10] Consequently, the increasingly intrusive nature of contemporary trade in domestic policies implies that respective regulatory frameworks have not only had a strong impact on the content of free trade agreements but also render compliance more complex and protracted.

Altogether, in the face of these limitations, and against the background of exporters' concerns, the Global Europe communication[11] conceived of a parallel track to address non-tariff barriers, not only when market opening has been ensured by means of a bilateral agreement but also in situations when such an agreement does not exist or where a country is not subject to the rules of the WTO – the ultimate deterrent of trade protectionism.[12]

The revamped framework of the Market Access Strategy (MAS)[13] followed in 2007 to ensure proper enforcement of rules and commitments off the negotiating table. The Strategy reveals two main characteristics. The first, and the main, source of its strength is the concept of a so-called Market Access Partnership (MAP), which brings together representatives of the EU business community, the Commission and EU Member States. The partnership operates both in Brussels and in third countries,

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8 This is changing, however, as political considerations go in the direction of launching negotiations for a free trade agreement with Japan. Japan is the EU's sixth largest export partner (trade in goods) and sixth main importer with exports worth 43.7 billion euro (2010) and imports value equivalent to 64.8 billion euro (2010). The US remains the EU's first trade partner for exports and second for imports, with trade in goods reaching the value of 242 billion euro (2010) in exported goods and 169.5 billion euro (2010) in imports. Figures: European Commission, DG Trade statistics.

9 See for example: OECD, *Looking beyond tariffs. The role of non-tariff barriers in world trade*, OECD Trade Policy Studies, 2005.

10 See for example: European Commission, *Trade and Investment Barriers Report 2011*, COM(2011)114, March 2011. See also World Trade Organisation, *Overview of developments in the international trading environment, Annual Report by the Director-General*, WT/TPR/OV/13, 24 November 2010.

11 See *supra*, footnote 4.

12 Indeed, during the economic crisis which followed the financial one in the second half of 2008, the World Trade Organisation passed its biggest test as a framework that prevented its members from widespread resort to protectionism to shield domestic producers from the consequences of the global downturn. See *supra* and, for example, European Commission, Directorate-General Trade, *Seventh Report on potentially trade restrictive measures*, October 2010, http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146796.pdf.

13 The Strategy was initially conceived in 1996 by means of the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *The Global Challenge of International Trade: A Market Access Strategy for the European Union*, COM (96) 53 final, 14 December 1996, and implemented by virtue of *Council Decision on the implementation by the Commission of activities relating to the Community market access strategy*, 98/552/EC, 24 September 1998, OJ L 265/31. In 2007, the European Commission published a Communication *Global Europe – A Stronger Partnership to Deliver Market Access for European Exporters*, 18 April 2007, which created the Market Access Partnership.

coordinated respectively by the Commission's Directorate-General for Trade and EU delegations in third countries. The second characteristic of the Strategy is reliance on all available instruments of the EU trade strategy. Rather than reinventing the wheel, efforts were made to make better use of existing channels, on the basis of a more coordinated cooperation with the stakeholders. These include the full use of available geographical and horizontal (especially regulatory) dialogues within existing bilateral frameworks, resort to less formal trade diplomacy in the absence of specific agreements, use of WTO Committees and WTO Councils' meetings, including the WTO accession process, as well as the Trade Barrier Regulation procedures[14] and, as a last resort, the WTO dispute settlement mechanism. This is by no means an exhaustive list, for instance trade diplomacy coordinated by the EU delegations with the participation of locally based EU business and EU member states (so called Market Access Teams - MATs) in third countries constitutes also an important part of the Strategy.

The (re)launch of the Strategy in 2007 to address market access enforcement met with considerable interest of EU stakeholders at both national and European level. Whereas it may still be too early to assess its effectiveness, the short-term experience of the last couple of years indicates that substantial progress has been achieved in terms of prioritisation of work, systematic and consistent addressing of barriers to trade and regular monitoring of their removal.[15] Free trade negotiations and the Market Access Strategy have indeed come to play complementary roles to ensure that markets remain open. This complementarity has been explicitly confirmed in the latest Commission communication on Trade, Growth and World Affairs,[16] making of market access enforcement one of the priorities of the EU trade policy.

The Market Access Strategy activities, driven to a great extent by the EU business community's concerns about different barriers to trade, have in particular enabled trade policy to 'deliver' in the short-term, a commitment that is more difficult to respect in the context of free trade negotiations. Gradual increase of removed barriers (from 30 to almost 50 between 2009 and 2010 on an annual basis) and ongoing analysis and investigation of many others, together with regular feedback, have sent an important signal to stakeholders. More generally, the number of potential barriers analysed and addressed by the Commission since 2007 has been gradually increasing; the reason being not only the developments in the global economy but also, mainly, a more engaged approach of EU business and EU member states. A more systematic approach to market access enforcement, including prioritisation of main obstacles to trade, monitoring of compliance with existing agreements and of protectionist tendencies during the financial and economic crisis have enhanced the level of overall scrutiny.

3. EU's Market Access Practice Prior to Lisbon Treaty

Evolution of the market access dossier in trade policy, both through FTA and MAS channels, has been taking place against the strengths and weaknesses of trade policy-making. Beyond the wider global trade rules, the EU's own institutional and policy frameworks have come to influence its effectiveness. Some of the internal constraints have importantly been addressed by the Lisbon Treaty (of which more below). Others, such as the global macroeconomic imbalances or patterns of regional integration efforts, remain beyond the EU's direct control, shaping the global context in which the EU trade policy operates.

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[14] Council Regulation No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation, OJ L 349, 31 December 1994, p. 71.

[15] Commission Staff Working Document, *Implementation of the Market Access Strategy, Annual Report 2010 accompanying the Trade and Investment Barriers Report 2011*, SEC(2011)298, March 2011. Compare also Report from the Commission to the European Council, *Trade and Investment Barriers Report 2011*.

[16] European Commission, *Trade, Growth and World Affairs. Trade policy as a core component of the EU's 2020 Strategy*, COM(2010)612, 9 November 2010.

Of all factors that have impact on wider market access policy objectives and implementation, four have been particularly pertinent: (1) the inter-institutional dimension – relationship between the Commission and the Council; (2) definition of the EU's exclusive competence in trade policy; (3) the (post-modern) nature of EU trade diplomacy, particularly visible in the case of market access enforcement; (4) and last but certainly not least, cooperation between the stakeholders of the Market Access Partnership. The first two elements have a particular bearing for the free trade negotiations pillar of market access; while the last three are pertinent for the market access enforcement activities.

Market access opening through a free trade negotiations agenda has been influenced most significantly by the EU's inter-institutional dimension on the one hand, and by the definition of EU competence in trade policy, linked not least to the degree of integration of the EU Single Market, on the other. These elements have determined not only the institutional interplay, but also conditioned the content and effectiveness of EU negotiating strategy, particularly pertinent in the area of services, intellectual property, or investment, where a great number of EU offensive interests lie, but where completion of the EU Single Market still remains to be achieved. This specific 'capability-expectations gap', which in trade policy could be measured by distance between the 'possible' in institutional terms but also in terms of substance on the one hand, and, on the other, demands for an improved and wider access to other countries' markets,[17] revealed the borders of the EU's market opening strategy. The gaps were limited to some extent with the entry into force of the Lisbon Treaty, but important limitations remain. On the institutional level, a close relationship between the Council and the Commission is ensured through a system of trade-specific checks and balances, which determine the content and, to some extent, length of the negotiating process. Occasionally, tensions appear in the Trade Policy Committee (pre-Lisbon it was known as the 'Art. 133 Committee'), which fully plays its role as a political scrutiniser of the Commission's actions. This has been lately evidenced at the conclusion phase of the EU-South Korea FTA[18] and the controversies that commitments undertaken in the automotive sector caused among certain EU Member States. Exclusive competence of the EU in trade matters has not reduced over time the influence of the Council on the content, on the contrary, the Commission's input remains subject to close political scrutiny of the Council.

The Commission's relations with the Council as a decision-making body bear, however, less relevance (if not less scrutiny) when it comes to market access enforcement. Not only does the follow-up to an agreement remain in the domain of the Commission as a policy executive, which reports regularly to the Trade Policy Committee; market access enforcement as an objective, either in the context of concluded agreements or in their absence is per definition subject to, at best, minor controversy, given the widely shared agreement among EU member states as to its benefits for EU trade. Its implementation and effectiveness is, however, shaped by the three factors mentioned above – the post-modern nature of EU trade diplomacy, definition of trade competence, and cooperation among EU stakeholders within the Market Access Partnership.

One of the fundamental characteristics of market access enforcement policy is its somewhat naturally decentralised approach. Coordination of barrier removal and monitoring efforts takes place both from Brussels headquarters and from third countries. While the Commission's Directorate General for Trade takes the lead role and cooperates closely in Brussels with the EU Member States and business stakeholders, cooperation in third countries takes place through Market Access Teams, which mirror the Brussels cooperation structures, led by the EU delegations. The specific feature of the Partnership lies therefore in the close involvement, both in Brussels and in third countries, of EU business and of EU Member States, in market access enforcement. To some extent this approach blurs the distinction between the policy executive – the Commission – and the Member States' controlling functions in

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[17] To use the term coined by Christopher Hill, C Hill, 'The Capability-Expectations Gap, or Conceptualising Europe's International Role' (1993) 31 *Journal of Common Market Studies* 305.

[18] A comprehensive overview of the Agreement can be found at ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/korea/.

trade policy, by involving the latter more closely in policy implementation. The scope for their practical involvement is two-fold. On the one hand, EU Member States are an important source of information by bridging the gap between the national and EU-level stakeholders, including small businesses. On the other hand, their strong diplomatic presence in a number of partner countries and respective bilateral relationships create certain additional opportunities (but also risks) for trade policy. These in turn stem from the, now precise, content of EU competence in trade policy as opposed to areas which remain in the Member States' competence. Prior to the Lisbon Treaty's entry into force, these included trade promotion (which post-Lisbon is still the case) and aspects of foreign direct investment (FDI) policy linked to investment protection. Strong bilateral trade relationships that EU Member States forge with different third countries on this basis offered, in theory, room for additional leverage that could be applied to address outstanding market access barriers. It is to that purpose that the Commission and Member States aligned respective positions and messages on most pertinent barriers to trade, with a view to strengthening the EU voice in trade diplomacy.

From the Brussels perspective, therefore, implementation of the barrier removal strategies lies in the hands of the Commission but the EU Member States and business representatives are closely associated with this work.[19] In turn, the picture *in situ*, as seen from the EU delegations' point of view, looks a bit different. Market Access Teams, although mirroring the Brussels-based modes of cooperation, are no rigid structures but merely reflect the concept of the Partnership and are adapted to local conditions. The most important advantage of MATs is close direct contact with authorities of the partner country and access to information. Monthly EU trade counsellors' meetings, which were chaired by the rotating Presidency Member State until the Lisbon Treaty's entry into force, are the most frequently used opportunity to discuss market access issues.

While Union delegations are in the driving seat of representing the Union's trade interests, the strength of the EU's position and of its representation abroad differs, however, depending on the weight and significance of the partner country at stake. In trade and economic affairs, like in foreign affairs, bilateral relations of some EU Member States with a given trade partner may be somewhat stronger than those forged by the EU as a whole. This aspect may be visible in particular in relations with some bigger trade partners, who may tend to perceive the EU through the sum of its components. Strong bilateral relations pursued to enhance bilateral trade (trade promotion) or forged to ensure investment stability (through bilateral investment treaties, BITs) contribute to a competitive spirit among EU Member States and to some extent reduce the impact of the EU position in what relates to, for example, tackling market access barriers. In result, the economic strength of individual Member States and respective bilateral relationships with a partner country continue to determine the extent to which the EU is seen as a coherent unity that speaks with one voice. Conversely, the extent to which Member States decide to assist in solving market access issues is also a function of their bilateral trade relations with a given trade partner. For example, the practice of aligning messages on barriers to trade is strongly issue-dependent. Even if, on the whole, Member States increased their involvement in discussing barriers to trade, both sides acknowledge that the task of dealing with problematic issues remains principally with the European Commission/EU delegations. One of the reasons of member states' hesitant approach is the interest in maintaining a positive climate for the pursuit of mutually advantageous bilateral relationship, which could be distorted by discussing trade irritants. This in turn allows EU trade partners to favour relations with one or another Member State, which may limit the effectiveness of the MAP approach. That said, trade partners do notice when a unified message is passed by all EU interlocutors and the more unified the EU trade representation in third countries, the stronger the chance of resolving a problem.

Furthermore, concerning the issues of diplomatic representation in a third country, a Member State's intra-agency coordination as well as limited willingness to share information also indicate the shortcomings of the Partnership approach. EU Member States share information about outcomes of

[19] I.e. in the framework of the Market Access Advisory Committee and its sectoral working groups.

bilateral discussions with the Commission, but rarely is such information available for other Member States, let alone EU business at large. Some notable exceptions can be observed among the Nordic countries. The limitations also pertain to the structure of national administrations, where tensions between the foreign ministry, responsible for managing external representation, and the ministry of economy/industry, usually in charge of trade, are not infrequent. In consequence, domestic coordination and flow of information regarding trade issues and at large may inhibit coordination of respective positions. Interestingly, however, cooperation on market access led some Member States to review their internal structures and introduce improvements precisely to address this issue.

Overall, while the principle of exclusive competence, as clarified by the Lisbon Treaty,[20] guides the work on trade issues, there are natural limits to the assistance the EU Member States can and want to provide in addressing barriers to trade. Even if the major part of the task lies in the hands of the European Commission/EU delegations, there are reasons to think that the precise definition of competence at EU level and internal coordination limitations define somewhat the policy effectiveness. This specific capability-expectations gap between the domestic constraints, which determine the trade diplomatic capacity and demand for market access deliverables, although partly result of legitimate policy choice, has implications for the extent to which the EU is able to present a united stance to the outside world.

4. Market Opening and Market Access Enforcement Post-Lisbon

Lisbon Treaty has brought a number of innovations that have direct impact on the EU's market access agenda, both in terms of market opening through FTA negotiations and policy enforcement activities. The extent of this impact varies though, with immediate consequences for the institutional dimension and a somewhat delayed influence on policy effectiveness.

4.1. The Inter-institutional Dimension – Relationship Between the Commission, the European Parliament and the Council

The above analysis indicated that institutional relations in the context of the market access objectives have the biggest impact on the negotiations of free trade agreements. The Treaty of Lisbon introduced a major shift in the established policy in this respect by converting the dual Council-Commission relationship into a triangle involving the European Parliament as co-legislator. Accordingly, Art. 218(6)(a) TFEU provides that the Parliament's assent is now required for all agreements concluded in areas which fall in the remit of the ordinary legislative procedure. This provision extends therefore the Parliament's role to all types of agreements with a trade component, including also 'pure' trade agreements. It implies bringing the Council and Parliament, so far absent in trade policy-making, on a par. This power shift potentially creates scope for political tensions between the two institutions, in addition to occasional debates between the Council and the Commission on sensitive political issues. The change of the configuration arguably shifts the role of the Commission as well, by putting it more in a position of an 'honest broker' between the Council and the Parliament, which traditionally hold conflicting views on major issues. The debate surrounding the approval of the EU-Korea FTA has offered an interesting probe of possible inter-institutional tensions which are likely to occur in at least three areas.

The first concerns the main exception to the parity rule, as specified in Art. 207(3) TFEU. It stipulates that authorisation of the Commission to open free trade negotiations remains in the hands of the *Council*. The Parliament plays no formal role in that process and has merely the right to information on progress in negotiations.[21] The Parliament's insistence[22] that the Commission submit the proposal

[20] Art. 3(1)(e) TFEU.

[21] Art. 207(3) TFEU reads:

for negotiating directives to both institutions at the same time clearly indicates its interest in narrowing down this legal distinction as far as possible.

The second relates to the Parliament's possible attempts to influence the negotiating directives and/or condition the adoption of a free trade agreement through the inclusion of specific, advanced provisions pertaining, i.e., to foreign policy objectives, such as respect for human rights and democracy (typical for comprehensive EU agreements with third countries where trade is only part of the overall package) or particular clauses designed to satisfy particular electoral groups. Such EU domestic bargaining process would, however, surely need to take into account the negotiating agenda of a given trade partner, thereby trapping the negotiations in an even more complex two-level game scenario.[23] Inserting such clauses in stand-alone trade agreements with more assertive trade partners would not only be a matter of internal bargaining between the Council and the Parliament but would also depend on the will of the trading partner to accept such propositions. In the trade-off between demands and concessions, the EU's already very open internal market does not offer many carrots in exchange for more market access in the partners' relatively closed markets. The risk of Parliament demonstrating an excessively ambitious approach is perhaps theoretical; yet, this is only to be verified by future events.

A further element to be borne in mind pertains to the time-frame for the agreements' entry into force, especially in case of provisional application. In principle, again it is the Council, without the Parliament, that decides on an agreement's provisional entry into force.[24] However, the Council's unilateral move would risk prejudging the Parliament's role as a consent-giving body for the agreement's definitive entry into force. Balancing between the two institutions and managing the timing component is certainly left for the Commission, as is the need to hold an open and regular dialogue on subsequent progress in the negotiations with both institutions. As of yet, it is impossible to assess whether the new institutional set-up will have an impact on the adoption and entry into force of an agreement, but significant delays may provoke criticism from the stakeholders.

4.2. Clarification of EU Competence in Trade Policy

No less substantial changes pertain to the clarification of competence in trade policy. The Treaty brought all trade-related aspects of intellectual property protection, services and foreign direct investment (FDI) within the scope of the Union's exclusive competence.[25] This is a significant change in particular for FDI in that previously the Union competence in the field explicitly covered only

(Contd.)

> '[…] The Commission shall make recommendations *to the Council*, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.
>
> The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall *report* regularly to the special committee *and to the European Parliament* on the progress of negotiations.' (emphasis added)

[22] In European Parliament resolution of 9 February 2010 on a revised Framework Agreement between the European Parliament and the Commission for the next legislative term, P7_TA(2010)0009, pt. (h), the Parliament calls on the Commission to make a commitment 'for reinforced association with Parliament through the provision of immediate and full information to Parliament at all stages of negotiations on international agreements (including the definition of the negotiation directives), in particular on trade matters and other negotiations involving the consent procedure, in such a way as to give full effect to Article 218 TFEU, while respecting each institution's role and complying in full with new procedures and rules for the safeguarding of the necessary confidentiality'.

[23] For the seminal contribution, see R Putnam, 'Diplomacy and Domestic Politics: The logic of Two-Level Games' (1988) 42 *International Organization* 427.

[24] Art. 218(5) TFEU: 'The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.'

[25] Art. 3(1)(e) TFEU *juncto* Arts. 206 and 207(1) TFEU.

abolition of restrictions to market entry (pre-establishment stage). All other investment-related issues (post-establishment) remained in the remit of the EU Member States. In result, important aspects of FDI linked to investment protection were usually regulated through bilateral treaties between the EU Member States and individual third countries. Given the increasingly stronger economic links between trade and investment, the emerging patchwork of bilateral investment treaties (BITs) prevented to some extent policy coherence in the investment area at the Union level. Full EU competence in all FDI matters therefore improves the situation at the EU level, not least for future negotiations of free trade provisions in this area in new and existing agreements with third countries.[26]

Additionally, market access enforcement policy will now be able to progressively address the Union's offensive interests in the whole range of issues related to foreign direct investment. This competence shift may contribute to more policy cohesion not only from the Brussels perspective, but also from the perspective of trade representation in third countries between the EU delegations and Member States' embassies. The EU delegations' role in representing the complete spectrum of EU investment interests may reduce to some extent the scope for third-countries approaching individual EU Member States in matters having clear impact on the EU as a whole. By ensuring a more unified EU approach, it may thus arguably strengthen the EU delegations' position *vis-à-vis* the trade partners in general and in particular with regard to advancing the EU's arguments on market access, and further encourage Member States to actively participate in the Market Access Partnership.

4.3. The Post-modern Nature of EU Trade Diplomacy in Market Enforcement and Cooperation in the Market Access Teams

The Lisbon Treaty brings a number of salient changes to the EU's external representation in trade matters, which in turn may influence the capacity to advance EU's offensive interests. These are pertinent in particular for former Commission, now EU, delegations in third countries and their work on market access enforcement led in the Market Access Teams.

The institutional set-up of EU trade representation in third countries is increasingly acquiring post-modern diplomatic features,[27] going further beyond nation state-based diplomatic representation. The competence-broadening and creation of the EEAS have changed the EU delegations' established patterns of EU representation. Change of the name plate is the first most sign thereof, since all officials work now in the *European Union* delegations, whether in the traditional Community policy areas (trade, technical assistance) or foreign policy-related. The EEAS, in turn, includes now not only Commission officials, but also officials from the EU Member States diplomatic services and part of the staff from the Council secretariat. Creating institutional allegiance and a spirit of loyalty (*esprit de corps*) among staff coming from different institutional cultures is certainly one of preconditions for the effectiveness of the EEAS. As for trade policy, while ensuring that it contributes to the foreign policy formulation, trade remains in the remit of the European Commission's activities and so formally outside the EEAS. This institutional division is not a novelty, and as such does not have an impact on the way EU delegation's work is coordinated. Policy instructions continue, as before the Lisbon Treaty, to be coordinated and sent from the Commission's DG Trade, while keeping the EEAS informed. The creation of the EEAS therefore does not change the policy practice applied before the

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[26] The ongoing work relates now to ensuring a legal transition between the Member States' bilateral investment agreements and Union-level policy instruments. See European Commission, *Towards a comprehensive European international investment policy*, COM(2010)343 final, 7 July 2010.

[27] Jozef Batora has been one of the advocates of this concept, implying that EU diplomacy is increasingly departing from the nation state-based, Westphalian diplomacy in international relations and increasingly acquiring supranational, and so post-modern, features within the EU. See J Batora and B Hocking, 'Bilateral Diplomacy in the European Union: Towards "Post-Modern" Patterns?', *CDSP Paper, Clingendael: Netherlands Institute of International Relations, April 2008*; also J Batora, 'Does the European Union transform the institution of diplomacy?' (2005) 12 *Journal of European Public Policy* 44.

Lisbon Treaty. EU position on trade issues, represented by trade officials in the EU delegations, continues to be aligned with the main EU foreign policy paradigms, and communicated to the (in part) successor of DG RELEX.

Furthermore, the entry into force of the Lisbon Treaty created an opportunity to look into some coordination aspects in EU's external representation from the point of view of its effectiveness and its impact on trade. For example, the EU delegation in Geneva was formally separated so as to make a distinction between the EU delegation to the World Trade Organisation and the new EU delegation to the United Nations in Geneva. EU delegations in third countries also formally took over the chairing and coordinating functions for the EU represented abroad, so far in the hands of the rotating presidency. Previously, the EU Member State performing the rotating presidency function held the chair of all, including EU trade counsellors', meetings and agenda-setting. This political objective was facing a number of pragmatic constraints, given the uneven representation of EU Member States in different third countries. In consequence, Presidency coordination functions could not always be ensured by the country currently presiding the EU.[28] Additionally, for smaller EU Member States these tasks represented certain burden for the limited staff in the embassies. Progressively, since 1 December 2009, EU delegations have taken over the chair function, confirming, at least in the case of trade policy, a *de facto* coordination role among EU member states.

The EEAS creation brings, however, another element, mentioned already above, and linked to the 'corporate identity' it needs to integrate and ensure loyal cooperation of personnel from the Commission, the Council Secretariat and the Member States' diplomatic services. The 'Brussels socialisation effect' has been subject of a wide academic debate,[29] addressing a phenomenon which remains hardly understood in the national capitals. Bringing together Member States' personnel in a truly Europeanised environment within the EEAS, as opposed to mere attendance of meetings, may also bring more cooperative attitudes in external representation.[30] Such 'Brusselsisation' process, also in third countries by virtue of the Union delegations, could in turn contribute to more engaged cooperation of Member States in market access enforcement activities. The limitations inherent in the concept of the Market Access Partnership, as indicated earlier both in terms of spheres of competence and internal coordination constraints, may be partly mitigated thanks to the EEAS. Accordingly, closer cooperation may enhance the alignment of common messages on trade barriers and lead to better coordination at national level. Similarly, the competence shift in investment policy will limit the scope for policy incoherence at EU level and enhance the EU common voice in external trade representation. Such developments could in the long run effectively lead to better coordination of the EU position, advancing its interests in trade and foreign policy alike.

Against these major developments, the creation of the European External Action Service does not bring any *direct* changes to the way trade policy and market access issues will be handled in Brussels headquarters. EEAS as an institution does not have a direct bearing on the content of FTA negotiations, except for preparing the foreign policy context (for Council consideration) within which they are pursued and, even less so, on the content of the market enforcement agenda. Thus, its influence on trade is rather of an *indirect* character. Trade policy remains outside the remit of the EEAS competence in formal terms, although it will be, as before, closely associated with it as part of

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[28] All EU Member States have diplomatic representations only in two countries in the world: China and Russia. In others, Member States' representation is dictated i.e. by presence/absence of substantial economic interests. This in turn had an impact on the Member States ability to ensure coordination functions in third countries during the Presidency. Where a country did not have a diplomatic representation, usually another EU Member State from the Presidential Trio would ensure coordination of EU representation in such a country.

[29] For a wide and interesting account see the contributions in B Hocking and D Spence (eds), *Foreign Ministries in the European Union. Integrating Diplomats* (Basingstoke: Palgrave Macmillan 2002).

[30] For a roadmap to training the future EEAS and fostering a common EU diplomacy official see J Lloveras Soler, 'The New EU Diplomacy: Learning to Add Value', *EUI Working Paper RSCAS* 2011/05.

EU external relations as a whole.[31] The role of the EEAS consists foremost of preparing and implementing the EU's foreign and defence policies (CFSP/CSDP), now pledging more coherence also with development policy objectives.[32] The decision-making *per se* remains, however, in the hands of appropriate Council bodies. From that point of view, trade policy at the Council level continues to be coordinated by the Trade Policy Committee, chaired by the Presidency and subordinate to the Foreign Affairs Council (FAC).[33] These two bodies, including the intermediate COREPER, remain the main responsible for trade decision-making (now of course together with the European Parliament), while the Commission's Directorate-General Trade is now associated in preparation of some of the Council's geographical working groups.[34] Yet, while trade policy continues to be guided by the exclusive competence paradigm as opposed to foreign policy's continued intergovernmental character, complete separation of trade from EEAS would render it largely inoperable. Consequently, the policy coordination mechanisms[35] on the Commission-EEAS front follow the above logic, bridging the practical gaps between the Lisbon Treaty's provisions and political reality, in line with the necessity for the Council and the Commission to ensure policy coherence in the EU's external relations.

5. Conclusions: Achieving the Market Access Objectives Post-Lisbon, Bridging the Capability-Expectations Gap?

The academic debate on the implications of the new treaty framework, also for trade policy, tends to focus on its impact on policy formulation, the institutional and decision-making set up. Rightly so, since advancing policy objectives depends to a great extent on the quality of decision-making methods and inter-institutional cooperation. However, no less attention should be paid to the way the Lisbon Treaty will influence trade policy *effectiveness*. Despite the European Commission's traditional executive functions, a closer look reveals that the institutional picture is by no means straightforward, as evidenced by the work on market access issues. Inter-institutional relations, the nature of EU diplomacy, competence definition and the Commission's relations with different stakeholders, among them EU Member States as well as EU business representatives, all play a role in advancing trade policy's objectives. The above analysis suggests that the Lisbon Treaty may have a nuanced impact on the market opening agenda. On the one hand, it clarifies the EU competence and allows its institutions to act more consistently on behalf of the EU. On the other hand, it remains to be seen how the new institutional triangle will affect the conduct and outcome of market opening efforts. As for market access enforcement, the Lisbon Treaty indicates scope for significant improvement in the EU external representation and strengthening of the EU position *vis-à-vis* third countries. Important limitations however, remain, with boundaries set by what is achievable without questioning the last bits of Member States' sovereignty; moreover, it is a matter of future evaluation whether this opportunity has been seized by the EU as a whole.

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31 This is an imperative of consistency of EU (external) policies, see Arts. 18(4) and Art. 21(3) TEU.

32 See in this regard Bart Van Vooren's contribution in this edited Working Paper.

33 The High Representative/Vice-President of the Commission, if she so decides, may let the Presidency chair the FAC when trade policy is discussed.

34 DG DEVCO will participate in Council Working Groups that work on development cooperation issues.

35 Enshrined explicitly also in: Council, *Decision establishing the organisation and functioning of the European External Action Service*, 2010/427/EU, 26 July 2010, 13 recital and Art. 5(3) in particular.

The Protection of EU Citizens: The Perspective of International Law

Patrizia Vigni*

Abstract

International law traditionally recognises the exclusive competence of the State of nationality where the protection of individuals who have suffered injuries abroad is concerned. Two different types of assistance can be provided under international law: diplomatic protection and consular assistance. On the other hand, EU norms, in particular, Art. 23 TFEU, provide for other forms of protection vis-à-vis EU citizens. One must ascertain whether these norms are consistent with international law. Some problems may arise as regards this issue. First, the concepts of diplomatic protection and consular assistance are mainly derived from international norms, which at this stage include, besides treaty law, provisions of customary origin binding for all States and other international legal entities, such as international organisations. Second, regardless of whether the EU intends to adopt the concepts of diplomatic and consular protection with their original meaning as generally recognised under international law – or rather with an autonomous meaning and in accordance with EU law – diplomatic and consular protection must always be exercised with respect to third countries, which clearly are not bound by EU law. In order to determine to what extent international law allows the EU to provide specific forms of protection to its citizens in the territory of third countries, one must ascertain if the EU, as an international legal entity, and EU citizenship, as the legal link between this entity and individuals, have achieved full recognition at the international level. Only the recognition of EU citizenship as a solid link between the EU and individuals would make the exercise of the protection of the EU effective under international law. In order to reach this acknowledgment, the EU should demonstrate that it enjoys full jurisdiction over these individuals and thus, is fully accountable for their conduct under international law.

Keywords

International law – diplomatic protection – consular assistance – EU citizenship – accountability and responsibility of International Organisations

1. Introduction

International law traditionally recognises the exclusive competence of the State of nationality where the protection of individuals who have suffered injuries abroad is concerned. This competence is justified by the fact that the recognition of the legal personality of individuals has always been quite controversial. Therefore, it is necessary to identify the appropriate legal entity that can stand for the safeguarding of the individuals' interests at the international level. Similarly, under international law, the tight nexus between the State of nationality, its organs and citizens, serves as a legal basis for recognising State responsibility for the conduct of its nationals. In sum, the criterion of nationality helps to recognise the entity that is both competent and accountable to act in the name of individuals *vis-à-vis* third countries.[1]

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1 For the view that accountability is 'the need to attribute certain activities under international law to [...] actors', see G Hafner, 'Can International Organizations be Controlled? Accountability and Responsibility' (2003) 97 *American Society of International Law Proceedings* 236, 237.

States usually exercise the protection of their nationals by means of their diplomatic and consular organs. Two different types of assistance can be provided under international law: diplomatic protection and consular assistance. According to Art. 1 of the Draft Articles on Diplomatic Protection (Draft Articles) adopted by the International Law Commission (ILC) in 2006 diplomatic protection

> 'consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.'[2]

On the other hand, consular assistance entails the support that national consular organs offer to individuals when they deal with their personal affairs in the territory of another country.

Even at the first glance, the competence of the State of nationality with respect to its citizens still remains one of the primary principles of international law, in spite of the recent developments relating to the recognition of the legal status and rights of individuals (particularly in the fields of human rights and international criminal law). Thus, this paper will first of all define the precise features of diplomatic protection and consular assistance under international law, paying special attention to the person entitled to the exercise of these kinds of protection.

Second, one must analyse whether EU norms providing some forms of protection other than diplomatic protection and consular assistance are consistent with international law. Some problems may arise as regards this issue. First, the concepts of diplomatic protection and consular assistance are mainly derived from international norms, which at this stage include, besides treaty law,[3] provisions of customary origin binding for all States and other international legal entities, such as international organisations.[4] Second, regardless of whether the EU intends to adopt the concepts of diplomatic and consular protection with their original meaning as generally recognised under international law – or rather with an autonomous meaning and in accordance with EU law – diplomatic and consular protection must always be exercised with respect to third countries, which clearly are not bound by EU law. This makes it necessary to determine whether the protection that the EU aims to extend to its citizens when abroad also entails certain international obligations binding the EU and its Member States. In fact, although the EU has achieved considerable influence and authority within the international community, one must admit that international law falls short of providing the specific obligations offered by the EU with respect to diplomatic and consular protection. Therefore, some EU provisions may not correspond to international obligations of either a customary or treaty origin. In particular, Art. 23 of the Treaty on the Functioning of the European Union (TFEU) provides for the right of EU citizens to diplomatic and consular protection of Member States other than the State of nationality in the territory of a third country. First of all, one must ascertain whether the scope of protection granted under Art. 23 TFEU corresponds to either diplomatic protection or consular assistance as they are regulated by international law. Second, special attention must be paid to the question of who are the legitimate actors involved in the exercise of these types of protection, since the wording of Art. 23 TFEU seems to highlight some discrepancy between the EU and international law as to the criteria identifying these actors.

In addition, in recent years one can observe that the Commission has militated persistently posited the transfer of the competence of diplomatic and consular assistance from States' authorities to the EU or,

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2 Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10).

3 1961 Vienna Convention on Diplomatic Relations and 1963 Vienna Convention on Consular Relations. See *infra* for a thorough analysis.

4 For the view that the legal personality of international organisations does not automatically entail that these organisations are bound by customary international law see J Alvarez, 'International Organizations: Accountability or Responsibility', www.asil.org/aboutasil/documents/CCILspeech061102.pdf, 14. However, one must recall that the European Court of Justice (ECJ) recognised that the European Union (EU) (at that time, the European Community) has to apply its norms in accordance with customary international law, see the Case C-162/96 *Racke* [1998] ECR I-3655.

more precisely, to the Union delegations, emphasising the close link between the EU and its citizens.[5] In view of the objective of the EU to assume new functions *vis-à-vis* its citizens at the international level, one must ascertain as to whether international law allows legal entities other than national States to provide diplomatic and consular assistance. In light of these proposed 'external' functions of the EU, some (although brief) attention must also be paid to the issue of the international accountability and responsibility of international organisations such as the EU, in particular with regard to the unlawful conduct of their members and organs. In fact, as States may be responsible for the activities that their organs and, in some circumstances, nationals carry out in the territory of third countries, similarly, the EU might be accountable for the conduct that its organs and citizens perform in the name and interest of the EU itself. This problem has become particularly marked considering the recent adoption, by the ILC, of the Draft Articles on Responsibility of International Organizations ('RIO Articles').[6]

In short, in order to determine to what extent international law allows the EU to provide specific forms of protection to its citizens in the territory of third countries, one must ascertain if the EU, as an international legal entity, and EU citizenship, as the legal link between this entity and individuals, have achieved full recognition at the international level.

2. Diplomatic Protection and Consular Assistance Under International Law

2.1. Diplomatic Protection

In order to better understand how diplomatic protection works, it is essential to clarify who, and on the basis of which criteria, can exercise such protection, whose interest is actually protected, and by which means diplomatic protection is performed.

As to the 'actor' that can carry out diplomatic protection, Art. 3(1) of the Draft Articles specifies that '[t]he State entitled to exercise diplomatic protection is the State of nationality'. Therefore, in order to determine the actual State that can exercise diplomatic protection in a specific case, one must ascertain the nationality of the injured person.[7] International law leaves States free to choose the rules for the attribution of their nationality. Nevertheless, the International Court of Justice (ICJ), in the *Nottebohm* case,[8] required, in cases of multiple or controversial nationality, the presence of a genuine link between the injured individual and the State that intended to exercise diplomatic protection in respect of him/her.[9] Moreover, in Art. 4 of the Draft Articles, the ILC affirms that State law that attributes

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5 See Paragraph 5 of the EU Commission's Green paper, *Diplomatic and consular protection of Union citizens in third countries* COM(2006) 712, OJ C 30, 1 February 2007.

6 The ILC adopted the RIO Articles on first reading in 2009. See Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10 (A/64/10), ch. IV, Section C. For further developments of the RIO Articles see the Resolution adopted by the General Assembly on the ILC Report in December 2009, A/RES/64/114.

7 For the view that nationality is the necessary link between a State and an individual in order to allow the former to exercise diplomatic protection in favour of the latter see CF Amerasinghe, *Diplomatic Protection* (Oxford: Oxford University Press, 2008) 66. See also the Commentaries to the Draft Articles on Diplomatic Protection, in *Yearbook of the International Law Commission* (2006) Vol. II Part Two, 30-31. For recent case law reaffirming the relevance of nationality as a criterion to recognise the right to exercise diplomatic protection see *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, 24 May 2007 www.icj-cij.org/docket/files/103/13856.pdf, para. 41.

8 *ICJ Reports* (1955) 23.

9 The ILC considered that the doctrine of 'genuine link' may be of some help to avoid, in cases of multiple nationality, that solid and tenuous ties between an individual and different States are equated. See para. 5 of the Commentary to draft Art. 4. Moreover, in cases of dual nationality, draft Art. 6 does not allow the State of nationality that does not have a genuine link to exercise diplomatic protection against the other State of nationality which by contrast has such link. For an

nationality must not be 'inconsistent with international law'. The freedom of States to acknowledge nationality, therefore, encounters limits in international norms, such as those prohibiting any form of racial or gender discrimination.[10]

In the ILC's view, the term 'national' covers both natural and legal persons.[11] As to the diplomatic protection of legal persons and, in particular, a corporation, Art. 9 of the Draft Articles affirms that 'the State of nationality means the State under whose law the corporation was incorporated'. This formal criterion of attribution of nationality with respect to corporations is generally recognised by international law, as the Barcelona Traction case demonstrates.[12] However, Art. 9 also deals with the question of whether diplomatic protection can be exercised by the State of nationality of shareholders instead of the State where the corporation was established.[13] The ILC, in its commentaries, specifies that this second solution is ancillary with respect to the criterion of incorporation.[14] More favourable criteria on the basis of specific treaty law applicable to the disputing Parties and allowing the diplomatic protection of shareholders were established by the ICJ.[15]

One of the most innovative provisions of the Draft Articles is certainly Art. 8, which provides for the possibility of a State to exercise diplomatic protection in respect of stateless persons and refugees who are lawfully and habitually resident in its territory. This proviso seems to express a rule of customary international law which, in these very specific cases, departs from the general principle under which diplomatic protection can only be exercised by the State of nationality.[16] The proactive character of this Article might encourage States to exercise diplomatic protection also in respect of people with whom they have solid ties other than nationality, even in those cases that do not concern stateless persons or refugees, such as, for instance, the relationship between any Member State and EU citizens. However, except for the case of stateless persons, diplomatic protection, which is exercised on grounds other than nationality, has not yet been recognised by customary international law. Therefore, in order to make this exercise lawful, an agreement between the intervening State, the State of nationality of the injured person, if any, and the State against which the protection is invoked, seem to be required.[17]

Moreover, as regards the persons that are entitled to exercise diplomatic protection under international law, mention must be made of the special case of international organisations. In its commentaries, the

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overview, see C Forcese, 'The Capacity to Protect: Diplomatic Protection of Dual Nationals in the "War on Terror"' (2006) *European Journal of International Law* 369, 389.

10 See, for example, Art. 9 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13. For the view that nationality attributed or gained by fraud or negligence cannot be internationally accepted see Amerasinghe, *Diplomatic Protection*, 95.

11 This precise matter was discussed by the ILC in 2004. See Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10 (A/59/10) 25.

12 *ICJ Reports* (1970) para. 70.

13 Art. 9 states that 'when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality'.

14 See para. 5 of the Commentary of Art. 9 of Draft Articles. For an overview, see F Francioni, *Imprese multinazionali, protezione diplomatica e responsabilità internazionale* (Milan: Giuffré 1979).

15 In the *ELSI* case, the ICJ considered the interests of shareholders as worthy of protection since the injured corporation no longer existed, *ICJ Reports* (1989) para. 118. Moreover, in the *Diallo* case, the ICJ has affirmed that, when a direct and personal right of the shareholder is at stake, such as the economic rights arising from the status of shareholder, diplomatic protection of the State of nationality of the shareholder is admitted. *Case concerning Ahmadou Sadio Diallo*, para. 66.

16 See A Künzli, 'Exercising Diplomatic Protection. The Fine Line between Litigation, Demarches, and Consular Assistance' (2006) *ZaöRV* 321, 343.

17 For the view on the absolute impossibility of third States to exercise diplomatic protection with respect to non-nationals see C Forcese, 'The Capacity to Protect' 389.

ILC specifies that it does not intend to deal with this issue in the Draft Articles[18]. So far, international law has only recognised the possibility for an international organisation to bring an action against a State which has caused damage with respect to the agents of the organisation itself[19]. This type of protection is more similar to the intervention of States in case of injuries to their organs than diplomatic protection of private individuals.[20] Intervention of an international organisation is in fact aimed at safeguarding the functioning and dignity of the organisation indirectly injured by means of the offences which were perpetrated against its agents. For this reason, intervention of an international organisation can be performed without the consent of the State of nationality of the injured agent, since such intervention does not affect the interests of the individual as such, but the organ by means of which the organisation exercises its powers[21]. For the same reason, the action of an international organisation for the protection of one of its agents should also be brought against the State of nationality of the agent him/herself since, in this specific case, the relevant relationship for international law is not the nationality link, but rather the functional link.[22]

Notwithstanding the efforts of legal doctrine to extend the number of entities that can exercise diplomatic protection on the basis of criteria other than nationality, customary international law only recognises the admissibility of diplomatic protection for the State of nationality.

A further fundamental issue concerning diplomatic protection is the question of whether the injured person has an individual right to be protected by his/her State of nationality. If such a right existed, the State's intervention would be just an instrument for the protection of the right of the individual. More importantly, the State of nationality would be compelled to exercise diplomatic protection and its failure to act would consist in a breach of international law. By contrast, if no individual right to diplomatic protection were deemed to exist under international law, the exercise of such protection would be aimed not at safeguarding the rights of the individual, but rather the interest of the State of nationality in having its citizens respected when they are abroad. Thus, the bearer of the right to complain and achieve satisfaction would be no longer the individual, but his/her State of origin.

Although the ILC discussed this issue for a long time, its members did not reach an agreement on the existence, under international law, of a duty to exercise diplomatic protection.[23] In fact, in its commentary to Art. 2 of the Draft Articles, the ILC comments that, according to the current state of the law, the State of nationality has the right, but not the obligation, to exercise diplomatic protection. However, recent case law is not consistent on this matter. Some State case law has denied the

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[18] See para. 3 of the Introduction of the Commentaries to the Draft Articles.

[19] See the ICJ's Advisory Opinion in the case *Reparation for Injuries suffered in the Service of the United Nations*, ICJ Reports (1949) 174 ff.

[20] This view was also expressed by the ILC with regard to the definition of the scope of 'diplomatic protection' during the drafting of the Draft Articles in 2004. The ILC excluded, from the persons that could enjoy diplomatic protection, nationals engaged in official business on behalf of the State. See *Fifty-ninth Session, Supplement No. 10* (A/59/10) 26.

[21] For this view, see the Reparation case, 185-186. See also Amerasinghe, *Diplomatic Protection*, 151-152.

[22] See the ICJ's Advisory opinion *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports (1999) 62. The ICJ stated that the immunity of a UN officer can also be invoked against the State of nationality of such an officer when this expert acts in the name of the organisation. The same conclusions had been reached by the ICJ some years before in the Advisory Opinion on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, dealing with the case of Mr Mazilu, the Romanian member of the UN Commission on Human Rights, who was hindered by Romania from leaving the territory of the State in order to exercise his function at the UN*, ICJ Reports (1989) 177.

[23] Some countries recognise the existence of an individual right to diplomatic protection. See the judgments of the German Constitutional Court and British Court of Appeal respectively in the *Rudolph Hess* and *Abbasi* cases, as quoted by Künzli, 'Exercising Diplomatic Protection' 329. For an overview see A Bassu, *La rilevanza dell'interesse individuale nell'istituto della protezione diplomatica: sviluppi recenti* (Milan: Giuffré 2008).

existence of a duty incumbent on the State of nationality to exercise diplomatic protection.[24] On the other hand, in the 2010 judgement of the *Diallo* case, the ICJ and, in particular, Judge Conçado Trindade in his separate opinion, adopted a more nuanced approach then the aforementioned stance of the national judiciary, affirming that the discretionary power of States to exercise diplomatic protection should be mitigated when the protection of the human rights of an individual is at issue in order to reaffirm the priority of the protection of such rights under international law.[25]

To sum up, in most cases, the exercise of diplomatic protection is subject to the complete discretion of the State of nationality. For this reason, the effectiveness of such protection as an instrument for safeguarding individual prerogatives is to be questioned in the view of the legal tenets and judicial bodies. The ECJ itself has highlighted the inadequacy of diplomatic protection in the *Kadi* case.[26]

2.2. Diplomatic Functions Other Than Diplomatic Protection

In order to better distinguish between diplomatic protection on the one hand, and consular assistance on the other, one must ascertain what typical requirements and features characterise diplomatic protection and what, conversely, are not present in other functions exercised by diplomatic and consular organs.

One of the fundamental requirements for the exercise of diplomatic protection is the prior exhaustion of domestic remedies by the person invoking protection.[27] As stated by Art. 14 of the ILC Draft Articles, domestic remedies are 'legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury'. For the purposes of the present analysis, when an individual is assisted by his/her national organs during the exhaustion of local remedies, this assistance cannot be considered to entail diplomatic protection precisely because the exhaustion of local remedies is a precondition for the exercise of diplomatic protection. By contrast, consular assistance sometimes requires diplomatic or consular organs to provide legal and judicial support to the citizens of their sending State when these individuals are in a third country.

Moreover, diplomatic protection not only differs from consular assistance because of its distinct features, but also because of its diverse aims. The purpose of diplomatic protection is not to assist injured individuals in their relations with third countries, but rather to bring the issue to the inter-state level, through legal or political means. Conversely, consular assistance is aimed precisely at providing any citizen with the support of the organs of his/her State of nationality when he/she must face foreign States' organs.

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[24] For an example of this case law see the decision of the Supreme Court of Appeal of South Africa in *Van Zyl v Government of RSA* [2007] SCA 109 (RSA), www.justice.gov.za/sca/judgments/sca_2007/sca07-109.pdf. The applicants claimed that the South African Government did not comply with its duty to exercise diplomatic protection in their respect against Lesotho. The Court of Appeal affirmed that citizens have the right to request the government to consider the possibility of exercising diplomatic protection with respect to them. Nevertheless, both under South African and international law, the government is free to decide whether and through which means it intends to protect its citizens. See paras. 51 and 52 of the judgement. See also the 2004 judgment of the South Africa's Constitutional Court where the issue of the existence of a duty to exercise diplomatic protection was analysed both under international and State law in *Kaunda and Others v President of the RSA* 2004 (10) BCLR 1009 (CC), 2005 (4) SA 235 (CC), www.constitutionalcourt.org.za/uhtbin/cgisirsi/Cey2GG5dyr/MAIN/0/57/518/0/J-CCT23-04.

[25] www.icj-cij.org/docket/files/103/16244.pdf.

[26] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Counci and, Commission* [2008] ECR I-06351, paras. 256 and 323.

[27] See Arts. 14 and 15 of the Draft Articles. For an overview of the issue of the exhaustion of local remedies see R Pisillo Mazzeschi, *Esaurimento dei ricorsi interni e diritti umani* (Turin: Giappichelli 2004).

In apparent contradiction to this view, in the *LaGrand* and *Avena* case,[28] the ICJ recognised the diplomatic protection rights of Germany and Mexico in order to bring a complaint against the US regarding the violation of the individual right of their citizens to consular assistance. In particular, the Court affirmed that diplomatic protection, being a concept of customary law

> 'does not prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty.'[29]

Despite this statement, the ICJ still considered the exercise of diplomatic protection and the judicial action arising from such protection as inter-state acts. In fact, both in the *LaGrand* and *Avena* cases, after having acknowledged that the US had breached the individual right of German and Mexican citizens to consular assistance, the ICJ recognised the right of the applicant-State (not of the citizens of that State) to reparation both for the violation of its own right and the individual right of its citizens.[30] Thus, notwithstanding the fact that in some circumstances, national States exercise diplomatic protection to claim the violation of the interests of their citizens, diplomatic protection is still deemed a State action, which can only indirectly result in the protection of individual rights.[31]

Diplomatic protection also differs from diplomatic relations. While diplomatic protection is a legal and political action of a State exercised in exceptional circumstances, diplomatic relations involve several ordinary activities, which the State performs through specific organs: diplomatic agents. The typical functions of diplomatic agents are listed in Art. 3 of the 1961 Vienna Convention on Diplomatic Relations[32], and include representing and protecting the interests of the sending State, and promoting relations with the host State[33]. In short, diplomatic organs represent the sending State in the host State and maintain relationships with the latter State in the name of the former.[34] Art. 3(b) explains that diplomatic functions consist in '[p]rotecting in the receiving State the interests […] of […] nationals, within the limits permitted by international law'. The wording of this paragraph seems to imply a type of '*in situ*' assistance, guaranteed within the territory of the host State, rather than diplomatic protection, as intended by international law. These activities ought not to be confused with those declarations that, in some circumstances, States make through their diplomatic agents to express their formal complaint to the host State, such as the initial act of the proceedings of diplomatic protection. In this case, diplomatic organs do not protect citizens, rather, they exercise their function of 'representing the sending State in the receiving State.[35] Thus, their action is a form of '*ex situ*'

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28 *LaGrand* and *Avena* cases, ICJ Reports, respectively, (2001) 466 and (2004) 12. For an overview of these cases see *infra*.

29 See the *LaGrand* and *Avena* cases, respectively, paras. 42 and 40.

30 See the *LaGrand* and *Avena* cases, respectively, paras. 126 and 115.

31 For this view see B Conforti, *Diritto Internazionale* (Naples: Editoriale Scientifica 2006) 215-216. For the view that other instruments, such as the mixed tribunals of ICSID and 1981 Alger Iran-US Agreement, have replaced diplomatic protection, see Amerasinghe, *Diplomatic Protection* 154.

32 Done in Vienna on 18 April 1961, 500 *UNTS* 95.

33 Art. 3 states: 'The functions of a diplomatic mission consist, inter alia, in:

> (a) Representing the sending State in the receiving State;
>
> (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law […]'.

34 For an overview of this subject-matter see GR Berridge, *Diplomacy: Theory & Practice* (Basingstoke: Palgrave 2005); E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford: Oxford University Press 1998); Société Française de Droit International, *Aspects récents du droit des relations diplomatiques* (Paris: Pedone 1994).

35 This is particularly frequent in cases in which the injured person is still in the territory of the foreign State. In this case, the individual will likely present his/her petition to the national diplomatic organs that are present in such a territory, in order to achieve diplomatic protection. Such organs can be used by the State of nationality to raise its formal complaint against the responsible State.

protection since it comes from outside the host State even though the complaint concerned a violation occurring within the territory of the latter State.

2.3. Consular Assistance

The function of safeguarding the interests of citizens in the territory of a third country is also described in Art. 5 of the 1963 Vienna Convention on Consular Relations (VCCR).[36] In fact, in this field, the competences of diplomatic and consular authorities are almost the same. Art. 5 VCCR is quite detailed in its description of the typical administrative functions of consular posts.[37] In particular, paragraphs a) and e) provide for the general obligations of, respectively, protecting the interests and helping the nationals of the sending State.[38] Such paragraphs must be read together with Art. 36 VCCR in order to define the concept of consular assistance that must necessarily be compared with the notion of diplomatic protection. Although Art. 36 seems to regulate the rights of consular organs rather than those of individuals – since it is included in Section 1 of Chapter 2 of the VCCR, which deals with facilities, privileges and immunities relating to a consular post – nevertheless, its paragraph 1 specifies that its purpose is to 'facilitating the exercise of consular functions relating to nationals of the sending State', which are the functions, described in the above mentioned paragraphs (a) and (e) of Art. 5 VCCR. Art. 36 VCCR continues by establishing the right, both of consular organs and individuals, to communicate in case of need of the latter.[39] In addition, Art. 36(b) VCCR provides for the right of consular agents to be informed of the arrest and detention of one of the citizens of their sending State. Most importantly, paragraph b) subjects this right to the request of the individual.[40] In recent years, Art. 36(b) VCCR has been the object of extensive litigation before judicial bodies and discussion in legal doctrine. In particular, in the *LaGrand* case, the ICJ recognised the existence of two separate rights. On the one hand, the ICJ affirmed the right of a State to be informed of the arrest and detention of one of its citizen in a third country in order to ensure him/her legal or practical assistance. On the other hand, the ICJ recognised that Art. 36 provides for the right of the individual to be informed of the possibility of being assisted by his/her national consular organs.

The ICJ's decision is particularly important because it points out the clear difference between diplomatic protection and consular assistance. The latter is a right of the individual, as sanctioned by Art. 36 VCCR.[41] The ICJ reaffirmed the same conclusions in the Avena case, which concerned some

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36 Done in Vienna on 24 April 1963, 596 *UNTS* 262.

37 For an overview of this issue see LT Lee, *Consular Law and Practice* (Oxford: Oxford University Press 1991); GE Do Nascimento e Silva, 'Diplomatic and Consular Relations' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (Dordrecht: Nijhoff 1991) 444-447.

38 The content of paras. (a) and (e) of Art. 5 of the Convention on Consular Relations is quite similar to the wording of Art. 3 of the Convention on Diplomatic Relations. For this view see also Künzli, 'Exercising Diplomatic Protection' 322.

39 Para. (a) of Art. 36 states that 'consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State'.

40 Art. 36(b) provides that: '[…]if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph'.

41 The ICJ held that Art. 36 VCCR 'provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the individual's detention without delay'. It provides further that 'any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State without delay'. Significantly, this subparagraph ends accordingly: 'The said authorities shall inform the person concerned without delay of his rights under this subparagraph […]' Based on the text of these provisions, the Court concludes that Art. 36(1)1 creates 'individual rights' *LaGrand*, para. 77. This view has been successively embraced by some other international bodies, such as the Inter-American Court on Human Rights. For the

Mexican citizens whose right to consular assistance had been disregarded in the course of criminal proceedings before the United States courts.[42] This view of the ICJ was also espoused by the European Union in an official document that was addressed to the US Supreme Court as an a*mici curiae* brief in a case that concerned the domestic legal effects of the judgment of the ICJ on Art. 36.[43]

By contrast, the 1961 Diplomatic Relations Convention does not provide for the right of an injured person, but the right of the State of nationality to complain against the violations of the rights of its citizens. For this reason, in the *LaGrand* and *Avena* cases, the ICJ admitted both the direct action of the State (Germany and Mexico) against the violation of its own right to be informed of the detention of its citizens, as sanctioned by Art. 36 VCCR, and the indirect action, corresponding to the exercise of diplomatic protection, against the breach of the right of its citizens to be informed of the possibility of enjoying consular assistance, as established by Art. 36(b) VCCR.[44] In this way the ICJ made evident the differences between diplomatic protection and consular assistance.

As is well known, the only requirements for the exercise of diplomatic protection are the breach of an international norm that provides for the right of an individual; the nationality of the individual concerned, which determines the State entitlement to intervene; and the prior exhaustion of local remedies. By contrast, consular protection can be ensured by consular organs even in the absence of any violation of international law. In addition, such organs must carry out their functions in accordance with the host State's law, as required by Art. 36(2)VCCR.[45]

Moreover, one must recall that while the right to consular assistance is expressly recognised by the ICJ as an individual right, at least in the specific circumstances of a detained or arrested national, despite the recent developments of international jurisprudence, diplomatic protection is still considered an exclusive prerogative of the State of nationality, which does not have any duty to exercise such protection *vis-à-vis* its nationals.

Finally, consular assistance and diplomatic protection also differ with respect to the time and place in which they occur. In respect of chronology, consular assistance consists of providing support for a citizen abroad either *ex ante*, that is before an injury to the citizen occurs, or *ex post*, when the citizen is already in danger or injured. However, in both these cases, consular assistance is aimed at supporting the action undertaken by the citizen. Thus, such assistance never entails an autonomous action of the State of nationality. As to the place, consular assistance can be defined as '*in situ*' protection, i.e., protection given in the host State where the beneficiary of the assistance is physically located. By contrast, diplomatic protection corresponds to the complaint of a State against a violation of the rights of one of its nationals by another State. This complaint can be only made when a violation

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view of the latter, see the opinion of the Inter-American Court of Human Rights, Advisory Opinion OC-16/99 *The right to information on consular assistance in the framework of the guarantees of the due process of law*, www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf.

42 These Mexican nationals were sentenced to death by US courts without having being informed of the possibility of being assisted by the national consular organs of their State of nationality during the judicial proceedings, as Art. 36 VCCR states. After the unsuccessful exhaustion of domestic remedies of these Mexican citizens, Mexico brought an action against the US before the ICJ claiming the violation of Art. 36 both with respect to Mexico itself and its citizens. The ICJ recognised the US responsibility for both the violations and invited the latter State to review and reconsider the decisions with which US courts had sentenced Mexican citizens.

43 Brief of Amici Curiae, The European Union and Members of the International Community in support of petitioner, Josè Ernesto Medellín v. State of Texas, on Writ of Certiorari to the Court of Criminal Appeals of Texas, no. 06-984, 26 June 2007. Mr Medellín was one of the Mexican citizens that led to the ICJ's decision in the *Avena* case. The EU Brief was aimed at supporting Mr Medellín application in his last chance to avoid execution that actually took place in July 2008. For an overview, see B Simma and K Hoppe, 'From LaGrand and Avena to Medellin-A Rocky Road toward Implementation' (2005) 14 *Tulane Journal International and Comparative Law* 31.

44 On this point see Künzli, 'Exercising Diplomatic Protection' 338.

45 Art. 36, para. 2 provides: '[t]he rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State […]'.

of the rights of the individual and the exhaustion of domestic remedies have already taken place. In addition, the presence of an individual in the territory of the foreign country at the time of the complaint of the State of nationality is not necessary for the exercise of diplomatic protection. Thus, diplomatic protection is an action that brings the dispute to the international level, outside the territory both of the responsible State and the State of nationality. In short, diplomatic protection can be classified as *'ex situ'* protection.

As a concluding remark, diplomatic protection and consular assistance cannot be equated under international law. If the EU or its Members States intend to establish new rules which recognise the right to exercise one of these forms of protection interchangeably and by organs different to those which have such competence under international law, they ought to clarify their intention explicitly by the adoption of specific norms.

3. The Right to 'Diplomatic and Consular Protection' of EU Citizens Under EU and International Law

3.1. The Scope of the Right to 'Diplomatic and Consular Protection'

EU Treaties and subsequent norms are demonstrably binding *vis-à-vis* contracting States only. Thus, EU provisions dealing with the protection of EU citizens can become effective at the international level only if third countries, against which the EU and Member States intend to apply these norms, recognise their binding character either as rules of customary law or provisions belonging to treaties concluded between these countries and the EU and Member States.

Art. 20(2) (c) TFEU stipulates clearly as an individual right of the Union citizen the same protection mentioned also in Art. 23(1) TFEU and Art. 46 EU Charter.[46] This Article states that, '[e]very citizen of the Union shall […] be entitled to protection by the diplomatic or consular authorities of any Member State […]'.

Although Art. 23(1) TFEU appears to use the adjectives 'diplomatic' and 'consular' as synonyms, under international law, diplomatic protection and consular assistance are two completely different legal concepts, as demonstrated above. Nevertheless, at a careful analysis of the wording of Art. 23(1) TFEU, one can infer that this Article only deals with a form of protection which implies the assistance of diplomatic or consular authorities of other Member States in respect of EU citizens when they are in third countries and cannot rely upon their national consular or diplomatic organs because such organs are not present.[47] This protection can be categorised as consular assistance consisting in an individual right as declared by the ICJ and other international bodies.[48] Thus, Art. 23 TFEU seems to exclude from its scope diplomatic protection which, as affirmed above, is the right of the State of nationality to claim the violation of the interests of its nationals.[49]

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[46] Such correspondence is not a casualty. In fact, the explanations relating to Art. 46, which were prepared under the authority of the Praesidium of the Convention that produced the text of the EU Charter, specify that the right at issue is the same as that guaranteed by the EC Treaty in accordance with Art. 52(2) of the Charter. The latter Article, in fact, provides that '[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties'. Thus, not only the text of Arts. 46 of the Charter and 23 TFEU, but also the scope of the right guaranteed is the same.

[47] For this view see also S Kadelbach, 'Union Citizenship' in *European Integration: The new German School* (Heidelberg: Max Planck Institute for Comparative Public and International Law 2003), *Jean Monnet Working Paper 9/2003*, www.jeanmonnetprogram.org/papers/03/030901-04.pdf, 29.

[48] The ICJ judgments in *LaGrand* recognise an individual right only in the limited circumstance of Art. 36(2)(b) VCCR which is considerably limited in relation to the circumstances under EU law.

[49] This view seems to be confirmed by other EC norms implementing Art. 23 TFEU. For example, Decision 95/553 highlights that the main concern of Member States is to regulate the cases in which prompt and effective assistance is

In apparent contraction to this conclusion, a website fact-sheet of the EU Commission, which provides EU citizens useful information concerning the protection that they can expect to achieve by dint of their EU citizenship when outside the EU,[50] seems to suggest the possibility of exercising diplomatic protection on the basis of Art. 23 TFEU. An ambiguous sentence in the text of the fact-sheet states that, in cases of arrest or detention, the embassy or consulate of any EU Member State must

> 'ensure that the treatment offered [to the detained EU citizens] […] does not fall below minimum accepted international standards […] In the event that such standards are not respected, [the embassy or consulate] will inform the foreign ministry of the country of origin [of the detained person] and, in consultation with them, take action with the local authorities.'

This part of the fact-sheet could imply that the diplomatic mission of any EU Member State may help the Foreign Affairs Ministry of the State of nationality of the detained person to bring a formal complaint, against a third country, of the violation of the rights of this person. Such a complaint would raise this issue at the inter-state level and thus, could be considered as diplomatic protection.[51] However, further in the text, the Commission seems to acknowledge the leading role of the State of nationality when the violation of a fundamental right of an EU citizen is at stake, by stating that other Member States' diplomatic agents must seek the intervention of the State of nationality of the detained person. Thus, regardless of who informs the State of nationality of the violation, whether it be the citizen or other Member States' agents, it is only the State of origin that can exercise diplomatic protection, pursuant to international law. In short, the action of other EU States' agents only seems to respond to the general obligation of cooperation between Member States to keep other States informed of the conditions in which their nationals are, rather than the intention of exercising diplomatic protection in the interest of the sending State or the EU.

3.2. The Legitimate Actors of 'Diplomatic and Consular Protection' Under EU and International Law

If one assumes that existing EU norms merely allow Member States to provide EU citizens a type of protection that international law defines as 'consular assistance', the only difference between EU and international law relating to the right to consular assistance, affects the actors that can ensure this kind of protection. While under international law consular assistance can only be provided by the State of nationality, EU law also recognises the power of the consular organs of other Member States to intervene. This difference could encourage the third country, in the territory of which such assistance should be guaranteed, to deny the legitimacy of the other EU Member's intervention under international law. For this reason, the text of Art. 23(1) TFEU suggests Member States to negotiate agreements with the countries where consular assistance for EU citizens may be needed. It appears that the negotiation of these international agreements would contribute to make effective the right established by Art. 23 with respect to third countries.[52] Nevertheless, the intervention of a Member State other than the State of nationality might also be justified under international law. In fact, the consular agents of the intervening Member State may be considered indirect organs (of the State of nationality of the injured EU citizen) acting as substitutes for the organs of the latter State that are not present in the territory of the third country involved. Accordingly, the third country could not dispute the legitimacy of the intervention by a 'non national' EU Member State under international law, because this Member State does not act in its own interest, but as 'an agent' of the State of nationality

(Contd.)

needed by EU citizens. See Decision 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations, OJ L 314/73, 28 December 1995.

50 See ec.europa.eu/youreurope/redirect_it.htm.

51 This ambiguity is also highlighted by Künzli, 'Exercising Diplomatic Protection' 348.

52 For this view see E Horváth, *Mandating Identity: Citizenship, Kinship Laws and Plural Nationality in the European Union* (Alphen aan den Rijn: Kluwer Law International 2007) 90.

of the injured person. Certainly, a third country would recognise this form of agency between EU Member States on the basis of the general principle of international law which allows any State of nationality to assist its nationals by instruments of its choice.

In the end, the criterion on the basis of which consular assistance of EU citizens would be allowed, would still remain an individual's nationality. No role of EU citizenship would be recognised under international law. Actually, in the present author's view, EU citizenship has not yet acquired the status of nationality (or of a similarly solid link) at international level, so as to justify the intervention of any Member State for the protection of any EU citizen, regardless of his/her nationality. One cannot deny that, in recent years, there seems to be a development of the idea that a solid link may also exist between an EU citizen and his/her Member State of residence.[53] However, international law does not seem to have recognized the legitimacy of these new developments occurring within the EU legal system.

It is up to Member States to convince third countries that the status of an EU citizen is, for them, as important as nationality. So whenever an EU citizen requires consular assistance, third countries would automatically accept the intervention of consular organs of EU Members other than the State of nationality.

3.3. The EU as International Defender of EU Citizens

The EU (in particular, the Commission) has always considered Art. 23(1) TFEU as the first step towards the recognition of a wider power of intervention on the part of the Union itself for the protection of its citizens at the international level.[54]

Some innovative proposals by the Commission are included in paragraph 5 of the 2006 Green Paper on diplomatic and consular protection of Union citizens in third countries. As affirmed above, in this paragraph, the Commission suggests the transfer of the competence of diplomatic and consular assistance from States' authorities to Union delegations. Given that in 1992, the EU did not have diplomatic missions that possessed the same status and competences of States' missions in third countries, in order to ensure the best protection of EU citizens, the drafters of Art. 20 TEC (current Art. 23(1) TFEU) presumably decided to attribute such competence primarily to the Member States' organs. Nevertheless, after the entry into force of the Lisbon Treaty, Union delegations have somehow increased their role in the fulfilment of diplomatic and consular protection of EU citizens. In fact, Decision 2010/427/EU established the European External Action Service,[55] which is considered as the first form of EU common diplomacy.[56] Moreover, Art. 35(3) of the EU Treaty provides that Union delegations must 'contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries cooperate with States' diplomatic authorities'.[57]

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[53] See C O'Brien, 'Real links, abstract rights and false alarms: the relationship between the ECJ's "real link" case law and national solidarity' (2008) 33 *European law Review* 643; and S O'Leary, 'Developing a closer Union between the people of Europe', *Europa Institute, Edinburgh Mitchell Working Papers 6/2008*.

[54] For this view see A Ianniello Saliceti, 'The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services' (2011) *European Public Law*, 91 *et seq.*

[55] Council Decision 2010/427/EU of 26 July 2010 establishing the organization and functioning of the European External Action Service OJ L 201/30, 3 August 2010.

[56] For this view see in particular the Final Report of the CARE (Citizens Consular Assistance Regulation in Europe) Project, 'Consular and Diplomatic Protection. Legal Framework in the EU Member States', www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf, 31.

[57] See on the same line also Art. 5(10) of the Council Decision on the EEAS: The Union delegations shall, acting in accordance with the third paragraph of Article 35 TEU, and upon request by Member States, support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis. See Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L 201/30.

Nevertheless, 'contribution' is not 'direct intervention'. Since the content of Art. 23(1) TFEU makes reference to diplomatic authorities of Member States only, the contribution of Union delegations to the protection of EU citizens may presumably be ancillary and supportive with respect to the intervention of Member States' diplomatic organs.[58]

In order to allow the direct intervention of EU delegations, the Commission suggests introducing a clause that might acknowledge this competence in future EU 'mixed' agreements. The need for specifying this competence in the text of an international agreement and not only in an EU act, is due to the fact that the Commission considers that the third State's consent is necessary to make this new EU power binding at the international level. In fact, as affirmed above, only when the status of EU citizen becomes opposable *vis-à-vis* third countries, both Member States other than the State of nationality and maybe the EU itself, will be able to intervene for the protection of EU citizens as such. Actually, Member States already provided assistance to EU citizens regardless of their nationality in some cases of urgent evacuation and natural disasters. In these cases, no third country made objections to this intervention.[59] Nevertheless, this lack of opposition cannot be so far equated to the formal recognition of the legal power of Member States to provide assistance to all EU citizens. However, one must observe that this type of clause cannot be deemed a general solution to the problem of diplomatic and consular protection of EU citizens. In fact, such clauses could be introduced only in the treaties dealing with issues that fall within the competence of the EU. So, if this solution was adopted, different organs (State or Union delegations) would exercise consular assistance in the cases which, despite their similarity, concern diverse subject-matter that pertain to the competences of either the EU or Member States. For this reason, the creation of common diplomatic offices in third countries where diplomatic agents of all Member States work side-by-side, would be advisable in order to ensure the protection of EU citizens.[60] The positive result of such a solution would be that, since EU citizens would be assisted by the diplomatic agents of their State of nationality, there would be no problems of competence relating to international relations, which by contrast, arise when EU organs intervene.

The need for such a solution highlights that the lack of exclusive attribution of competence to the Union relating to the protection of EU citizens raises problems at the international level. In order to persuade third countries to trust new procedures for the protection of EU citizens that the EU may establish, the EU and Member States ought to make clear to what extent the EU is accountable at the international level with regard to the conduct of its organs, Member States, and citizens. It is therefore necessary to define both the powers and responsibilities of the EU under international law.[61]

First, the EU, as any international organisation, must be considered responsible for the unlawful conduct of its organs and agents when they are performing their functions. This principle is established by Art. 5 of the ILC's Draft Articles on Responsibility of International Organisations (RIO Articles) in accordance with the same criterion which, under international law, attributes the responsibility for the conduct of their organs to States.[62]

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[58] The Lisbon Treaty has also added a new norm, Art. 221 TFEU that sanctions the 'close cooperation' of Union delegations 'with Member States' diplomatic and consular missions' with regard to any foreign policy issue.

[59] See the case of the 2004 Tsunami or the 2006 Lebanon War.

[60] This solution was proposed by the European Economic and Social Committee commenting in the Green Paper on diplomatic and consular protection of Union citizens in third countries. See para. 4.4. of the Opinion of the Committee, 2007/C 161/21, 13 July 2007), OJ C 161, 75.

[61] For the view that accountability is a prerequisite of responsibility see Hafner, 'Can International Organizations' 237. For the opposite view see Alvarez, 'International Organizations' 34, who affirms that, as far as international organisations are concerned, accountability is so limited as to exclude international responsibility almost in all cases.

[62] Seventh Report on Responsibility of International Organizations of the Special Rapporteur Gaja A/CN.4/610, 8. Along with the similarity between international organisations and States, Art. 7 of RIO Articles also provides for the responsibility of an international organisation for the unlawful conduct of its organs even when they act beyond their official functions.

Second, in line with the RIO Articles, an international organisation must be deemed as responsible either for the conduct that a State organ performed under the control of the organisation[63] or when 'the organization acknowledges and adopts the conduct in question as its own'.[64] Although there is no extensive international practice on this matter, the ILC has affirmed that an international organisation cannot escape responsibility when it has exercised the effective control over unlawful activities performed by State organs[65]. Effective control may also consist in the fact that an organisation has established specific obligations and directions with which Member States must comply.[66] If, in light of the principle of effective control, the EU accepted responsibility for any conduct of Member States providing consular protection to EU citizens in accordance with Art. 23(1) TFEU, third countries might be encouraged to accept this atypical form of consular assistance. In this way, both the international person entitled to exercise protection and its agent may be clearly identified. Actually, the EU has already endorsed international responsibility for the conduct of its Member States in some specific fields, such as commercial relations.[67] As an example, one can mention the fact that the EU regularly stands before the WTO dispute settlement organs when one of its Member States is involved in a commercial dispute.[68] Commercial relations undoubtedly pertain to the exclusive competence of the EU,[69] while the exercise of diplomatic and consular protection is still considered as a typical function of sovereign States. Thus only if EU Member States renounced their sovereign powers in a clear manner, would third countries rely upon the innovative EU regime of consular protection.

Finally, in order to define the extent of the accountability of international organisations, and thus of the EU, at international level, one must ascertain whether or not the responsibility of the organisations may be recognised with regard to the conduct of private persons. The RIO Articles totally exclude the legitimacy of this type of responsibility due to the fact that international law does not acknowledge any solid link between international organisations and individuals in order to justify the attribution of the conduct of private persons to an organisation.[70] However, in order to achieve the recognition of its full accountability under international law and, consequently, its right to exercise diplomatic protection with respect to EU citizens, the EU should stress the point that a solid link between individuals and an international organisation may exist, for example, in the case of EU citizenship. Thus, by emphasising the role of EU citizenship as the legal criterion which provides recognition of the responsibility of the Union for the conduct of EU citizens, the EU might indirectly achieve the acknowledgment of its right to exercise diplomatic and consular protection with respect to those individuals for whom the EU is accountable and responsible at the international level. Clearly, EU

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63 See Art. 6 of RIO Articles.

64 Art. 8 of RIO Articles.

65 See ILC's Commentary to RIO Articles, 48-49.

66 The principle of effective control of international organisations over State activities is also stated by the European Court of Human Rights in the *Behrami* case concerning the conduct of forces placed in Kosovo at the disposal of the United Nations. See the Decision of the Grand Chamber of 2 May 2007 on the admissibility of applications No. 71412/01 *Behrami and Behrami v France*, as quoted in the Seventh Report of the Special Rapporteur Gaja, 49.

67 See S Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in M Ragazzi (ed), *International Responsibility Today* (Leiden: Nijhoff 2005) 406. This author highlights the fact that the EU was the international organisation that asked the ILC, drafting the RIO Articles, for special treatment by reason of its total independence and accountability as an international person. However, this author also underlines that the main concern of the EU is the allocation of powers rather than the recognition of its responsibility, S Talmon, 'Responsibility' 411.

68 For this view see also the Seventh Report of the Special Rapporteur Gaja, 12.

69 See P Craig and G de Burca, *EU Law* (Oxford: Oxford University Press 2008) 89-17. See also Talmon, 'Responsibility' 408.

70 The ILC has also affirmed that an international organisation is not responsible for the private conduct of the individuals that are organs of this organisation. See the Commentary to RIO Articles, 73.

citizenship has not so far achieved the status of a solid link that may substitute the criterion of nationality as a legal criterion for the exercise of diplomatic protection.

Therefore, it is up to the EU and Member States to stress the importance of this link in order to make third countries confident of a mechanism of protection for individuals that sets aside the traditional principle of nationality and promotes the new concept of EU citizenship.

In all probability, the need for Member States to safeguard their exclusive powers as sovereign States with respect to their nationals has so far prevailed over the interest of delegating their functions to the EU. However, the EU must demonstrate itself to be more courageous if it intends to modify one of the fundamental principles on which international law has been based for centuries, such as nationality.

4. Conclusions

With regard to the protection of individuals, international law primarily recognises the power and responsibility of the international legal entity that has the strictest legal link with these persons: namely, the State of nationality.

In light of the above, the State of nationality provides consular assistance to its nationals when they need support in the territory of a third country by means of its diplomatic and consular organs. In addition, if an individual suffers an injury abroad, the State of nationality can exercise its own right to diplomatic protection in order to complain against the violation of the interests of an individual that 'pertains to its sovereignty'. Thus, consular assistance and diplomatic protection are two different legal concepts under international law.

In this regard, concerning the scope of the right of EU citizens to 'diplomatic and consular protection', as established by Art. 23(1) TFEU, one may observe that this right mainly corresponds to consular assistance, as defined by international law. If in the future the EU intends to establish a form of assistance to EU citizens that entails diplomatic protection, as characterised under international law, it must adopt specific norms that expressly provide for this kind of protection. However, the main inconsistencies between EU and international law relating to the protection of EU citizens *vis-à-vis* third countries, seem to affect the identification of the actors which, under EU law, ought to be entitled to exercise this protection.

Firstly, Art. 23 TFEU recognises the right of any Member State to provide consular assistance to EU citizens, regardless of their nationality. In order to make this right effective at the international level, Art. 23(1) TFEU invites Member States to conclude international treaties with third countries in the territories of which this right might be exercised. This solution would help to achieve both the consent of third countries and the worldwide recognition of EU citizenship as a jurisdictional link. Certainly, one must distinguish between a case whereby EU Members and a third country adopt a specific treaty establishing that the consular and diplomatic protection of EU citizens will be hereafter performed in accordance with Art. 23 TFEU and a case where the EU, its Members and a third country include a clause requiring the application of Art. 23(1) TFEU in an agreement regulating subject-matter pertaining to the competence of the EU. In the latter case, the application of Art. 23(1) TFEU is absolutely guaranteed. In the case where a clause is added to an EU agreement, Member States may extend protection to the nationals of another EU Member only when EU citizens need protection concerning a matter that is within the scope of the agreement concerned. As to the issues falling outside of the scope of the agreement, the exclusive competence of the State of nationality would remain. Clearly, this solution does not provide a good example of legal certainty. The consequences might be even worse if the agreement to which the clause is added concerned a subject belonging to the shared competence of the EU. In this regard, even in some cases that are covered by the agreement, the intervention of the State of nationality might be required.

Thus, the EU and Member States must necessarily clarify at the international level to what extent Member States can provide protection to EU citizens instead of the State of nationality in order to avoid legal uncertainty both *vis-à-vis* EU citizens and third countries.

In the present author's view, in the absence of specific treaties or clauses recognising the right established in Art. 23(1) TFEU, third countries might be equally compelled to accept that the consular assistance of EU citizens may be provided by EU Members other than the State of nationality. In fact, if this State officially declares (the inclusion of a norm within a treaty, such as Art. 23(1) TFEU, may be considered as an official declaration) that it intends to exercise this assistance by means of the consular organs of any EU Members, a third country might be obliged to accept this form of assistance in order to respect the will of the State of nationality of the individual that needs protection. As affirmed above, in this case, one might envisage a relationship of agency between the State of nationality and EU Members that exercise consular protection. Although this solution may be of some value under international law, one must admit that it is still anchored to the concept of nationality rather than to the criterion of EU citizenship. Thus, it scarcely contributes to the recognition of EU citizenship as a valid legal status for the acknowledgment of the rights of individuals at the international level.

The international recognition of EU citizenship would be decisive if, as the EU Commission has proposed, the EU was definitively allowed to perform diplomatic and consular protection of its citizens under EU law. Only the recognition of EU citizenship as a solid link between the EU and individuals would make the exercise of the protection of the EU effective under international law. In order to reach this acknowledgement, the EU should demonstrate that it enjoys full jurisdiction over these individuals and thus, is fully accountable for their conduct under international law.

The Union is certainly the most effective international organisation within the worldwide community; it possesses an institutionalised structure and wide powers that can be exercised by independent organs. In light of the existing authority of the Union, international law undoubtedly recognises the full accountability and responsibility of this organisation for the conduct of its organs and Member States when they act in the interest and under the control of the EU itself.

This accountability and responsibility are conversely limited as regards State activities concerning subject-matters that do not belong to the exclusive competence of the EU, because in this case, powers and obligations are shared between the Union and its Members within and outside the Union. The protection of EU citizens pertains to this type of subject-matter. For this reason, the full accountability of the EU for the conduct of individuals, i.e. EU citizens, has not yet been recognised at the international level.

So far, no international organisation has established a solid link with private persons so as to achieve the right to exercise control and protection with respect to them instead of their State of nationality. The EU might be the first organisation to reach this goal if the status of EU citizen became an undisputable jurisdictional link both within the EU and international legal orders.

Indeed, it is up to the EU and Member States to demonstrate to the international community that they are also prepared to endorse further international obligations in order to make EU citizenship effective at the international level.

The Protection of EU Citizens in the World: A Legal Assessment of the EU Citizen's Right to Protection Abroad

Madalina Moraru*

Abstract

The unprecedented magnitude of disasters that recently hit third countries have shown that not even the Member States with the widest network of consular and diplomatic representations can ensure alone the protection of their nationals located in the affected areas. The present paper addresses the question of whether the Union citizenship confers to the citizens of the Member States benefits when they find themselves in distress outside of the Union's borders. It critically assesses the legal nature, content and effects in the domestic legal orders of the least developed 'Union citizenship right': the right to protection abroad (Art. 20(2)(c) TFEU). The paper will demonstrate that the Union citizen has a clear, individual and directly effective right to receive un-discriminatory protection in third countries abroad from any of the Member States that is represented *in loco*. Nevertheless, since for the moment, the right to protection abroad is limited to an application of the principle of non-discrimination based on nationality, the paper will show that in practice, the effectiveness of the Union citizen's right to protection abroad is hindered due to the divergent regulatory frameworks of the Member States on consular and diplomatic protection of nationals which have not, so far, been harmonised by a Union measure. The paper concludes by presenting what are the new roles acquired by the Union after the Lisbon amendment in the field of consular and diplomatic protection of the Union citizens abroad and what is their impact on the Union citizen's right and the role of the Member States in a traditional State-like activity.

Keywords

EU law – public international law – Lisbon Treaty – consular and diplomatic protection – EU citizenship – EEAS

> *'There are fifty-four cities on the island, all spacious and magnificent, identical in language, customs, institutions, and laws.'*
>
> Sir Thomas More, Utopia (1516)

1. Introduction

In light of the recent and devastating natural and man-made disasters which unfortunately seem to be more and more frequent, and so far have affected all the regions of the world,[1] any of the Union

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[1] Many regions of the world were hit by major natural or man-made disasters in the last five or six years which caused a great number of deaths and injuries to the population. For instance, the democratic uprising in spring 2011 in the Southern Neighborhood, the earthquake and the tsunami that hit Haiti in January 2010, the Icelandic volcanic ash cloud of 2010, acts of local or international terrorism (Sharm el-Sheik 2005, 11 September 2001 Attacks on World Trade Centre in New York), military conflicts (Lebanon conflict of summer 2006, the Georgian conflict of August 2008).

citizens who finds himself unrepresented[2] by his home Member State in a third country would like to know whether his 'additional'[3] and 'fundamental'[4] status of Union citizen may give him any additional benefits to those flowing from national citizenship while outside of the Union's borders, or are the rights and freedoms resulting from Union citizenship stopping at the borders of the Union's internal market?

For instance, when Haiti was hit by a tsunami in 2010, less than half of the Member States had a consular or diplomatic mission *in loco* to which their nationals could resort to for help. When the democratic revolution shook Libya in the spring of 2011, only 8 Member States were represented, while a total of 6000 EU citizens were in need of protection.[5] The aforementioned crises are not isolated events, but they are part of a phenomenon which has developed in the last decade. More and more EU citizens travel outside of the Union,[6] while increasingly, certain of them establish in third countries and thus need protection abroad on a regular basis.[7] While the number of Union citizens in need of protection abroad increases, the number of consular and diplomatic representations of the Member States decreases, mainly due to the financial crises that recently affected each of them.[8] The result is that a number, higher that even before, of Union citizens cannot obtain protection in third countries from their home Member States.

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[2] According to a 2007 survey there is a high percentage of Union citizens that may find themselves in this situation, since only in Beijing, Moscow and Washington all 27 Member States have at least one embassy (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009, COM (2007) 767 of 5 December 2007). In regard to the recent international crisis: in Libya only 8 Member States were represented, while in Bahrain only 4, see Communication from the Commission to the European Parliament and the Council - *Consular protection for EU citizens in third countries: State of play and way forward*, doc. COM (2011) 149/2 of 23 March 2011).

[3] After the Lisbon amendment, there is a noteworthy turn of phrase in the key provisions on Union citizenship. Art. 9 TEU (placed in the very first Title of the TEU on Common fundamental provisions on the EU) and Art. 20 TFEU (the specific Treaty Article on citizenship) stipulate that the citizenship of the Union shall be 'additional to' instead of 'complementary to' the national citizenship. According to Shaw and de Waele, the difference in terminology is not a mere cosmetic change, but signals that the Union citizenship should now be seen as a self-standing, independent status from national citizenship, see more in J Shaw, 'The Treaty of Lisbon and Citizenship', *The Federal Trust European Policy Brief*, June 2008; and H de Waele, 'European Union Citizenship: Revisiting its Meaning, Place and Potential' (2010) 12 *European Journal of Migration and Law* 319-336.

[4] This pronouncement of Union citizenship which 'is destined to be the fundamental status' of the nationals of the EU countries has been repeated in a long line of case-law. See, for instance, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31; Case C-224/98 *D'Hoop v. Office national de l'emploi* [2002] ECR I-6191, para. 28; Case C-103/08 *Gottwald*, Judgment of 1 October 2009, nyr, para. 23; Case C-544/07 *Rüffler*, Judgment of 23 April 2009, nyr, para. 62; Case C-135/08 *Rottmann* [2010] ECR I-0000, para. 43; Case C-34/09 *Zambrano*, Judgment of 8 March 2011, para. 41. In the last two cases there has been a change of terminology, the European Court of Justice has no longer described the Union citizenship in terms of a future achievement ('is destined to be'), but already as a present result ('is') which the citizens of the Member States can benefit of.

[5] Communication from the Commission to the European Parliament and the Council - *Consular protection for EU citizens in third countries: State of play and way forward*, COM (2011) 149/2 of 23 March 2011).

[6] According to a 2007 survey, there are around 7 million of Union citizens travelling in a third country where their home Member State is not represented. See Action Plan 2007-2009 and related Impact Assessment, European Commission, Communication to the European Parliament, the EU Council, the Economic and Social Committee and the Committee of Regions, Document COM (2007) 767 final of 5 December 2007 and Document SEC (2007) 1600 of 5 December 2007.

[7] According to the European Commission 2010 Report on Union citizenship 'more than 30 million EU citizens live permanently in a third country, but only in three countries (United States, China and Russia) are all 27 Member States represented'. See European Commission, EU citizenship Report 2010 - *Dismantling the obstacles to EU citizens' rights*, doc. COM (2010) 603 of 27 October 2010, p. 9.

[8] According to a comparative research, all of the Member States have had to close certain of their consular or diplomatic representations abroad. See www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf .

The question that this paper seeks to answer is firstly, whether the nationals of the unrepresented Member States have a right to protection while in third countries under the EU law, and secondly, from whom should they ask for this kind of help: should it be the Union delegations since, after all, in addition to being nationals of at least one of the Member States, they are also the EU's citizens,[9] or should they turn to the consular or diplomatic representations of the other Member States that are represented in third countries, based on the idea that the European Union, as an international organisation is not entitled under public international law to exercise a State reserved competence such as consular and diplomatic protection of nationals?[10]

The paradox is that even if the Union citizens travel now more frequent outside of the Union, they are not more aware of the rights the foundational Treaties of the EU confer them while located in third countries. From the very beginning of the Union citizenship, the citizens have been endowed with a Treaty based right which reads as follows

> 'Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State'.[11]

Notwithstanding, a 2006 and 2008 Eurobarometer surveys[12] revealed that the majority of Union citizens do not know they have this right, and, even if they know of its existence, they do not know what exactly are they entitled to receive under this right.[13] When the Union citizens were asked what kind of assistance would they expect to receive from the Member State they turn to for help, the majority of them responded that they expect to receive the same kind of help, regardless of which of the Member State they will approach.[14]

This paper will show (section two) that, for the moment, despite the wish of the majority of Union citizens, the EU law does not confer them a right to uniform protection abroad, due to the fact that the Treaty provides for a mere prohibition of discrimination based on nationality which does not require the Member States to harmonise their national laws on consular and diplomatic protection of nationals. Section two continues by presenting the exact rights a Union citizen can claim under the Treaty based right of protection by the consular and diplomatic authorities of the Member States while outside of the Union borders and assesses their legal effects within the Member States' domestic legal orders.

After looking at the material scope of the Union citizen's right to protection in third countries, the paper continues by addressing the question of the actors competent to ensure the European model of consular and diplomatic protection of the Union citizens. Under public international law, the question

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9 According to the declaration of F Frattini, Director of the DG Justice in 2007, 17% of the interviewed Union citizens believed that that they could seek protection from the European Commission delegations. See Public hearing: Diplomatic an consular protection (Centre Borschette) Brussels, 29 May 2007.

10 Public international law recognises a right to exercise diplomatic protection to an international organisation only in regard to its agents, generally described as 'functional protection'. A mechanism which the International Law Commission (ILC) has described as a different mechanism than the diplomatic and consular protection of nationals. See Draft Articles on Diplomatic Protection with commentaries, text adopted by the ILC at its fifty-eighth session, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, 2006 (A/61/10).

11 Former Art. 8c TEC became after the Amsterdam amendment Art. 20 TEC, after the Lisbon amendment, Art. 23(1) TFEU. In addition, the EU Charter of Fundamental Rights stipulates the same right in Art. 46.

12 Eurobarometer No. 188 of July 2006 and Flash Eurobarometer No. 213 of February 2008. On the same line, see also the more recent Flash Eurobarometer 294 'EU citizenship' of March 2010.

13 This is confirmed by the Commission's Report to the European Parliament, the Council and the European Economic and Social Committee on progress towards effective EU Citizenship 2007-2010 (doc. COM (2010) 602 of 27 October 2010), Section 2.7.

14 Flash Eurobarometer 294 'EU citizenship' of March 2010.

has received a clear answer[15], which has remained mostly un-changed[16] for the last decades - it is only the State of nationality that has competence to exercise consular and diplomatic protection of its own nationals.[17] However, under EU law, the State of nationality is no longer the sole actor entitled to exercise consular and diplomatic protection of its own citizens. First, the Maastricht Treaty entitled other Member States than the Member State of nationality to exercise consular and diplomatic protection for the Union citizens, and, now, the Lisbon Treaty has expressly conferred a role for the European Union, an international organisation, in the exercise of protection abroad of the Union citizens.[18] Section three assesses in which way has the Lisbon Treaty changed the exercise of consular and diplomatic protection of the Union citizens in third countries and what is the division of roles between the EU and the Member States in this field.

2. What Rights for the Union Citizen in Distress in Third Countries Under the EU Law Framework?

18 years have passed since the moment when the Maastricht Treaty conferred to the Union citizen a right to protection in third countries when he is not represented *in loco* by his home Member State. Despite the long existence of this right and the fact that its material scope has remained un-changed by the several Treaty amendments,[19] the Union citizens have barely exercised their right.[20] A recent analysis of Art. 23(1) TFEU has identified as the main cause for the low level of claims by the Union citizens the different standards of protection abroad of nationals existent between the Member States.[21] The EU Treaties have provided only for a mere prohibition of non-discrimination based on nationality which does not necessarily require harmonisation of the national practice and legislation, but primarily to confer to the other Union citizens the same treatment the Member State confers to its own nationals.[22] The result of the EU legal framework is 27 different forms of protection abroad given to the EU citizens by the Member States.

In light of the discrepant national regulatory frameworks on consular and diplomatic protection of citizens,[23] it is no surprise that the Union citizen is not aware or is confused about the rights he enjoys

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15 E Vattel, *The Law of Nations, or the Principles of Natural Law* (1758), Book II, Chapter VI, republished by T and JW Johnson, (Lonang Institute 2005); FC Amerasingh, *Diplomatic Protection* (Oxford: Oxford University Press 2008) Chapter 2 on 'History and Development of Diplomatic Protection'.

16 Despite the work of the International Law Commission (ILC) on codification of the law on diplomatic protection finished in 2006, the Vatellian legal fiction whereby diplomatic protection is a right of the State of nationality and not of the individual, has been maintained by the ILC Draft Articles on diplomatic protection. See Arts. 1 and 2 of the Draft Articles on the Diplomatic Protection. Text adopted by the International Law Commission at its fifty-eighth session, (A/61/10). Online available at: untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf .

17 For the international law perspective on consular and diplomatic protection of individuals and whether the European construction of consular and diplomatic protection is in conformity with public international law norms, see the contribution of P Vigni in this edited Working Paper; as well as P Vigni, 'Diplomatic and consular protection: Misleading Combination or Creative Solution?', *EUI Law Working Paper 2010/11*.

18 See Art. 3(5) TEU, Arts. 23(2), 221 TFEU and Art. 5(10) of Council Decision establishing the organisation and functioning of the European External Action Service 11665/1/10 REV 1 Brussels, 20 July 2010.

19 Including the latest amendment by the Lisbon Treaty, which has kept unchanged the material scope of the right of external protection of the Union citizen.

20 Between 2007- 2009 approximately 600 unrepresented Union citizens were provided consular protection under Art. 20 (2)(c) TFEU. See Section 3 of Chapter three of the CARE Final Report.

21 See the CARE Project (No. JLS/2007/FRC-1/50) funded by DG JUST of European Commission.

22 Art. 23 (1) TFEU facilitation of the protection, harmonisation.

23 For instance: different legal status and effects of the consular and diplomatic protection of citizens (certain Member States recognise a fundamental right, others only a right, while others have an approach whereby consular and diplomatic protection is a matter of policy under the executive's control); different material and personal scope of the consular and

while he is in distress in third countries. Ironically, even if the Union citizen is aware of what the EU law confers, this paper argues[24] that the effectiveness of the right is hindered because of, *inter alia*: the principle of non-discrimination based on nationality provided in Art. 23(1) TFEU has a very limited standardization force, that leads to a Union citizen's right to protection abroad whose content is only the minimum denominator of what the Member States' confer to their nationals, which, due to the wide difference between the domestic standards of protection abroad, is close to nothing; absence of domestic legal remedies available to the Union citizens in certain of the national judicatures against acts of consular and diplomatic protection; and, currently, limited legal remedies also at the Union level.[25]

In light of the problems raised above, this paper plans to shed light on the material scope of the EU Treaties' Articles, as amended by the Lisbon Treaty, on consular and diplomatic protection of the Union citizens abroad. The paper will argue that the still persistent confusion surrounding the area is the inevitable result of accommodating divergent domestic frameworks on consular and diplomatic protection of nationals under the EU law umbrella: ranging from matter reserved to the executive's control to a fundamental right to protection abroad of the national enshrined in the Constitution. Arguably, the confusion surrounding the material and personal scope of the Union citizen's right to protection abroad will decreased only if the national legislation and practice of the Member States will be harmonised.[26]

In this section, the paper will seek to identify the material scope of the Union citizen's right to protection outside the Union's borders by analysing: 1) the legal status of the Union citizen's protection in the world; 2) whether Art. 20(2)(c) TFEU confers a right or only a prohibition of discrimination based on nationality; 3) whether the equal treatment principle is applicable only to consular protection requests or also to the diplomatic protection requests of the Union citizens; and finally whether the Union citizen's right to consular and diplomatic protection is directly effective within the domestic legal orders.

(Contd.)

diplomatic protection; certain of the Member States still have in force international agreements concluded with other Member States before their accession to the EU, whose compatibility with the relevant EU law is questionable. See more on this in CARE Report, section 7 of Chapter 3.

[24] Based on the factual information provided by the CARE Report.

[25] The limited legal remedies available under current EU law result from the hybrid legal nature of the Decisions on consular protection (Decision 95/553/EC and Decision 96/409/CFSP), which, on the one hand, are international agreements and not EU acts, even though concluded within the institutional framework of the Council, while, at the same time, despite their public international law nature, they form an integral part of EU law due to their legal basis – Art. 23(1) TFEU. Despite being part of the EU law, the legal nature of international agreements of these Decisions restricts the available EU legal remedies to infringements procedures. The possibility of actions of annulment brought by individuals and preliminary references addressed by national courts is debatable. On the legal status, effects and judicial remedies against Decisions of the Representatives of the Governments of the Member States concluded within the Council, in general, see RH Lauwaars, 'Institutional Structure' (Chapter IV) in PJG Kapteyn, AM McDonnell, KJM Moterlmans, CWA Timmermans (eds), *The Law of the European Union and the European Communities*, fourth edition (Alphen aan den Rijn: Kluwer Law International 2008) 221; and B de Witte, 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements' in B de Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU law* (Antwerpen: Intersentia 2001) 261-62.

[26] After the entry into force of the Lisbon Treaty, the Council has the legislative power to adopt by qualified majority voting directives for the purpose of facilitating the protection abroad of the Union citizens (Art. 23(2) TFEU).

2.1. The Legal Status of the Union Citizen's Protection Abroad by the Consular and Diplomatic Officials of the Member States - Right or Entitlement to Legitimate Expectations?

The legal status of the Union citizen's protection in third countries – whether right or entitlement – is not entirely clear[27] for either academics[28] or practitioners, be they from the Member States,[29] or from the Union's Institutions.[30]

The difference between 'right' and 'entitlement to legitimate expectation' as legal status of the protection the Union citizen can enjoy in third countries is of utmost importance for what the Union citizens can claim in practice. The doctrine of 'legitimate expectations' applies to areas perceived as matters reserved to the executive power, where the later enjoys discretionary powers to define the content of the policy. If the protection of the Union citizen in the world is considered an entitlement to legitimate expectations, then the Union citizen is entitled only to having its claim properly taken into account by the administrative power while considering his individual case.[31] He does not have a right to receive in practice consular assistance. On the other hand, if the protection of the Union citizen in third countries is interpreted as a 'right', then the margin of discretion left to the State is significantly limited, as the citizen has the right, and the State a correspondent obligation to provide consular protection. In short, the difference between 'right' and 'legitimate expectations' sits in the starting premise of the citizen's claim. While in the case of legitimate expectations, the premise is that the citizen is not entitled to receive consular protection, and, it is the citizen who bears the burden of proving otherwise, in the case of a 'right', the premise is that the citizen is entitled to receive consular protection, and the burden of proving otherwise is on the administrative authorities.

Let us now turn to the wording of Art. 20(2)(c) TFEU in order to establish whether the EU law provides or not for an individual right of the Union citizen to protection abroad by the represented Member States, or, only an entitlement to legitimate expectations to receive this kind of external protection, as sustained by certain of the Member States.[32]

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[27] The situation was more convoluted in the pre-Lisbon era, due to a more vague language used in the relevant Treaty provisions.

[28] There are certain academic opinions which portrayed former Art. 20 TEC as an illustration of the Common Foreign and Security Policy (CFSP), a requirement for joint action between the Member States rather than as an individual right like the Union citizen's right to move and reside within the EU. See S Kadelbach, 'Union Citizenship', *Jean Monnet Working Paper*, 2003, 30 and Siofra O'Leary, *EU Citizenship – The Options for Reform*, IPPR, 1996, 63.

[29] For e.g., Ireland and UK Ministries of Foreign Affairs. However, UK has argued different opinions. In mid-2005, during hearings before the ECJ, the UK acting as a defendant in a case brought before the Court by Spain, argued that consular and diplomatic protection is a right and not a policy (Case C-145/04 *Spain v UK* [2006] ECR I-17917, para. 54). During the same year, as a response to the Commission Green Paper, the UK argued that the same Treaty based provision did not provide for a' right' to the Union citizens.

[30] See for the different opinions of the MEPs. European Parliament – Committee on Civil Liberties, Justice and Home Affairs, Resolution of 11 December 2007 P6_TA(2007)0592, available at http://www.careproject.eu/database/schedaEU.php?eulex=EUEPreport&lang=6 .

[31] See de Smith, *Judicial Review*, fifth edition, 1995, at 574-5, citing Re Findlay [1985] AC 318, 388, per Lord Scarman. For an application of the doctrine of legitimate expectations to the specific case of diplomatic protection of citizens, see R (on the application of Abbasi and another) v Secretary of State for Foreign and Commonwealth Affairs and another [2002] EWCA Civ 1598; and R (on the application of Al-Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and another [2006] EWCA Civ 1279, both cases are available in the CARE Database.

[32] For instance, UK and Ireland. See the UK position: 'the United Kingdom will not engage in publicity campaigns to inform EU citizens of Art. 23 TFEU until its definition and meaning has been legally clarified. The language of 'consular and diplomatic protection' and 'entitlement' hold a stronger guarantee than is actually available to EU citizens and could create a potentially confusing state of affairs for EU citizens.' Sir Jim Murphy, Minister of Europe at the Foreign and Commonwealth Office, European Standing Committee, 'Diplomatic and Consular Protection', session 2007-08, 23 June 2008, at col. 5, available in the CARE Database. This position has not changed, according to the Report on the UK regulatory framework on consular protection to be found in the CARE Report.

Under the EC Treaty framework, the unclear wording of the provision on protection of the Union citizens in third countries left room for interpretation. For instance, the following could be seen as arguments in favour of the entitlement argument: the use of the expression 'shall be *entitled* to' in Art. 20 EC Treaty, instead of 'shall have *the right to*' which was the expression used for all other rights of the Union citizens provided in Part two on citizenship; the fact that Art. 17(2) EC Treaty even if providing in mandatory terms that the Union citizens 'shall enjoy the rights conferred by this Treaty', the Article did not include a list of these rights; Art. 46 of the EU Charter, which has the same wording as Art. 20 EC Treaty, even if clearly entitled 'right to consular and diplomatic protection' thus indicating that Art. 20 EC Treaty established a right for the Union citizens, and not an entitlement, was not legally binding, but had only an interpretative role.

Pre-Lisbon, the EU law framework on consular and diplomatic protection of the Union citizens was drafted in ambiguous wording subject to opposing interpretation, where an obligation for the Member States could be clearly identified rather in soft law documents[33] and international agreements[34] than in the founding Treaties.

One of the innovations brought by the Lisbon Treaty which clarifies what are the exact rights of the Union citizens under EU law is the re-structuring of former Art. 17 of the EC Treaty in a non-exhaustive list of rights clearly stated as being the rights of the Union citizens. Instead of having the rights spread in different Articles, as it was in the EC Treaty, Art. 20 TFEU starts by putting forward the list of rights that the Union citizens enjoy:

> 'Citizens of the Union shall enjoy *the rights* and be subject to the duties provided for in the Treaties. They *shall have* […] *the right* to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State.' (emphases added)

To be noticed that Art. 20 TFEU does not use the word 'entitlement' of the Union citizens, nor does it make a distinction between the protection by the consular and diplomatic authorities of the Member States in third countries and the other Union citizen's rights. Consequently the FEU Treaty clarifies the previous debate on whether the Union citizen has or has not a right to protection while in third countries. This conclusion is supported also by the now legally binding EU Charter on Fundamental Rights and Freedoms. Art. 46 of the EU Charter is entitled '*the right to consular and diplomatic protection*' and is part of the Union primary law[35] that binds the Member States in their conduct towards the Union citizens. Since there is no legal hierarchy between the EU Charter and the EU Treaties, and the wording of Art. 46 of the EU Charter is identical with the wording of Art. 23 (1) TFEU, then, by way of consequence, the headline of Art. 46 – *right to consular and diplomatic protection* – indicates that Art. 20(2)(c) TFE enshrines an *individual* right to consular and diplomatic protection recognised to the unrepresented Union citizen.[36]

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[33] Guidelines on Protection of EU citizens in the event of a crisis in a Third Country adopted by the COCON Working Group on 26 June 2006 – 10109/2/06 REV 2.

[34] See the preamble and Art. 2 of the EC Decision.

[35] See Art. 6 TEU.

[36] It is important to distinguish between the Union citizen and unrepresented Union citizen as the holder of the right. The Treaties and the EU Charter do not confer a right to consular and diplomatic protection to all Union citizens, but only to a restricted category, namely, as expressly mentioned by the Treaties, to the 'unrepresented Union citizens'. The notion of 'unrepresented' as a condition that a Union citizen has to fulfil in order to enjoy the right to consular protection is, currently, exhaustively defined in Art. 1 of Decision 95/553/EC: 'Every citizen of the European Union is entitled to the consular protection of any Member State's diplomatic or consular representation if, in the place in which he is located, his own Member State or another State representing it on a permanent basis has no: - accessible permanent representation, or - accessible Honorary Consul competent for such matters.'

2.2. Legal Content of the Right to Consular and Diplomatic Protection – Is it Something More Than the Principle of Equal Treatment Based on Nationality?

It was mentioned in the introduction that according to a recent survey, the majority of the Union citizens expect to receive the same kind of help they will be given by their Member State of origin from the consular and diplomatic representations of any of the other Member States under Art. 20(2)(c) TFEU.[37] For the moment it is rather a utopian desire than the reality. Such a common framework for the exercise of consular protection for the benefit of the Union citizens presupposes either the existence of a Union law that establishes this binding common framework which, with the help of the EU Courts, will be applied and interpreted uniformly across the Union territory, or that the 27 national legal frameworks on the exercise of consular and diplomatic protection of nationals are almost identical. Unfortunately, none of these scenarios applies.

At the moment of writing, the EU law framework governing the topic of consular and diplomatic protection of the Union citizens does not establish a common set of rights and procedures for consular and diplomatic protection of the unrepresented Union citizens. The relevant EU law is made of first, general provisions found in Union primary law (the founding Treaties[38] and the EU Charter), secondly, of two international agreements implementing former Art. 20 EC Treaty, which substantially restrict the EU primary law scope (two Decisions of the Representatives of the Member States meeting within the Council[39]), without though harmonising the relevant national legislation and practice, and lastly, of an impressive amount of soft law: Council Conclusions and Guidelines[40], and numerous papers issued by the Commission.[41] There is no space here to engage in a detailed discussion of these provisions and reasons of the existent EU legal framework[42], suffices is to say at this point that these measures do not establish, neither separately nor combined, a uniform framework

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37 Eurobarometer from March 2010.

38 Art. 20(2)(c) and 23 TFEU and 35 TEU.

39 More details on the content and legal nature and effects of Decision 95/553/EC and Decision 96/409/CFSP can be found in the CARE Report.

40 The COCON committee has adopted in 15 years of its existence an impressive number of conclusions and guidelines in the field of consular protection, which however maintain a very broad language, sometimes simply limiting to reiterate the relevant Treaty provisions: see Guidelines approved by the Interim PSC on 6 October 2000, Cooperation between Missions of Member States and Commission Delegations in Third Countries and to International Organisations, 12094/00; Consular Guidelines on the protection of EU citizens in third countries adopted by the COCON and endorsed by the PSC 15613/10, of 5.11 2010; Guidelines on Protection of EU citizens in the event of a crisis in a Third Country adopted by the COCON on 26 June 2006 – 10109/2/06 REV 2; Lead State Concept in Consular Crises, Conclusions adopted by COCON, 10715/07, 12.07.2006; 'Common Practices in Consular Assistance' and 'Crisis Coordination' adopted by the COCON, 10698/10, 9.06.2010; Guidelines for further implementing a number of provisions under Decision 95/553/EC adopted by COCON, 11113/08, 24.06.2008. The initial work of the COCON was not disclosed to the public.

41 Green Paper - Diplomatic and consular protection of Union citizens in third countries (COM/2006/712 final), 28/11/2006; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Communication from the Commission, 05/12/2007; Accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Summary of the Impact Assessment (SEC/2007/1601) - Commission staff working document, 05/12/2007; Accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Impact Assessment (SEC/2007/1600) - Commission staff working document, 05/12/2007; European Commission, EU citizenship Report 2010 - Dismantling the obstacles to EU citizens' rights – 27/10/2010; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TFEU On progress towards effective EU Citizenship 2007-2010 – 27/10/2010.

42 These issues are addressed in a PhD thesis currently undertaken at the EUI by the author.

for the exercise of consular and diplomatic protection of the Union citizens in the world, but they all preserve the existing different domestic standards of protection of the Union citizens.

As to the scenario that the 27 Member States might have a similar regulatory framework on consular and diplomatic protection of nationals, it has been pointed out at the beginning of this section that there are extensive discrepancies between the Member States' national law and practice on protection abroad of nationals. The divergence between the domestic frameworks is, in fact, a natural result of the different national foreign policy interests, historical ties developed by each of the Member States with different regions of the world, different ambitions and seize in population. Thus it would have been almost impossible to develop a shared model of consular protection of nationals. The resistance of the Member States to the adoption of a common harmonised EU model of consular and diplomatic protection of EU citizens results from their understanding of consular and diplomatic protection of the nationals as one of the ultimate attributes of a sovereign State. The loss of the State's discretionary power to contour the model of protection abroad of nationals is thus equated with loss of an important part of the State's sovereignty. In light of the Member States' approach of consular and diplomatic protection of nationals, the EU design of protection abroad of the EU citizens as a right uniformly applied irrespective of the requested Member States is for the near future a utopian aim.

Having established what Art. 20(2)(c) TFEU does not confer to the Union citizens, we now turn to the question of what the provision does confer to the Union citizens in distress abroad?

The wording of the Union citizen's right to consular and diplomatic protection abroad has remained almost the same from its very first construction as Art. 8c of the Maastricht Treaty until present:

> 'Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.'[43]

From the use of the 'on the same conditions' expression, we can legitimately conclude that the Article provides for the application of the principle of non-discrimination based on nationality in the specific field of consular and diplomatic protection of Union citizens in the world. Certain academics[44] argued that the right to consular and diplomatic protection as framed by the founding Treaty is not innovative as to its content, since it is a mere reiteration of the explicit general EU law principle of non-discrimination based on nationality laid down in Art. 18 TFEU (former Art. 12 EC Treaty) to the specific situation of protection of the Union citizens abroad. Interestingly, it has to be noticed that at the moment of introducing the European citizenship, the scope of other citizenship rights of the Union citizens were also interpreted as mainly an application of the principle of non-discrimination based on nationality, however, they were still seen as a major step in the European integration process.[45]

In the meantime, the scope of the Union citizen's rights, especially of the freedom to reside and move, has been developed by the Court so as to include also prohibition of serious inconvenience without actual discrimination based on nationality.[46]

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[43] The Article made express the obligation for the EU countries to start, within a short deadline *before 31 December 1993.* There is only one difference between the wordings of Art. 20(2)(c) and 23(1) TFEU: if Art 20(2)(c) TFEU provides that consular ***and*** diplomatic authorities of the Member States will confer protection, Art. 23(1) TFEU provides that national consular ***or*** diplomatic authorities will confer protection.This paper argues that the use of 'or' is rather intended to clarify the situation when a Member State has both diplomatic and consular representations in a third country. In this case, the Union citizen should seek protection only from one of these authorities representing the Member State, and not take advantage of help from both of representations. However, in light of the perfect match of the rest of the wording of Art. 20(2)(c) TFEU with Art. 23(1) TFEU, the change of 'and' with 'or' is regrettable and should have been avoided by the Treaty drafters.

[44] M Condinanzi and A Lang, *Cittadinanza dell'Unione e libera circolazione delle persone* (Milan: Guiffre editore 2009) 49.

[45] A Duff, *Saving the European Union – The Logic of the Lisbon Treaty* (London: Shoehorn 2009).

[46] Case C-391/09 *Runevič-Vardyn and Wardyn*, Judgment of 12 May 2011, nyr.

A similar evolution can be identified, though to a lesser degree, also in regard to another Union citizenship right which, in a way, shares more similarities than the freedom to reside and move, with the right to consular and diplomatic protection, since it is framed in evident equal treatment language, and applies also in the sensitive area of high politics of the Member States: the right to vote for the European Parliament elections enshrined in Art. 22 TFEU.[47] Despite the explicit equal treatment wording and the high sensitiveness of the 'political rights' field, the Court of Justice in the *Aruba* case[48] held that Union citizens have a right to vote for the European Parliament's elections as 'a normal incident of Union citizenship'.[49]

We can thus notice a trend in the jurisprudence of the ECJ whereby, the rights of the Union citizens as recognised by Art. 20 TFEU, have a scope going beyond the application of the principle of non-discrimination based on nationality.[50] The question is: can we identify an extension of the aforementioned jurisprudential thread experienced by the freedom to reside, move and the right to vote for the European Parliament also in regard to the Union citizen's right to consular and diplomatic protection? In other words, has the Union citizen's right to consular and diplomatic protection developed into something more than the principle of non-discrimination, so that the Union citizen enjoys wider protection abroad than equal treatment solely based on the fundamental status of Union citizenship?

For the moment such a judicially developed evolution cannot be traced in regard to the right to consular and diplomatic protection, simply because the EU Courts have never dealt with the Union citizens' right to protection abroad.[51] The majority of the national case law that have reached the EU Courts do not concern the right to consular protection, but other consular affairs matters, such as: issuing of visas,[52] financial obligations arisen for the Member States as a result of signing a memorandum of understanding between the Commission and the Member States on setting up a common diplomatic mission in Abuja (Nigeria),[53] hierarchy between the methods of sending judicial

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47 Whereby citizens of the Member States resident in other Member States have the right to vote in European Parliament's elections *under the same conditions* as nationals.

48 Case C-300/04 *Eman and Sevinger v. College vanburgemeester en wethouders van Den Haag* (*Aruba*) [2006] ECR I-8055.

49 J Shaw, 'The Treaty of Lisbon and Citizenship', *The Federal Trust European Policy Brief*, June 2008.

50 Case C-135/08 *Rottmann*, judgment of 2 March 2010, nyp.

51 The landmark cases of the Court of Justice in the field of the EU citizenship have so far created either economic or social rights for the Union citizens within the borders of the internal market. For economic rights see the pronouncements of the Court of Justice in: Case C-138/02 *Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703; Case C-258/04 *Ioannidis* [2005] ECR I-8275; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257; Case C-362/88 *GB-INNO* [1990] ECR I-667. For social rights, see the pronouncements of the Court of Justice in Case C-148/02 *Garcia Avello v Belgium* [2003] ECR I-11613; Case C-85/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case [ECJ] C-413/99 *Baumbast* [2002] ECR I-7091; Case C-200/02 *Chen* [2004] ECR I-9925; Case C-158/07 *Förster* [2008] ECR I-8507; Case 186/87 *Cowan* [1989] ECR 195; Case C-57/96 *Meints* [1997] ECR I-6689.

52 Case T-372/02 *Internationaler Hilfsfonds v Commission* [2003] ECR II-438; Case C-327/02 *Panayotova* [2004] ECR 1-11055; Case C-139/08 *Kqiku* [2009] ECR I--2887; C-219/08 *Commission v Belgium* [2009] ECR 1-9213; Case C-228/06 *Soysal* [2009] ECR 1-1031; Case C-244/04 *Commission of the European Communities v Federal Republic of Germany* [2006] ECR I-885; Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgium* [2002] ECR I-6591; Case C-257/99 *Barkoci and Marcel Malik* [2001] ECR I- 6557.

53 Case C-203/07 P *Greece v Commission* [2008] ECR I-0000.

documents by post or by consular or diplomatic agents under Union law,[54] and the duty of diplomatic protection of the Union in regard to vessels (not individuals) of the Member States.[55]

The fact that for the moment the legal content of the Union citizen's right to consular and diplomatic protection is the principle of non-discrimination based on nationality does not mean first, that Art. 20(2)(c) TFEU in its initial form as Art. 8c of the Maastricht Treaty was not innovative, second, that it will remain at the level of the principle of non-discrimination based on nationality, and thirdly, that the Member States can deny the right to consular protection to un-represented Union citizens simply because they do not confer a right to consular protection to their own citizens either. It what follows I will explain each of the foregoing conclusions.

If the founding Treaties had not provided for the right to consular and diplomatic protection as it stands now, the mere existence of the general principle of non-discrimination based on nationality laid down at the start of the citizenship part of the Treaty[56] would not have been of too much help for the Union citizens located outside of the Union borders. The general principle of equal treatment applies, as Art. 18 TFEU (former Art. 12 EC Treaty) says, *within the scope of EU law*. In the absence of the primary law provision creating the right to protection abroad of the Union citizens, of legislative competence for the Council in this specific field[57], and of a Community objective that could have been developed by making use of the flexibility clause[58], then no EU law could have been developed, which would have then justified the application of the general principle of equal treatment.[59] The innovative element brought by inserting Art. 8c in the EC Treaty sits in creating the scope of EU law, or better said in creating the general legal basis which depending of the evolution of factual circumstances and the law it can be further developed by the Union legislative and judiciary.[60]

The right to consular and diplomatic protection of the Union citizens has so far remained quite underdeveloped in comparison with the other "citizenship rights" and has not been the subject of the EU Courts jurisprudence. However, the legal content of the Union citizen's right to consular and diplomatic protection does not necessarily have to remain at the current status of the equal treatment

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54 See Case C-473/04 *Plumex v Young Sports NV* [2006] ECR I-1579 – the Union law that was interpreted in this case was Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160, p. 37).

55 This duty arose however only as a result of an express contractual obligation on the part of the Union, Case T-572/93 *Odigitria AAE v Council of the European Union and Commission of the European Communities* [1995] ECR 11-2025.

56 To be noticed that the provision of the general principle of non-discrimination based on nationality at the beginning of the Citizenship chapter has been introduced only since the Lisbon amendment.In the EC Treaty, it was located in a different part (Part One on Principles) separated from Part two on Citizenship.

57 Pre-Lisbon the Council of the EU was not conferred internal legislative competence. It is the Lisbon Treaty which provided for the first time express internal legislative competence for the Council in the field of the Union citizen's right to consular and diplomatic protection (Art. 23(2) TFEU).

58 Former Art. 308 EC Treaty required the express provision of a Community objective (to be distinguished from Union objective) as one of the positive conditions that had to be fulfilled so as to justify the use of the flexibility clause as legal basis for Community legislative measures. See more on the conditions for the use of Art. 308 EC Treaty as legal basis for Community acts in K St Clair Bradley, 'Powers and Procedures in the EU Constitution: Legal Bases and the Court' in P Craig and G de Burca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press 2011) 100. See also, Case T-306/01 *Yusuf* [2005] ECR II-3533, para. 164; Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-03649; Case C-436/03 *Parliament v Council (European cooperative society*) [2006] ECR I-3733; and Case C-217/04 *UK v Council and European Parliament (European Network and Information Security Agency*) [2006] ECR I-03771.

59 The ECJ has constantly held that the principle of non-discrimination based on nationality applies only within the scope of EU law, see Case C-85/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

60 As happened with the other Treaty based rights of the Union citizen.

principle. The Council, depending of the content of the future directives it may adopt,[61] and the EU Courts, which may apply their purposive interpretation[62] to Arts. 20(2)(c) and 23(1) TFEU and to the future Council Directives, may lead the way to an evolution of the Union citizen's right to protection abroad similar to the one recently experienced by the other Union citizen's rights.

The current understanding of the right to consular and diplomatic protection as an equal treatment principle does not though justify a rejection of consular protection by a Member State simply on the basis that it does not confer such assistance to its nationals under its national law.[63] Being fundamental right of the Union citizens,[64] a rejection of this right by the Member States is justified only if respecting the pre-requisites provided by Art. 52 of the EU Charter.[65] A different understanding will empty the fundamental right of the Union citizen of any meaningful effect. The principle of equal treatment does not legitimise the conduct of the Member States that question whether to respond or not to the requests of the Union citizens to receive protection in third countries.

Let us now look at how the principle of non-discrimination based on nationality might work in the specific situation of evacuating the Union citizens from crises situations, which recently have greatly challenged both the Union and the Member States.[66] Art. 23(1) TFEU does not require a different conduct from the Member States in cases of crises than in day-to-day situations. In both circumstances, only the Union citizens that do not have an accessible consular or diplomatic representation of their Member State are entitled to receive protection from another Member State. In crises, however, the Member States have not followed such a strict approach, but they aimed to ensure the evacuation of all Union citizens, being guided by the motto of 'no citizen will be left behind', irrespective of whether they were or not represented in the third country hit by crises.[67] Despite their good intention, the Member States operated on the basis of an *ad-hoc* type of cooperation, and not on a pre-established contingency plan.[68] This practice has to be reconsider in light of the EU general principles and Treaty rights, so as to ensure the respect of the fundamental right to protection abroad

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61 Based on Art. 23(2) TFEU. To be noticed that the Article does not require the Council to adopt implementing legislation, but it only gives it a possibility.

62 The purpose of the Treaty Articles, especially those on Union citizen's rights and fundamental freedoms has plaid a significant role in the European Court of Justice's interpretation of these Articles, whether in cases assessing direct effect, or breach of these rights and freedoms. See more in B de Witte, 'Chapter 12 – Direct Effect, Primacy, and the Nature of the Legal Order' in Craig and de Burca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press 2011).

63 As certain Member States have argued, see the position of the Member States having an approach of the consular and diplomatic protection of nationals as a matter of the executive's policy in the CARE Final Report, available at http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf .

64 Enshrined in Art. 46 EU Charter.

65 According to Art. 52(1) of the EU Charter, limitations and restrictions of the Charter's fundamental rights are possible as long as the following conditions are fulfilled: the limitation must be provided by law; respect the essence of the fundamental rights; respects the principle of proportionality; it is necessary for the purpose of genuinely meeting objectives of general interest as recognised by the Union or there is a need to protect rights and freedoms of others.

66 See, *inter alia*, the recent democratic revolutions in Egypt, Libya, tsunami that affected Japan.

67 According to the information gather by the author during interviews with Commission and Member States representatives in the period of March – July 2011.

68 One author argues that the Member States will respect the principle of non-discrimination based on nationality only if an equal number of places is given to each of the Member States in the transport means made available by another Member State (A Ianniello-Saliceti, 'The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services' (2011) 17 *European Public Law* 91, 97). This paper argues that Art. 23 TFEU would not require the aforementioned method of division of places, as the Article entitles only the unrepresented EU citizens to equal treatment. According to Art. 1 of the EC Decision, unrepresented Union citizens are those that do not have an accessible consular or diplomatic mission of their Member in the third country where they are located. Thus, in practice, a strict application of the Treaty Article would require a division of places by the number of the unrepresented Member States plus one (the Member State providing the transport means). However, in practice, the Member States are not that formalistic, as proved by the recent evacuation procedure of the Union citizens from Egypt and Libya.

of the Union citizens and of their right to family life when considering the evacuation of the third country nationals family members of the Union citizen in the specific situation of evacuation procedures.

2.3. Does Diplomatic Protection Fall Under the Scope of the Union Citizen's Right to Protection Abroad?

In the previous section it was shown that the content of the Union citizen's right enshrined in Art. 20 (2)(c) TFEU is the principle of non-discrimination based on nationality. In this section it will be shown that the issue whether the Article confers independent rights beyond the equal treatment right is not the only unclear aspect of the legal content of this right. The most fervent critique brought by both academics[69] and Member States[70] to the scope of this right concerns the lack of clarity as to what type of protection of individuals in third countries is the Treaty referring to - consular *or*/*and* diplomatic protection-, and what is the exact scope of each of these mechanisms. As pointed out by Vigni in her contribution to this edited paper,[71] Art. 20(2)(c) TFEU does not use the settled public international law concepts of 'consular protection' and 'diplomatic protection', but a new concept which is not an established legal concept under the public international law norms – 'protection by the consular and diplomatic authorities of the Member States' and consequently should not be understood as encompassing both of the consular and diplomatic protection. Once again it seems that the EU legal order establishes its own autonomous legal concept which even though similar to ones existing under public international law, it is not clear whether they share or not the same meaning.[72] The present section will tackle the question whether under the European model of protection of the Union citizens abroad, the latter are entitled to receive both consular and diplomatic protection or only one of them, and whether these types of protection should be understood as having the same meaning as those existent under public international law.

A brief retrospective of the Maastricht inter-governmental debate on the citizenship provisions might help to understand the wish of the Member States. At the time of drafting the Maastricht Treaty, Spain made a proposal for an Article on the protection of the unrepresented Union citizens while outside of the Union. The article was drafted in clear terms, expressly providing for 'consular and diplomatic assistance and protection'[73] of the citizens of the European Union from any of the Member States.[74] However, not all of the Member States agreed with Spain's proposal to refer precisely to consular and diplomatic protection of the unrepresented Union citizens. The compromise they managed to reach

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69 T Stein, Interim Report on 'Diplomatic Protection Under the European Union Treaty in: ILA Committee on Diplomatic Protection of Persons and Property, Second Report, New Delhi, 2002, 32-39; A Vermeer-Künzli, 'Exercising Diplomatic Protection The Fine Line Between Litigation, Demarches and Consular Assistance' (2006) 66 *ZaöRV* 321-350; Vigni, 'Diplomatic and consular protection: Misleading Combination or Creative Solution?'; C Closa, 'Citizenship of the Union and Nationality of the Member States' (1995) 32 *Common Market Law Review* 487-519;

70 See the national Reports on France, Ireland, Poland, UK in the CARE Report, available at www.careproject.eu/database/browse_eu.php .

71 See the contribution by Patrizia Vigni to this edited Working Paper.

72 For instance, see the EU specific legal definition of 'goods', 'worker', 'primacy', 'subsidiarity', 'proportionality', 'alien', 'national security', 'genuine link' – in EU citizenship case law the meaning of 'genuine link' is different in comparison to the public international law concept of 'genuine link'. The following examples show that the EU Courts have not limited their interpretation to mere transposition of the international law concepts, but adapted them to the EU legal order specificity.

73 It can be noticed that the Spanish proposal referred to both 'protection' and 'assistance' since under Spanish national law the two concepts are legally different. The Spanish legal literature distinguishes between protection, which involves formal complaints before public authorities, while assistance refers rather to provision of food, clothes, and medicines. See E Vilarino Pintos, *Curso de Derecho Diplomatico y Consular. Parte general y textos codificadores* (Tecnos: Madrid 1987) 102-103; A Maresca, *Las relaciones consulares* (Piernas:Madrid 1974) 215-219.

74 See Documentation de la RIE, col 18 1991, 333-338 and 405-409.

was a broader concept which permits both interpretations – with/without diplomatic protection. This kind of 'enigmatic' legislative drafting is followed by the Member States when they do not agree on the exact scope of a Treaty provision. The result is that they leave it framed in broad terms that can be subject to different interpretation, which depending on the evolution of the Member States' view of the topic can be interpreted in different ways leading to different legal consequences.[75] The Member States maintained this attitude also latter on during the elaboration of the EC Decision on the implementation of the Union citizen's right to protection abroad. Several delegations of the Member States opposed to Arts. 11-18 of the original draft of the *ad-hoc* group which expressly referred to diplomatic protection.[76] Since the Decision is an international agreement which could have been adopted only by unanimous consent, those Articles and consequently diplomatic protection did not made their way into the final Decision. The Member States decided instead to focus on the matter that was causing them, at that time, more problems – consular protection.[77]

In the previous paragraphs we attempted to find out what the Member States intended to confer to the Union citizen and it resulted that their conduct during the several Treaty amendments and during the elaboration of the EC Decision is firmly suggesting indecision and divided opinions. However, so far we looked only at the English official version of the Treaties, if one was Polish, Finish or Czech, they would read differently Art. 20(2)(c) and 23(1) TFEU since the official version of these Articles in the aforementioned languages use the clear concept of consular and diplomatic protection. In case of different language versions of a text of EU law, the ECJ decided that uniform interpretation must be given to the text and hence, 'in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.'[78] In our case, the purpose of Art. 20(2)(c) TFEU has to be seen in light of the newly introduced Union objective of 'protection of the Union citizens in the world'. The objective seems to refer to a general protection of the Union citizens in third countries, without distinction or limitations. In the same way neither Art. 20(2)(c) or Art. 23(2) TFEU make a distinction or exclude diplomatic protection from their scope, even if the Member States had multiple occasions during several Treaty amendments to introduce such a limitation. This interpretation whereby diplomatic protection is included in the right of the Union citizen to protection abroad seems to be supported also by Art. 46 EU Charter, which is now part of the EU primary law. As previously mentioned, the wording of Art. 46 EU Charter is identical with Arts. 20(2)(c) and 23(1) TFEU, while Art. 46 EU Charter is conclusively entitled 'right to consular and diplomatic protection'. It can be argued that the EU Courts may have a similar interpretation of the scope of Art. 20(2)(c) TFEU since in cases concerning

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[75] A similar example of divided opinions between the Member States leading to broad definition of a legal concept is the well known broad, encompassing all, definition of the CFSP, R Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 34 *Common Market Law Review* 358–9.

[76] T Stein, Interim Report on 'Diplomatic Protection Under the European Union Treaty', in: ILA Committee on Diplomatic Protection of Persons and Property, Second Report (New Delhi 2002), 36-7.

[77] The Commission seems to have the same interpretation, diplomatic protection is not *per se* excluded from the legal content of the Union citizen's right, but for the moment, attention is given to the most problematic aspect of the right – consular protection for Union citizens found in distress in third countries. See Accompanying document to the Commission Action Plan 2007-2009 - Impact Assessment, doc. SEC (2007) 1600 of 5 December 2007 and the European Commission's EU citizenship Report 2010 - *Dismantling the obstacles to EU citizens' rights*, doc. COM (2010) 603 of 27 October 2010.

[78] Case C-341/01 *PlatoPlastik Robert Frank* [2004] ECR I-4883, para. 64; Case C 340-08 *M and others*, (Fourth Chamber) judgement of 29 April 2010, nyr, para. 44. In the latter case there was discrepancy between different language version of both the EU law at issue (Council Regulation no 881/2002) and the United Nations Security Council Resolution 1390 implemented by the foregoing Council Regulation. Since it could not take a decision solely on literary interpretation, the European Court of Justice interpreted the provision on the basis of the aim of the Regulation and Resolution.

citizenship rights, or fundamental human rights, the Court has had in mind the effectiveness of these rights, sometimes even to the detriment of the Member States' interests.[79]

In *Ayadi*[80] and *Hassan*[81], the General Court of the EU has recognised an obligation on the part of the Member States to exercise diplomatic protection for foreign citizens resident in the Union territory. If the Court was willing to go as far as recognising an obligation for the Member States in regard to third country nationals, it can be argued that, furthermore it will do so for the Union citizens.

Despite the appealing impulse of making an analogy between these cases where diplomatic protection of individuals was indirectly touched and the legal content of the Union citizen's right to protection in the world, we have to take distance and see that the foregoing judgments were decided in a specific context which weighed heavily in the Courts' decision. These specific and limited circumstances do not suffice to make a general statement that the Court will hold diplomatic protection as part of the Union citizen right to protection abroad, nevertheless, they can suggest that the Court will be poised between two difficult options where its decision will be finally influenced by the need to ensure effective protection abroad of the unrepresented Union citizen.

So far we have looked at the EU law framework to find out whether the right to protection abroad of the Union citizens can be interpreted as encompassing also diplomatic protection. It has been pointed out that the EU law favours such an interpretation. However, public international law academics[82] have argued that the EU model of protection abroad cannot be interpreted as encompassing also diplomatic protection as such an interpretation is unlawful under the public international law norms for the following main reasons: firstly, since the nationality condition required under public international law is not fulfilled, and secondly, because the previous consent of third countries to the EU model has not been obtained[83].

This paper argues that even if the general norm under public international law is still that only the State of nationality can exercise diplomatic protection for its own nationals as long as the nationality link is genuine, there are recent developments also under public international law which indicate a shift from this traditional approach. Draft Art. 8 of the ILC Draft Articles on Diplomatic Protection, whereby refugees and stateless persons lawfully residents in a country can receive also diplomatic protection, signals that the traditional understanding of the nationality as a *ius sanguinis* or *ius soli* is no longer the sole type of genuine link which can legitimize the exercise of diplomatic protection for an individual. Therefore, it seems that the ILC suggests that there is a genuine link between an individual and the State not only on the basis of nationality but also on other criteria as long as the relation between the individual and the State is still solid. The issue of whether currently there is such a solid link between the Union citizens and all other Member States so as to justify the European

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79 See for example, C-200/02 *Chen* [2004] ECR I-9925; Case C-135/08 *Rottmann* [2010] ECR I-0000; Case C-34/09 *Zambrano*, judgment of 8 March 2011; and the already famous Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351.

80 Case T-253/02 *Ayadi v Council and Commission* [2006] ECR II-2139, para. 149

81 Case T-49/04 *Hassan v Council and Commission* [2006] ECR II-52, para. 119.

82 J Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, 10; Draft Articles on Diplomatic Protection with commentaries, text adopted by the ILC at its fifty-eighth session, in 2006 (A/61/10),footnote 31, p. 41; A Vermeer-Künzli, 'Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance' (2006) 66 *ZaöRV* 321, 339-340.

83 According to Art. 8 of the Vienna Convention on Consular Relations (VCCR) and Art. 6 of the Vienna Convention on Diplomatic Protection (VCDR), the receiving third country has a discretionary power to oppose to the exercise of consular and diplomatic protection by another State than the State of nationality, as long as it has not formally consented to this type of protection of individuals.

model of protection abroad of the Union citizens is a complex one and due to limited place, it cannot be touched here.[84]

The main argument of this paper in favor of the legitimacy of the European model of consular and diplomatic protection of the Union citizens is not based on the 'solid link' argument, but on the fact that the ILC Draft Articles on diplomatic protection establish minimum standards under public international law which permits the States to go beyond these rules as long as they respect the condition of obtaining the express unanimous consent of all the States involved in the new model (i.e. the State of nationality, the States exercising the protection and the receiving third country).[85] Consequently, from a public international law perspective, the problem of the EU model consists not in the fact that public international law generally excludes diplomatic protection of the kind envisaged by the EU law, as exceptions are possible, but rather whether there is, on the one hand, an express unanimous consent of the Member States for the EU model to include diplomatic protection, and on the other hand, whether there is the consent of the third countries for the exercise of consular and diplomatic protection by non-nationality Member States.

In regard to the unanimous consent between the Member States, it was pointed out above that the Member States have divided opinions on the issue of the legal content of the right, and for the moment it cannot be said that they have a unanimous view on whether to include or not the diplomatic protection in the Union citizen's right to protection abroad.[86] As to the consent of the third countries in regard to the exercise of diplomatic protection by a non-nationality Member States, according to Art. 6 of the VCDR, there is no need of express consent for the exercise of diplomatic protection, it can be also implied from the third countries absence of opposition. However, in case of absence of a signed agreement, the third countries can, at any moment and without any explanation, object to this exercise of diplomatic protection. In spite of the express Treaty obligation of the Member States to start the international negotiations with third countries so as to ensure the consent of the latter, the majority of the EU countries have never started such formal negotiations, with only two exceptions,[87] consequently nor have they concluded such international agreements, or revised the existent ones.

In sum, from a public international law perspective, it can be argued that the Union citizens do not enjoy the right to diplomatic protection in third countries from the other Member States in light of absence of an express and clear consent of all the parties involved in the EU model. One might question why is the public international law perspective relevant since the EU has for a long time developed a practice of establishing autonomous legal concepts that even though they were

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[84] To be noticed though that the Lisbon Treaty has brought a proliferation of references to 'peoples of Europe', 'Union peoples' which signals a strong desire to continue the creation of a sense of belonging between the citizens of the Member States and the Union, and not necessarily between the citizens of the Member States and the other Member States: preamble 13, TEU - Arts. 1(2), 3(1), 3(5), 9(1), 3(2), 10(4), 13(1), 14(2), 35(3); TFEU – Arts.15(3), 20(1), 21(1), 22, 23, 24, 170(1), 227(1), 228(1).

[85] Case *US v Italy (ELSI Elletronica)* [1989] ICJ Reports 1989, para. 50 of the judgment; Advisory Opinion - Reparation for Injuries Suffered in the Service of the UN, ICJ Reports 1949:'In the second place, even in inter-State relations, there are important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality.'

[86] This requirement of unanimous consent under public international law might not though impede the European Court of Justice to rule in the future in favour of diplomatic protection.

[87] There are two exceptions: Italy signed several bilateral agreements after the entry into force of the Maastricht Treaty which include provisions protecting Union citizens working and/or living in third countries - namely the Conventions with Ukraine in 2003 (Art. 62), Republic of Moldova in 2000 (Art. 61), Georgia in 2002 (Art. 60), Great People's Libyan Arab Jamahiriya Socialist in 1998 (Art. 2) and Russian Federation in 2001 (Art. 37); the second exception is Portugal, namely the Consular Convention between Portugal and the Russian Federation (concluded in 2001). These agreements can be found online in the CARE database.

challengeable under public international law, did not stop their application under the EU law.[88] The present topic, diplomatic protection of unrepresented Union citizens in third countries, is a mechanism that does not operate within the EU territory, as the previous EU autonomous concepts, but entirely outside of the Union's borders. Consequently, the pact between the EU countries is a *res inter alios acta* for the third countries, which enjoy sovereign powers whether to prohibit or not a procedure carried out entirely within their sovereign territory. In future, if diplomatic protection will be recognized under the EU law framework for the benefit of the Union citizens, the consent of the third countries has to be ensured so as to prevent the prospect of discretionary rejection from the third countries, against whom the EU law is not binding.

2.4. Questioning the Direct Effect of the Union Citizen's Right

In light of the different positions currently taken by the Member States on whether the Union citizen has or not a right to protection abroad and on the material scope of this right, then, situations where the Union citizens will be refused assistance will most likely arise in the future. The question that this section plans to assess is whether the Union citizen can invoke his Treaty based right before the national courts in order to find redress against such refusals.

It is settled case law of the EU courts, that Union rights may be invoked directly before the national courts if they satisfy the conditions of clear, precise and unconditional wording.[89] As Bruno de Witte notes, the Court has, over time, changed its strict *Van Gend en Loos* understanding of these conditions so that currently, the direct effect test boils down to one single condition: 'is the norm sufficiently operational in itself to be applied by a court?'[90]

The main arguments raised by the academics[91] against the direct effect of the right to consular and diplomatic protection are first, that the right is not clear in what it confers to the Union citizens (see the above mentioned debate on whether diplomatic protection is or not included),[92] second that the right needs further implementing measures to be adopted by the Member States in order to be effective according to the requirement laid down in Art. 23(1) TFEU,[93] and third, that the exercise of the right by the Member States depends upon the consent of the receiving third country which, for the moment, none of the Member States has expressly acquired.[94] We will continue by addressing in turn each of these three critiques.

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88 See the practice of disconnection clauses. For an extensive discussion on the regime of disconnection clauses in EU law see M Cremona, 'Disconnection Clauses in EC Law and Practice' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited - The EU and its Member States in the World* (Oxford: Hart Publishing 2010).

89 C-26/62 *Van Gend en Loos* [1963] ECR 1. TC Hartley, *The Foundations of European Union Law*, seventh edition (Oxford: Oxford University Press 2010) 110.

90 The justiciability test as the author calls it. See de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' 331.

91 C Closa, 'Citizenship of the Union and Nationality of the Member States' (1995) 32 *Common Makret Law Review* 502 and S Kadelbach, 'European Integration: The New German Scholarship', *Jean Monnet Working Paper 9/03*; J-P Puissochet, 'La pratique francaise de la protection diplomatique' in J-F Flauss (ed), *La Protection diplomatique-Mutations contemporaines et pratiques nationales* (Bruxelles: Bruylant 2003) 119-120.

92 In addition to this argument, certain Member States argue that the Treaty based Article needs further clarification whether it confers consular assistance and/or protection as in certain national legal orders the two legal concepts are distinct, as for instance in: Germany, Ireland, Romania, Spain, UK. See more on this topic in CARE Report, Chapter three, Section. 4.1.1.

93 Art. 23(1) TFEU second indent provides: 'Member States shall adopt the necessary provisions […] required to secure this protection.'

94 Art. 23(1) TFEU second indent provides: 'Member States shall […] start the international negotiations required to secure this protection.', recognising the public international law requirements: Art. 8 of the VCCR and Art. 6 of the VCDR.

Concerning the questioned clarity of the EU citizen's right to protection abroad, it was previously shown that, for the moment, the right is at a status of a specific application of prohibition of discrimination based on nationality in the field of consular and diplomatic protection of the unrepresented Union citizens. To be noticed that in *Reyners*,[95] the European Court of Justice recognised direct effect to former Art. 52 EEC Treaty on freedom of establishment based on the interpretation of this Article as a prohibition of discrimination.[96] Nowadays it can be argued with certainty that the principle of non-discrimination based on nationality enjoys direct effect.[97]

As to the contention that the right is not unconditional since it requires the Member States to adopt implementing measures, it has to be noticed that the Lisbon Treaty brought a change in the wording of Art. 23(1) TFEU. Former Art. 20 EC Treaty stipulated that 'the Member States *shall establish the necessary rules among themselves* […] required to secure this protection.' while current Art. 23(1) TFEU reads as follows: 'The Member States *shall adopt the necessary provisions* […] required to secure this protection.' (emphases added) Art. 23 TFEU continues in paragraph two with an express conferral of legislative competence for the Council which can act in the field of consular and diplomatic protection of the Union citizens by way of adopting directives. There are two important changes in the wording of the right: first is the replacement of 'establish rules' with 'adopt provisions' and second, the word which indicated the purely inter-governmental character of the field 'among themselves' was eliminated. As noted by another author,[98] the change of wording may indicate that the referred measures are those that the Member States have to adopt so as to implement the Council directives, the expression 'adopt provisions' is commonly used in the field of implementation of directives by the Member States.[99] On the contrary, the previous expression 'establish rules' rather conveys the idea of new norms to be adopted for the purpose of detailing the content of the Union citizen's right. Whether this is or not the intention of the Member States, the European Court of Justice constantly rules that the need for further implementing measures to be adopted by the Member States is not *per se* capable of denying direct effect to a Treaty based provision. There are numerous examples pointing in this direction, most of them to be found in the field of fundamental freedoms,[100] however the most relevant example for the present topic is the Union citizen's right to reside and move which the Court has recognised as directly effective.[101]

Former Art. 18(1) EC Treaty was firstly conditioned by limits which the Member States could impose and secondly by measures which the Member States themselves could adopt 'to give effect to the right'. The latter condition is similar to the one existent in Art. 23(1) TFEU. Contrary to the Member States, the European Court of Justice in the *Baumbast* judgment held that the need of further implementing measures by the Member States does not prejudice the direct effect character of the right to reside and move as the margin of discretion left to the Member States is subject to strict

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95 Case C-2/74 *Reyners v Belgium* [1974] ECR 652, para. 30: 'After the expiry of the transitional period the directives provided for by the chapter on the right of establishment have become superfluous *with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect.*' (emphasis added) See also Case 43/75 *Defrenne v SABENA* [1976] ECR 445.

96 See also P Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law' (1992) 12 *Oxford Journal of Legal Studies* 464.

97 For a recent case on direct effect of the principle of non-discrimination based on nationality, see Case C-164/07 *Wood* [2008] ECR I-4143.

98 Ianniello Saliceti, 'The Protection of EU Citizens Abroad' 91-109.

99 See for instance Art. 291(1) TFEU: 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts.'

100 For instance, Case C-13/68 Salgoil [1968] ECR 463. Hilson notes that the recognition of direct effect to the fundamental freedoms by the European Court of Justice surprised, as 'none of them sit particularly happily with the requirements as to clarity, precision and unconditionality.' See C Hilson, 'What's in a right? The relationship between Community, fundamental and citizenship rights in EU law' (2004) 29 *European Law Review* 636, 640.

101 Case C-431/99 *Baumbast* [2002] ECR I-7091.

judicial review by the national and EU courts. Consequently, even if rejecting the interpretation of the new wording of Art. 23(1) TFEU as a reiteration of the Member States' duty to adopt national measure implementing the relevant EU law, in light of the Court's reasoning in *Baumbast*, the right to consular and diplomatic protection still cannot be rejected direct effect because the limitations that the Member States can adopt are subject to the full jurisdiction of the EU and the national courts.[102]

In the foregoing paragraphs, the *Reyners* and *Defrenne* cases were invoked as examples of cases where the direct effect was recognised by the European Court of Justice to unclear and legally incomplete Treaty Articles.[103] The reason why the European Court of Justice, despite expressly recognising the conditionality of these Articles, held in favour of direct effect was to ensure the objective of these Articles when the Member States failed to fulfil their obligations to adopt implementing legislation within the provided transitional period. In light of this reasoning, the un-fulfilment by the Member States of their expressly provided Treaty obligation to start international obligations for the last 18 years, and contrary to the initial time limit provided in Art. 8c of the Maastricht Treaty,[104] might influence the Court's decision in favour of recognising direct effect to the right to consular and diplomatic protection of the Union citizen.

3. What Role for the Union in the Protection of the EU Citizens Abroad – A Unique Model of Protection of Individuals Abroad

> 'The EU remains the only organisation that can call on a full panoply of instruments and resources [to] complement the traditional foreign policy tools of its member states.'[105]

The above statement made by Solana one month before the entry into force of the Lisbon Treaty in regard to the role of the EU as an international actor perfectly reflects the *statu quo* of the relation between the Union and the Member States in the area of consular and diplomatic protection of Union citizens. Currently, the Union complements the exercise by the Member States of the international protection of the Union citizens with the help of its institutions[106] when the Member States so request.[107] For the moment it plays only a supporting role for the Member States but as it will be shown in this section it has the potential to develop into something even more revolutionary. We say 'even more' revolutionary as even if one may take at face value the current role of the Union in regard to Union nationals as something normal, expected in light of the Union's external ambitions, it should not. This merely 'supporting' role plaid by the EU is a unique role in the arena of international

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[102] The general rule is that the EU courts have jurisdiction, unless expressly excluded as is the case of the CFSP (Art. 24 TEU).

[103] *Reyners* – former Art. 52 EC Treaty and *Defrenne* – former Art. 119 EC Treaty.

[104] Art. 8C of the EC Treaty reads as follows: '*Before the 31 December 1993* the Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.' (emphasis added)

[105] Statement made by Javier Solana, 'EU Makes Its Mark on the World Stage', *The Guardian*, 11 October 2009.

[106] So far EU Institutions that have plaid a role in consular and diplomatic protection of the Union citizens are: the Union Presidency, SITCEN, the President of the European Council, the High Representative of the Union for Foreign Affairs and Security Policy, and now also the EEAS (Art. 5(10) of Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L 201/30.

[107] The area is not categorised among the TFEU list of competences, however, Art. 5(10) is suggestive of the Union role in the area of consular and diplomatic protection, as well as Art. 35(3) TEU.

organisations[108] and it has definitely not been an overnight change, but the process of a long evolution and fervent debate between the Member States and between the Commission and the Council.[109]

When the Maastricht Treaty introduced for the first time a Union citizen's right to protection outside the Union's borders, the only role envisaged for the Union was limited to one sentence in the EU Treaty, whereby the consular and diplomatic representations of the Member States and the Community delegation were obliged to cooperate so as 'to contribute to the implementation' of the Union citizen's right to protection in third countries.[110] In contrast with other Union citizen's rights, the drafters of the Treaty did not endow the Council with legislative powers to ensure that the Union citizen's right would be effectively applied and developed, but similar to sensitive foreign policy areas, the Union model of consular and diplomatic protection of the Union citizens was kept out of the reach of the Union's legislative and left to the control of the Member States' executives. The only instruments that the Union could have adopted to implement the Union citizen's right were political acts: CFSP measures adopted by unanimous consent,[111] though in practice they have never been adopted, or non-binding Council Guidelines[112] adopted in Council's specific Working Group (COCON) made up of representatives of the Member States' Ministries of Foreign Affairs, which have been more popular due to their non-constraining effect on the Member States. The latter remained the masters of the field, due to their exclusive competence to adopt acts implementing the Union citizen's right to consular and diplomatic protection.[113] And so they did, by way of using a hybrid type of acts - Decisions of the Representatives of the Governments of the Member States adopted within the Council, which was not designed to affect rights of the individuals, but were usually adopted for making political statements, or, even if producing binding legal effects, they were limited to the Member States.[114] In light of their purpose, the legal nature of these Decisions of international agreements and the limited EU legal actions to which they could be subject was not considered an issue. The EC and CFSP Decisions are though exceptions from this rule as they directly affect the Union citizens' right to consular and diplomatic protection by restricting the material scope of the fundamental right without even being subject to the full panoply of EU legal remedies.[115]

The possibility of using the flexibility clause (Art. 308 EC Treaty) by the Union as a legislative option, which has though been used for extending the Civil Protection Mechanism to consular assistance of the Union citizens in third countries[116], arguably, would have never received the unanimous approval of the Member States in light of their traditional views that the field should continue its tradition of matter reserved to the national State and allow the European integration process only to the extent of procedural cooperation without harmonisation.

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[108] The only situation recognised under public international law when an international organisation can exercise diplomatic protection is when it exercises functional protection, namely when the injury is suffered by an agent of an international organisation. In the Reparation case, the ICJ limited the functional protection only to injuries arising from a breach of an obligation designed to help an agent in performing his duties (ICJ, Advisory Opinion of 11 July 1949, 'Reparations for injuries suffered in the service of the United Nations', 1949, ICJ Reports, 182)

[109] See the comments made during the public debate following the Commission Green Paper on the different views of the Commission, Council (especially of certain Member States) available at www.careproject.eu/database/browse_eu.php .

[110] Former Art. 20(2) TEU

[111] From all possible CFSP measures, a Joint Action would have probably been the most suited due to their focus on operational character. In addition, CFSP Decisions could have served the purpose.

[112] See *inter alia*, Consular Guidelines on the protection of EU citizens in third countries adopted by the COCON and endorsed by the PSC 15613/10, of 5 November 2010.

[113] See former Art. 20 EC Treaty.

[114] E.g. Art. 253 TFEU (ex-Art. 223 TEC), Art. 341 TFEU (ex-Art. 289 TEC).

[115] For instance. the possibility of the Union citizens to bring a direct action of annulment against the Decision 95/553/EC before the General Court of Justice is questionable, since the Decision is not a Union act.

[116] Council Decision 2007/779/EC of 8 November 2007 establishing a Community Civil Protection Mechanism [2007] OJ L 314/9, 9-19.

The Lisbon Treaty has brought a salient change to the legal framework of consular and diplomatic protection by abandoning the previous logic of inter-governmental *sui generis* decision making, and instead involving the EU with its legislative procedure and the newly created EEAS in a field historically dominated by States. In view of achieving its newly inserted objective of protecting the Union citizens in the world,[117] the Council has been endowed with express legislative power to adopt Directives 'establishing the coordination and cooperation measures necessary to facilitate' the aforementioned protection.[118] After consulting the European Parliament, the Council acts by qualified majority.[119] The involvement of the European Parliament and the replacement of unanimous decision-making with qualified majority voting is a significant blow to the long defended sovereignty of the Member States. On the other hand, it has to be noticed that Art. 23(2) TFEU maintained part of the inter-governmental language as the directives the Council is entitled to adopt establish 'cooperation and coordination' measures, reminding of the pre-Lisbon framework of cooperation and coordination among the Member States that governed the field. In light of the wording Art. 23(2) TFEU, the directive to be adopted under this provision could be argued to be a legislative measure that cannot harmonise the national law and practice on the legal nature, force, material and personal scope of consular and diplomatic protection of citizens, but merely establishing a common model for operational actions in cases of Union citizens in distress, such as evacuation procedures.

Additional consequences for the sovereignty of the Member States in this this field may result from the fact that they are now sharing their external competence with the Union.[120] It seems the Member States are already experiencing the consequences, as, in light of the fact that the Member States have not started negotiations for third countries with a view to obtain the latter's consent, the Commission proposed to include a consent clause in mixed agreements with third countries. According to a Commission Communication of March 2011, 'the negotiations are on-going', however, the Community does not mention which kind of negotiating framework will be chosen: the Open Skies method[121] whereby the Member States continue to negotiate and conclude international agreements but under the strict supervision of the Commission, or is it the Union that will obtain delegation from the Member States to continue the negotiations.

The newly created European External Service (EEAS) has also been endowed with competence to act for the protection of the Union citizens, *via* the Union delegations in third countries.[122] The EEAS role, similarly to the general role of the Union, is for the moment only of supporting the Member States' representations in third countries, but has the potential to evolve according to Art. 13(2) of the EEAS Council Decision:

> 'The High Representative shall submit a report to the European Parliament, the Council and the Commission on the functioning of the EEAS by the end of 2011. That report shall, in particular, cover the implementation of Article 5(3) and (10) and Article 9.'

The Report on the EEAS activity in the field of consular and diplomatic assistance of Union citizens may reveal, in a similar way as the Commission Reports on Union citizenship did in regard to Union citizenship, the necessity to adopt further actions to respond to problems that occurred in practice. If the EEAS role in this area was insignificant, then there would have been no need to include this subject matter in the Report on the EEAS' activities.[123]

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[117] Art. 3(5) TEU.

[118] Art. 23(2) TFEU.

[119] Art. 16(3) TEU.

[120] Arts. 2(2), 4(2) TFEU.

[121] M Cremona, 'External Relations and External Competence of the EU: the Emergence of an Integrated Policy' in Craig and de Burca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press 2011) 230-267.

[122] Art. 5(10) Council Decision on EEAS and Art. 221 TFEU.

[123] More on this in the CARE Report, Section 7 of Chapter 3.

4. Conclusion

The right to consular and diplomatic protection of the Union citizens, which was introduced with the Maastricht Treaty in 1992, has so far remained quite underdeveloped in comparison with the other "citizenship rights".

In this paper it was argued that the EU law developed its own autonomous concepts of consular and diplomatic protection, which, contrary to public international law, is a right of the individual. However, in the case of EU law the right is not recognised to the individual in his relation to his State of nationality. The holder of the right is the Union citizen who does not have an accessible consular representation of its own Member State or another State representing it on a permanent basis.

The holder of the obligation to protection is not the Member State of nationality, but any of the Member States that has a consular or diplomatic protection in the place from the third country where the citizen is located. The term 'in the place' has to be differentiated from 'in the third country' since it confers the right to the Union citizen to ask for consular protection from any of the Member States that has a consular or diplomatic representation in a place nearer to where he is located instead of having to travel hundreds of kilometres to reach the consular or diplomatic representation of his own Member State within the same third country.

The recent revolutions in the Mediterranean region and Middle East have shown the importance of the Union citizen's right to consular and diplomatic protection and that consular assistance poses a growing challenge to the Member States and the Union. There is little doubt that, not even the Member States benefiting of the widest external representation network can cope alone with these catastrophes. These events have proved that only if both the Union and the Member States cooperate on a constant basis, could the Union citizens be effectively evacuated from areas in distress. If, in the situations of collective evacuation, the civil protection mechanism[124] plays an important role and ensures what seems to be an effective *modus vivendi* between the Union institutional setting and the Member States, in cases of individual consular protection, there still is much work to be done in order to ensure that the discrepancies existent between the 27 national regulatory frameworks on consular and diplomatic protection of citizens will not deprive the Union citizen of his fundamental right.

This paper presented one modality of ensuring the protection of the Union citizens in the world, through the European model of consular and diplomatic protection of unrepresented Union citizens. The mechanism was presented and evaluated as an aspect of the EU citizenship. However, consular protection can be conferred to the Union citizens in third countries hit by disasters also by ESDP missions. Interestingly, the first Decision adopted on the basis of former Art. 17 TEU concerned the evacuation of EU nationals whenever they are in danger in third countries. The Decision provided that, in these cases, the Council may request WEU to work out the operational plan for the evacuation.[125] The following paper will address this specific issue of whether ESDP missions, specifically the ATALANTA mission, play a role in the protection abroad of the Union citizens in distress.

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[124] Council Decision 2001/792/EC, Euratom of 23 October 2001 establishing a Community Mechanism to facilitate reinforced cooperation in civil protection assistance OJ L 297, p.7. See also, Article 2(10) and recital 18 of the preamble of Council Decision 2007/779/EC of 8 November 2007 which extended the Civil Protection Mechanism also to situation of consular assistance of the Union citizens in third countries.

[125] It was adopted as a *sui-generis* Decision that was not published in the Official Journal. Doc. 8386/96, Decision de Conseil du 27 juin 1996, relative aux operations d'evacuations de ressortisants des Etats membres lorsque leur sécurite est en danger dans un pays tiers – see more in RA Wessel, *The European Union's foreign and security policy: a legal institutional perspective* (Dordrecht: Martinus Nijhoff Publishers 1999) 133.

Operation *Atalanta* and the Protection of EU Citizens: *Civis Europaeus* Unheeded?

Joris Larik*

Abstract

This paper critically assesses the anti-piracy operation *Atalanta*, the EU's first-ever naval mission, in the light of the protection of Union citizens. The main question is to which extent a Union citizen threatened by pirates off the coast of Somalia could rely on the promise of *civis europaeus sum*. The paper discusses the various legal aspects pertaining to the forceful protection of EU citizens in international law, EU constitutional law and the operational parameters of *Atalanta*. It argues that within the particular framework of the international effort to combat piracy in this theatre, the protection of citizens by military force would be legal in principle. Moreover, the protection of Union citizens outside the EU forms now one of the legally-binding general objectives of the Union (but it does not represent an individual right in the area of CFSP/CSDP). Yet, this objective is not reiterated in the operational mandate. This conspicuous absence creates tension and confusion between the general objective and the CSDP instrument. The paper concludes that the mandate of *Atalanta*, by focussing entirely on universal objectives, is constitutionally incomplete and shows that the external dimension of Union citizenship is still underdeveloped.

Keywords

Operation EUNAVFOR *Atalanta* – Common Defence and Security Policy (CSDP) – Piracy – Union citizenship – use of force to protect citizens abroad

1. Introduction: The *Civis Europaeus* and the *Hostis Humani Generis*

The ancient roman dictum '*civis romanus sum*',[1] a pledge of respect for one's rights as a Roman citizen, has remained a powerful concept throughout the centuries. Importantly, the status that it indicates was not just relevant within the Roman Empire, but also carried considerable weight beyond its borders, instilling fear in the 'barbarians' that mistreating a Roman would be answered with severe reprisals. It is this external dimension of citizen protection with which the present contribution is concerned in the context of the European Union, with particular regard to its Common Security and Defence Policy (CSDP) as exemplified through the anti-piracy operation *Atalanta*.

In the modern age, the phrase resurfaced in the context of protecting a nation-state's citizens aboard. As one of the most (in)famous examples, Lord Palmerston evoked in 1850 before the British Parliament 'the sense of duty which has led us to think ourselves bound to afford protection to our fellow subjects abroad'.[2] Consequently, according to Palmerston,

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1 For an early example from the New Testament, see Acts of the Apostles 22:29.

2 Lord Palmerston's speech on Greece of 25 June 1850, reproduced in House of Commons, *The Parliamentary Debates: Hansard. House of Commons Official Report*, third series, Vol 112 (London: Her Majesty's Stationary Office 1943) 380-444.

> 'as the Roman, in days of old, held himself free from indignity, when he could say Civis Romanus sum; so also a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England, will protect him against injustice and wrong.'[3]

Similarly, even though in more aggressive terms, in 1900 Kaiser Wilhelm II told his troops, before sending them off to China to quell the Boxer Rebellion, that 'by its character the German Empire has the obligation to provide help to its citizens whenever they are oppressed abroad.'[4] Consequently, in order to avenge the alleged breaches of international law committed by the Chinese, the *Kaiser* instructed his troops to handle their arms in such a way that 'for a thousand years no Chinese will dare even to squint at a German anymore.'[5] Already here, it becomes obvious that there are two sides to the concept. Next to the as such laudable idea of the state extending its protection over its citizens wherever they may be to shield them from harm, there is also the negative connotation of disregard for other countries' sovereignty, as 'a pretext for intervention'[6] and generally a sign of 'imperialism', especially when the use of force is involved.

Also in the context of the European Union the ancient adage has been drawn upon. Four Advocates General have used the expression 'civis europeus [sic] sum'.[7] According to Advocate General Jacobs, who originally introduced the phrase into the vocabulary of the European Court of Justice, a Union citizen is 'entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values […]'.[8] However, *civis europaeus sum* in these cases concerned the invocation of fundamental rights by Union citizens *within* the EU. The protection of Union citizens abroad is a matter distinct from the legal momentum behind consolidation and incorporation of citizens' rights protection inside the Union's borders.[9]

Still, the introduction of Union citizenship into the primary law by the Maastricht Treaty already included an explicit external component, *viz*. the protection by the diplomatic or consular authorities of any Member State in third countries for Union citizens whose Member State is not represented.[10] Apart from consular and diplomatic protection proper, an innovation by the Lisbon Treaty is the inclusion among the objectives of the Union to 'uphold and promote its values and interests and

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3 Lord Palmerston's speech on Greece, reproduced in House of Commons, *The Parliamentary Debates*, 380-444.

4 The speech by Kaiser Wilhelm II, known as the '*Hunnenrede*', at Bremerhaven on 27 July 1900 (translation by author), reproduced in M Görtemaker, *Deutschland im 19. Jahrhundert. Entwicklungslinien*, fifth edition (Opladen: Leske+Budrich 1996) 357.

5 Kaiser Wilhelm II's speech at Bremerhaven (translation by author), reproduced in Görtemaker, *Deutschland im 19. Jahrhundert*, 357. For other historical examples see A Ianniello Saliceti, 'The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services' (2011) 17 *European Public Law* 91, 91-92.

6 C Gray, *International Law and the Use of Force*, third edition (Oxford: Oxford University Press 2008) 159.

7 Case C-168/91 *Christos Konstantinidis v Stadt Altensteig* [1993] ECR I-01191, Opinion of Mr Advocate General Jacobs of 9 December 1992, para. 46; Case C-380/05 *Centro Europa 7 Srl v Ministero delle Comunicazioni* [2008] ECR I-00349, Opinion of Mr Advocate General Poiares Maduro of 12 September 2007, para. 16 (quoting Jacobs); Case C-228/07 *Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich* [2008] ECR I-06989, Opinion of Mr Advocate General Ruiz-Jarabo Colomer, para. 16 (quoting Jacobs); Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*, Opinion of Mrs Advocate General Sharpston of 30 September 2010, nyr, para. 83 (quoting and endorsing Jacobs).

8 Case C-168/91 *Konstantinidis* [1993] I-01191, Opinion of AG Jacobs, para. 46. It also appears as the heading for the chapter on Union citizenship in a textbook on EU constitutional law, see A Rosas and L Young, *EU Constitutional Law: An Introduction* (Oxford: Hart 2011) 128.

9 For a pertinent example of this momentum notice the ECJ's judgement in Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)*, judgement of the Court of 8 March 2011, nyr (concerning a situation lacking any kind of transnational element, but was based solely on the status as a Union citizen). See also Arts. 20-22 TFEU; and Arts. 39-45 Charter of Fundamental Rights.

10 Art. 8c TEU (Maastricht Treaty version); for the post-Lisbon provision, Art. 23 TFEU; see also Art. 46 Charter of Fundamental Rights.

contribute to the protection of its citizens' in its external relations.[11] The failed Constitutional Treaty did not refer to the protection of citizens abroad as a general Union objective.[12] This novelty was introduced by the French government at the Intergovernmental Conference of 2007.[13] The motivation behind this was, it has been argued, to underline that the Union is not a 'Trojan horse' of globalisation, but instead acts as a shield for its citizens from globalisation's challenges and downsides.[14] Moreover, it could be seen as the constitutional concretization of the EU's objective, introduced also by the Maastricht Treaty, 'to assert its identity on the international scene'.[15] One important aspect of this would be the external dimension of Union citizenship, i.e. also 'to reinforce the identity of *European citizens* throughout the rest of the world.'[16]

With the introduction and rapid development of the Common Security and Defence Policy (formerly ESDP), the European Union has equipped itself also with military capabilities that can be used to pursue its foreign policy (or 'external action', to use the post-Lisbon term).[17] The extent to which these capabilities can also be used to pursue the objective of protecting Union citizens abroad will be addressed here in the context of Operation *Atalanta*, the EU's first naval military operation. Launched on 8 December 2008,[18] it will continue at least till December 2012.[19] The academic debate surrounding *Atalanta* has thus far focussed on issues pertaining to legal aspects of the detention and prosecution of pirates and/or Law of the Sea issues,[20] or the geopolitical implications of the operation.[21] However, it is argued here that the issue of protection of Union citizens should not be neglected, especially in view of both the unique (one might even say *sui generis*) nature of the concept of Union citizenship as well as of the EU as an actor in matters of international security. International organisations such as NATO

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11 Art. 3(5) TEU (Lisbon Treaty version).

12 Art. I-3(4) CT.

13 E de Poncins, *Le traité de Lisbonne en 27 clés* (Paris: Lignes de repères 2008) 75-76.

14 J-L Sauron, *Comprendre le Traité de Lisbonne: Texte consolidé intégral des traités* (Paris: Gualino 2007) 30.

15 Art. 2 TEU (Maastricht Treaty version).

16 Ianniello Saliceti, 'The Protection of EU Citizens Aboard' 92 (emphasis added), who states furthermore that this had been pursued already as early as 1985 by the 'Adonnino Committee'.

17 For a recent overview see M Webber, 'The Common Security and Defence Policy in a Multilateral World' in P Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Cheltenham: Edward Elgar 2011). With the entry into force of the Lisbon Treaty, the Union's CSDP institutional structure has been moved to the European External Action Service (EEAS), see Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L 201/30, Annex.

18 Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) [2008] OJ L330/19.

19 Council Decision 2010/766/CFSP of 7 December 2010 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2010] OJ L327/49, Art. 1(5).

20 See e.g. A Fischer-Lescano and L Kreck, 'Piraterie und Menschenrechte: Rechtsfragen der Bekämpfung der Piraterie im Rahmen der europäischen Operation Atalanta' (2009) 47 *Archiv des Völkerrechts* 481; MD Fink and RJ Galvin, 'Combating Pirates off the Coast of Somalia: Current Legal Challenges' (2009) 56 *Netherlands International Law Review* 367, 384-385 on *Atalanta*; and F Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Antwerp: Intersentia 2010) 179-191.

21 See e.g. B Germond and M Smith, 'Re-Thinking European Security Interests and the ESDP: Explaining the EU's Anti-Piracy Operation' (2009) 30 *Contemporary Security Policy* 573; S Kamerling and F-P van der Putten, 'Europe Sails East, China Sails West: Somali Piracy and Shifting Geopolitical Relations in the Indian Ocean' in F-P van der Putten and C Shulong (eds), *China, Europe and International Security: Interests, Roles, and Prospects* (Milton Park, Routledge, 2010); J Holmes, 'The Interplay between Counterpiracy and Indian Ocean Geopolitics' in B van Ginkel and F-P van der Putten (eds), *The International Response to Somali Piracy: Challenges and Opportunities* (Leiden: Martinus Nijhoff 2010); and J Larik and Q Weiler, 'Going Naval in Troubled Waters: The European Union, China and the Fight Against Piracy Off the Coast of Somalia' in J Men and B Barton (eds), *The EU and China: Partners or Competitors in Africa* (Aldershot: Ashgate 2011).

do not contain any notion of common 'citizenship', whereas for individual countries it is a rather traditional and uncontroversial issue to protect their own nationals, who are bound by a 'genuine link' to their state,[22] abroad. For some it is even a constitutional objective.[23] Consequently, these peculiar features set the EU and Operation *Atalanta* apart from the other actors and their respective deployments in this theatre. Moreover, and in contrast to other CSDP/ESDP operations, *Atalanta* serves as a well-suited case study for the external protection of Union citizens. Whereas former missions were strictly concerned with external objectives that could only indirectly or incidentally affect the security of Union citizens, e.g. peace-keeping operations, police missions or security sector reform programmes, *Atalanta* addresses pirates attacks in one of the most heavily-used maritime trade routes in the world, through which also large numbers of ships flying flags of EU Member States and EU citizens pass.[24]

It is against this backdrop that the novel *civis europaeus* encounters the re-surfacing *hostis humani generis* (as pirates were classically termed). Consequently, the question emerges whether Union citizens abroad can also trust here in the weight of the legal concept of *civis europaeus sum*. Can they rely on the assets of Operation *Atalanta*, i.e. – to use Palmerston's imagery – the 'watchful eye' and the 'strong arm' of the Union to protect them against the threat of pirate attacks? In order to approach this question, the paper will proceed as follows: Section (2.) addresses the international law aspects of the of the external protection of citizens by forceful means; section (3.) turns to the EU's constitutional framework and the issue of using the CSDP to pursue the objective of protecting EU citizens aboard; section (4.) subsequently scrutinizes to which extent the mandate of Operation *Atalanta* takes this goal into account, observing that in spite of a constitutional objective the operation is not explicitly pursuing the protection of Union citizens. Section (5.) points out the implications of this tension between the two. The paper concludes that the mandate of *Atalanta*, by focussing entirely on 'universal' objectives and neglecting the *civis europaeus*, is – if not unconstitutional – constitutionally incomplete.

2. International Law Aspects

The deployment of military forces and the use of force in order to protect a country's citizens abroad raise first and foremost the question of legality under international law. For the EU the issue to use force for that purpose arises in the context of *Atalanta* with regard to crew members with Union citizenship that are threatened by pirates in the operation theatre.

In view of the general prohibition imposed on states to use force 'in their international relations' under Article 2(4) of the Charter of the United Nations, we have to address first the general parameters of international law in terms of the use of force to protect one's citizens abroad. Even though International Law Commission (ICL) Special Rapporteur Dugard considered '[t]he use of force as the ultimate means of diplomatic protection' in his 2000 report,[25] this opinion cannot be regarded as the predominant one, and was not even shared by the majority of the ICL members.[26] The current ILC commentary clearly states that '[t]he use of force [...] is not a permissible method for the enforcement

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22 For a discussion of the difficult transferability of the 'genuine link' of nationality to the EU context under international law, see the contribution by Patrizia Vigni in the present edited Working Paper.

23 Ianniello Saliceti, 'The Protection of EU Citizens Aboard' 97. For the EU, see Art. 3(5) TEU (see also *infra* section 3.).

24 Germond and Smith, 'Re-Thinking European Security Interests and the ESDP' 587-589.

25 International Law Commission, First report on diplomatic protection by Mr. John R. Dugard, Special Rapporteur (A/CN.4/506), 7 March 2000, para. 47; see also C Gray, 'The Protection of Nationals Abroad: Russia's Use of Force in Georgia' in A Constantinides and N Zaikos (eds), *The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa* (Leiden: Martinus Nijhoff 2009) 137.

26 Gray, *International Law and the Use of Force*, 137.

of the right of diplomatic protection.'[27] Beyond the realm of diplomatic protection, international legal scholarship either discards any notion of forceful citizen protection as an exception to the prohibition to use force,[28] or see merely little support in state practice and legal opinion for it.[29]

However, in the present case, we are not dealing with intervention on the territory of another state and/or against foreign state agents, but with pirate attacks – that is non-state actors – on ships within the territorial waters of Somalia or on the high seas. This is, in the first place, regulated by the international Law of the Sea as codified in the United Nations Convention on the Law of the Sea (UNCLOS). The convention provides a definition of piracy,[30] and allows any state to seize the pirate ship on the high seas, arrest the pirates and exercise jurisdiction over them.[31] Therefore, on the high seas, a state is allowed to use force against pirates without having to invoke any exceptional (and controversial) 'right' to protect its own citizens or to exercise a humanitarian intervention.[32]

Importantly, in this particular case, the United Nations Security Council (UNSC) has passed a number of resolutions addressing the piracy problem off the Coast of Somalia, which supplement, and in view of the supremacy of the UN Charter to other international agreements partly supplant,[33] the UNCLOS framework. This concerns in particular Resolution 1816 of 2 June 2008,[34] which in essence makes 'the rules of international law concerning piracy on the high seas applicable also to territorial waters'[35] of Somalia and allows states operating under this legal framework to use 'all necessary means to repress acts of piracy and armed robbery',[36] i.e. also to use force.

The addition of the term 'armed robbery' to the UNCLOS-defined term 'piracy' is of some significance, as the latter notion might not always be applicable to modern forms of piracy (e.g. the requirement that always two ships must be involved). Treves points out that the term is used in the context of the International Maritime Organization (IMO) and supplements the notion of piracy, 'inspired by the aim of including all acts connected with piracy (such as preparatory acts) and future possible acts involving only one ship.'[37] According to the IMO, 'armed robbery' is defined as

> 'any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of "piracy" directed against a ship or against persons or property on board such a ship within a State's jurisdiction over such offences.'[38]

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27 UN General Assembly, Report of the International Law Commission on the work of its fifty-eighth session, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10) 27.

28 M Bothe, 'Friedenssicherung und Kriegsrecht' in W Graf Vitzthum (ed), *Völkerrecht*, third edition (Berlin: De Gruyter 2004) 604-605 and further references there.

29 Gray, *International Law and the Use of Force*, 156-159; but see N Ronzitti, *Introduzione al diritto internazionale*, second edition (Torino: Giappichelli 2007) 416-417, who concludes that it might constitute a distinct exception to the prohibition to use force based on customary international law and points to changing opinion and practice of states that were traditionally opposed to such an exception.

30 Art. 101 UNCLOS.

31 Art. 105 UNCLOS.

32 N Ronzitti, *Rescuing nationals abroad through military coercion and intervention on grounds of humanity* (Dordrecht: Martinus Nijhoff 1985) 137.

33 Art. 103 UN Charter.

34 UN Security Council Resolution 1816 (2008) of 2 June 2008, S/RES/1816 (2008) para. 7.

35 T Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) 20 *European Journal of International Law* 399, 404. For incursions even onto Somali soil, note United Nations Security Council Resolution 1851 (2008) of 16 December 2008, S/RES/1851 (2008) para. 6.

36 UN Security Council Resolution 1816 (2008) of 2 June 2008, S/RES/1816 (2008) para. 7(b).

37 Treves 'Piracy, Law of the Sea, and Use of Force' 403.

38 IMO Resolution A 922(22) of 29 November 2001 adopting the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, Annex, para. 2.2.

Moreover, even though the Security Council is acting here under Chapter VII of the UN Charter, the Transitional Federal Government (TFG) of Somalia has to be notified of operations in its territorial waters,[39] which Naert calls 'a simplified form of consent'.[40] While superfluous in view of the powers conferred upon the Security Council under Chapter VII, this could be seen as a supplementary invitation by Somalia for states to intervene in the fight against piracy in its territorial waters, which could serve to preclude illegality of the use of force as covered by such an invitation.[41] The EU has notified the TFG of Somalia accordingly.[42]

One should distinguish here the use of force against pirates from that in a situation of armed conflict between states. As Treves puts it, in contrast to acts of self-defence, counter-piracy should 'be assimilated to the exercise of the power to engage in police action on the high seas on foreign vessels which is permitted by exceptions to the rule affirming the exclusive jurisdiction of the flag state.'[43] Similarly, but more accurately, Lubell calls for a 'law enforcement approach of the scaled use of force', which recognizes that even though we face here a force level below that of armed conflict, '[t]he level of force and types of weapons employed may well rise beyond the usual domestic crime scenarios'.[44]

In view of the general authorization to combat piracy by the Law of the Sea and its extension *ratione materiæ* ('armed robbery') and *loci* (Somali territorial waters) through UNSC resolutions (and affirmed by TFG notifications), a state cannot be seen as violating another state's rights or territorial integrity if it uses force against pirates off the coast of Somalia.[45] There is no reason why this conclusion should change when the act of repressing piracy was carried out in a situation where the state's own citizens were under threat. As was pointed out earlier, states do not have to invoke an exceptional right to protect their citizens to employ forceful measures against pirates. Hence, they can use these measures also to that particular end. As states are under no obligation, but are instead generally authorized to combat piracy, the protection by the (proportionate) use of force of a state's nationals within these legal parameters is to be considered unobjectionable under international law.[46]

As regards the special nature of the EU as an international actor, it follows from the foregoing that in any case its Member States would be allowed to use force against pirates within the particular legal framework concerning Somalia. Only in case of overstepping this framework and breaching international law would the question of responsibility between the Member States providing military

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[39] United Nations Security Council Resolution 1816 (2008) of 2 June 2008, S/RES/1816 (2008) para. 11; see also the more recent United Nations Security Council Resolution 1897 (2009) of 30 November 2009, S/RES/1897 (2009), para. 8, which affirms the necessity of the consent of the TFG.

[40] Naert, *International Law Aspects of the EU's Security and Defence Policy*, 185.

[41] Ronzitti, *Introduzione al diritto internazionale* 417.

[42] See Council Decision 2008/918/CFSP of 8 December 2008, point 4 of the grounds.

[43] Treves, 'Piracy, Law of the Sea, and Use of Force' 413.

[44] N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press 2010) 225.

[45] Of course, general principles and basic human rights are to be observed, i.e. ensuring that the use of force is 'unavoidable, reasonable and necessary', Treves, 'Piracy, Law of the Sea, and Use of Force' 414; also Lubell, *Extraterritorial Use of Force Against Non-State Actors*, 225-226. In other words, the principle of proportionality can be applied here by analogy.

[46] See also already Ronzitti, *Rescuing nationals abroad through military coercion and intervention on grounds of humanity* 137. Given this express authorization, the arguably more far-fetched line of argumentation according to which pirate attacks could be deemed an armed attack by non-state actors triggering the right to self-defence will be omitted here. See in detail on this 9/11-related discussion Gray, *International Law and the Use of Force* 193-253; Lubell, *Extraterritorial Use of Force Against Non-State Actors* 29-36; and earlier on protection of nationals as a form of self-defence D Bowett, 'The use of force for the protection of nationals abroad' in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Dordrecht: Martinus Nijhoff 1986). In the EU context, note that the mutual assistance clause (Art. 42(7) TEU) only applies '[i]f a Member State is the victim of armed aggression on its territory', which therefore does not cover attacks on citizens abroad.

assets to *Atalanta* and the EU itself arise. After all, the relevant Joint Action states that '[t]he *European Union (EU)* shall conduct a military operation […] called "Atalanta"',[47] not the several Member States.

Such questions of international responsibility of the EU notwithstanding,[48] it seems clear that force by a Member State operating within *Atalanta* could be used to protect a Member State's own citizens. There have been already a number of instances where EU Member States contemplated the use of force or actually resorted to forceful means to protect their citizens against pirates. According to French diplomatic sources, '[o]n three occasions French forces have had to intervene to protect French citizens taken hostage by pirates'.[49] In early May 2009, a rescue operation by German commandos of the kidnapped freighter *Hansa Stavanger* anchored in a Somali harbour was narrowly aborted for security concerns.[50]

Furthermore, and crucially, this authorization under the international legal framework also covers the protection of non-nationals, which obviously makes sense seeing the often multinational setup of merchant ship crews and the general interest of the international community involved. These non-nationals could therefore also come from other EU Member States. A fitting example here is the rescue mission conducted by Dutch forces from the frigate *Tromp* operating in the framework of *Atalanta*, which saved German nationals from pirates that had hijacked the *MS Taipan* in April 2010.[51] This – at least in effect – amounts to an act of an EU Member State's military forces protecting EU citizens from pirates. In view of the foregoing this is to be deemed legal under international law. The extent to which such protection of Union citizens is framed by EU law will be dealt with in the next two sections.

3. EU Constitutional Law Aspects

From the perspective of EU primary law, as was stated in the introduction, the Lisbon Treaty introduced among the objectives of the Union to 'uphold and promote its values and interests and contribute to the protection of its citizens'.[52] From the emerging literature on the Union's objectives as a category of constitutional law, it can be concluded that these are binding obligations that commit the Union and its institutions to actively pursue these objectives and that frame the use of their discretion accordingly.[53] In this literature, there is general agreement that also the Members States are bound by

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47 Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJ L301/33, Art. 1(1).

48 See Naert, *International Law Aspects of the EU's Security and Defence Policy*, 641-644.

49 This concerned the vessels *Le Ponant*, *Carré d'As* and *Tanit*, Permanent Mission of France to the United Nations in New York, *Communiqué : Combating maritime piracy off the coast of Somalia: Action by France*, 20 April 2009, www.franceonu.org/spip.php?article3803.

50 See 'Entführter Frachter "Hansa Stavanger": Berlin stoppt Befreiungsaktion der GSG 9' *Der Spiegel*, 2 May 2009, www.spiegel.de/politik/ausland/0,1518,621051,00.html.

51 EU NAVOR Somalia, *Pirated German ship rescued – EU NAVFOR HNLMS Tromp retakes pirated MV Taipan*, 5 April 2010, press release, www.eunavfor.eu/2010/04/pirated-german-ship-rescue-eu-navfor-hnmls-tromp-retakes-pirated-mv-taipan/.

52 Art. 3(5) TEU.

53 See, writing in the pre-Lisbon context, F Reimer, 'Ziele und Zuständigkeiten: Die Funktionen der Unionszielbestimmungen' (2003) *Europarecht* 992; M Kotzur, 'Die Ziele der Union: Verfassungsidentität und Gemeinschaftsidee' (2005) 58 *Die Öffentliche Verwaltung* 313; and extensively, B Plecher-Hochstraßer, *Zielbestimmungen im Mehrebenensystem: Die Verzahnung der Staatszielbestimmungen im GG mit den Zielbestimmungen im EUV, EGV, EuratomV und EUVV* (Munich: Meidenbauer 2006) 105-136; also K-P Sommermann, *Staatsziele und Staatszielbestimmungen* (Tübingen: Mohr Siebeck 1997) 280-296. For a summary of different theoretical approaches as applied to the post-Lisbon external relations objectives of the EU see J Larik, 'Theoretical Approaches to a Peculiar

these objectives, in any event indirectly by virtue of the duty of cooperation.[54] Even though the Union's Common Foreign and Defence Policy, of which the CSDP is a component, have special characteristics (intergovernmentalism, exclusion of jurisdiction of the ECJ),[55] there is nothing to suggest that external action-related objectives should be treated in a fundamentally different way from internal policy-related objectives.

How, then, do the objectives of upholding and promoting the Union's values and interests and contributing to the protection of its citizens abroad apply to the piracy surge off the Coast of Somalia? As far as the (economic) interests are concerned, the stakes for the EU are obvious. The strategic economic importance for the EU lies in the fact that the Gulf of Aden is a maritime chokepoint through which 90 percent of merchandise and 30 percent of the energy resources consumed in Europe pass.[56] Therefore, as French vice-admiral Bruno Nielly puts it, 'il n'est pas question pour l'Europe de laisser ne serait-ce qu'un tronçon de cette route menacé par un phénomène tel que la piraterie' and that '[l]'Europe, d'abord, y défend ses intérêts.'[57] Also Germond calls Operation *Atalanta* 'the first ever ESDP operation that primarily aims at defending Member States' interests (that is, providing security to their merchant shipping)'.[58] In addition, Europe's fishing industry should not remain unaddressed, which has been very active in the area and has frequently been criticized for taking advantage of the lack of effective state power in Somalia.[59] Apart from the economic, there are also wider security concerns such as the pirates collaborating with terrorist groups, and of course the protection of EU citizens,[60] a matter to which we will return in detail. Therefore, *Atalanta* can definitely be seen as a measure in the pursuit of the Union's interests.

One could also argue that the EU's approach in *Atalanta* is framed to safeguard and promote its values. Examples for this would be the integrated approach that also aims at improving the situation in Somalia itself (above all through the EU Somalia Training Mission),[61] even though the effectiveness

(Contd.)

Norm Category: Shaping the International Order as a Union Objective', paper presented at the workshop 'The European Union's Shaping of the International Legal Order' organized by CLEER, Brussels, 27 May 2011.

54 Plecher-Hochstraßer, *Zielbestimmungen im Mehrebenensystem*, 114-119; Reimer, 'Ziele und Zuständigkeiten' 105-107; K-P Sommermann, *Staatsziele und Staatszielbestimmungen*, 293-296.

55 Above all Art. 24 TEU; see also D Thym, 'Foreign Affairs' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Oxford/Munich: Hart/C.H. Beck 2010) 330-338; and P van Elsuwege, 'EU external action after the collapse of the pillar structure. In search of a new balance between delimitation and consistency' (2010) 47 *Common Market Law Review* 987.

56 French Ministry of Defence, *Piraterie : entretien avec le vice-amiral Bruno Nielly, commandant la zone maritime de l'océan Indien (ALINDIEN)*, 27 May 2010, www.defense.gouv.fr/operations/piraterie/actualites/27-05-10-piraterie-entretien-avec-le-vice-amiral-bruno-nielly-commandant-la-zone-maritime-de-l-ocean-indien-alindien; see also Larik and Weiler, 'Going Naval in Troubles Waters' 85-86.

57 French Ministry of Defence, *Piraterie : entretien avec le vice-amiral Bruno Nielly*.

58 B Germond, 'From Frontier to Boundary and Back Again: The European Union's Maritime Margins' (2010) 15 *European Foreign Affairs Review* 39, 53. The reference to Member State interests, however, detracts from the notion of (autonomous) EU interests that are to be defended. As the worlds leading trade power, it may well be assumed here that the EU is also defending *its* interest in secure maritime trade, not just that of the individual Member States. Germond and Smith therefore rightly refer to the interests of the Union and its Member States, which are more directly at stake in *Atalanta* than in previous CSDP/ESDP missions, Germond and Smith, 'Re-Thinking European Security Interests and the ESDP' 587-589.

59 See e.g. L Phillips, 'The European roots of Somali piracy', *EU Observer*, 21 April 2009, euobserver.com/9/27966; generally on illegal fishing P Lehr and H Lehmann, 'Somali pirates' new paradise' in P Lehr (ed), *Violence at Sea: Piracy in the Age of Global Terrorism* (New York: Routledge 2007) 12-13.

60 Germond and Smith, 'Re-Thinking European Security Interests and the ESDP' 580-581.

61 Council Decision 2010/197/CFSP of 31 March 2010 on the launch of a European Union military mission to contribute to the training of Somali security forces (EUTM Somalia) [2010] OJ L87/33.

of this approach can be questioned.[62] With particular regard to the treatment of pirates, safeguard mechanisms to protect their human rights (most prominently, ensuring that they will not be subject to the death penalty when tried in third countries),[63] as well as fostering multilateral cooperation among the different actors in the region,[64] can be seen as expressions of European values.

But what about the potential contribution of *Atalanta* to the protection of Union citizens, as an objective that is stipulated explicitly next to values and interests, i.e. an objective in its own right? Here, first of all the question needs to be answered whether, and to which extent, the CFSP/CSDP can be used to this specific end. As is also generally agreed concerning constitutionally-codified objectives, they do not as such establish competence.[65] Especially in the EU as an entity based on conferred powers, this competence and the procedures to be followed ought to be specified elsewhere in the primary law.

As a preliminary observation, the objective of citizen protection abroad is not explicitly reiterated or linked to competences and procedures in Title V of the TEU or Part Five of the TFEU on external action. With particular regard to the objectives of the CFSP, Art. 23 TEU states that the Union's international action 'shall be guided by the principles, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1'. However, Arts. 21 and 22 TEU, which make up this chapter, do not include a specific reference to the protection of citizens. What is made explicit elsewhere is the right 'to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State' in third countries in which their Member State of nationality is not represented.[66] This provision is situated under the heading 'Non-discrimination and Citizenship' in the TFEU. This raises the question whether the objective of citizen protection abroad is only to be pursued through diplomatic or consular protection as an external aspect of citizenship and, *a contrario*, not through the CFSP/CSDP.

This would seem too narrow an interpretation. The scope of the CFSP is very broad, as Art. 24(1) states that '[t]he 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'.[67] Also, despite the lack of explicit reference to citizen protection there, the general objectives found in Art. 3(5) TEU could be regarded as implied under the Union's 'fundamental interests' and 'security', which are to be safeguarded under Art. 21(2)(a) through EU external action. Therefore, the Union can be deemed generally competent to protect its citizens abroad, including through the CFSP.

Turning now to the CSDP proper, Art. 42(1) TEU provides that '[t]he common security and defence policy shall be an integral part of the common foreign and security policy'. However, citizen protection is not explicitly mentioned, as civilian and military capabilities may be used by the Union

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62 See ML Sanchez Barrueco, 'Reflections on the EU Foreign Policy Objectives Behind the "Integrated Approach" in the Response to Piracy Off Somalia' (2009) 5 *Croatian Yearbook of European Law and Policy* 205.

63 Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJ L301/33, Art. 12(2).

64 Liaising with other organisations is part of the mandate, Council Joint Action 2008/851/CFSP, Art. 2(f); for the practice of the EU as promoter of coordination between the most important actors see Larik and Weiler, 'Going Naval in Troubles Waters' 93-97. Compare this in particular with Art. 21(2), second indent, TEU .

65 See for the EU, Reimer, 'Ziele und Zuständigkeiten' 995-996; and Kotzur, 'Die Ziele der Union' 314.

66 Art. 23 TFEU; see also Art. 46 Charter of Fundamental Rights.

67 This includes also 'the progressive framing of a common defence policy that might lead to a common defence'. However, as was pointed out above, citizen protection against pirates is not to be construed as collective/common defence. On the broadness as well as ill-defined nature of CFSP competence (Art. 2(4) TFEU), see A Sari, 'Between Legalization and Organizational Development: Explaining the Evolution of EU Competence in the Field of Foreign Policy' in PJ Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (The Hague: TMC Asser Press 2011), forthcoming 2011 (draft available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1858709).

'on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.'[68] That would not as such seem to include the protection of citizens.

However, the more precise enumeration of the so-called 'Petersberg tasks' in Art. 43(1) TEU 'include[s]', *inter alia*, 'humanitarian and rescue tasks'. Even though Union citizens are not mentioned, the notion of 'rescue tasks' can only reasonably be understood as referring also to rescue efforts of one's own citizens. This follows from the background of this provision. In the original 1992 WEU Petersberg declaration, the French version referred to 'des missions humanitaires ou d'évacuation *de ressortissants*'.[69] The later omission of this reference to citizens in the Amsterdam Treaty has been interpreted as intending to not a priori exclude third-country nationals from being rescued through EU missions.[70] Any other interpretation would seem to be at odds with the rather wide scope of the CSDP. According to Coelmont, 'apart from collective defence, all kinds of military operations one can at present realistically invent in our global world can all be undertaken in a European context as an ESDP (or CSDP) operation.'[71] Moreover, given the prominent place of the protection of citizens among the general objectives of the Union, a systematic-teleological interpretation of the Treaties would favour the pursuit of this objective by the entire spectrum of external EU policies and capabilities, including those of the CSDP.

Of course, competence to pursue this objective through the CSDP does not dispense of the legal limitations of EU law and international law that will have to be respected in doing so. For instance, a rescue operation of EU citizens from pirates, just like any general anti-piracy action, must respect basic legal principles such as necessity and proportionality, and respect the rights of third parties (e.g. the sovereign rights of third states into whose territorial waters/territory EU citizens are abducted by pirates and the parameters set by the UN Security Council).

Consequently, the preliminary conclusion is that the EU legal order allows the Union to use the CSDP and the assets of the Member States to pursue the objective of protecting its citizens. Furthermore, as was concluded earlier, the international legal regime in place also authorizes the use of force to that end (n.b. for counter-piracy in general, which includes but is not limited to citizen protection).

The question arises, then, whether the EU and its Member States are also under a stricter obligation in this regard. In particular, is there a right of EU citizens to be protected against pirates by the Union? What exists thus far – at most – is the right if EU citizens to protection by the diplomatic or consular authorities of EU Member States in case their Member State of nationality is not represented in a third country.[72] Legislatively, this has been elaborated upon by Decision 95/553/EC on the protection for

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68 Art. 41(1) TEU.

69 Union de l'Europe occidentale (Western European Union, WEU), Conseil des Ministres de l'UEO. *Déclaration de Petersberg*, Bonn, 19 June 1992, 7 (emphasis added), available at: www.ena.lu/declaration_petersberg_faite_conseil_ministres_ueo_bonn_19_jui n_1992-1-14941. Note that the reference resurfaced in a factsheet of the now defunct WEU, which states that 'Battlegroups can be used for the full range of missions and tasks listed in Article 43 of the Treaty on European Union (Petersberg missions)' including 'the evacuation of EU citizens'. European Security and Defence Assembly/Assembly of WEU, *Assembly Factsheet No. 12: Battlegroups*, December 2009, www.assembly-weu.org/en/documents/Fact%20sheets/12E_Fact_Sheet_Battlegroups.pdf.

70 S Graf von Kielmansegg, 'The meaning of Petersberg: Some considerations of the legal scope of ESDP operations' (2007) 44 *Common Market Law Review* 629, 632; and P d'Argent, 'Le traité d'Amsterdam et les aspects militaries de la PESC' in Y Lejeune (ed), *Le Traité d'Amsterdam: Espoirs et Déceptions* (Bruxelles: Bruylant 1998) 391.

71 J Coelmont, 'Europe's Military Ambition' in S Biscop and F Algieri (eds), *The Lisbon Treaty and ESDP: transformation and integration*, EGMONT paper 24, June 2008, 6.

72 See further the contribution by Madalina Moraru to this edited Working Paper.

citizens of the European Union by diplomatic and consular representations.[73] But given the succinctness of the law in this regard it is certainly correct to say that 'the *acquis* relating to the protection of EU citizens is not well developed'.[74] In any event, the reference to 'third countries' would imply that situations on the high seas are not included, nor would be the protection by naval forces as opposed to 'diplomatic or consular authorities'. Curiously enough though, Ianniello Saliceti discusses in this context the example of 'an evacuation operation from an area of crisis involving 'rescue aircraft'.[75] It is doubtful whether the notion of consular and diplomatic protection could be stretched thus far. At least the International Law Commission's Draft Articles on Diplomatic Protection or the Vienna Convention on Consular Relations do not include this particular type of action,[76] and *a fortiori* acts by military forces on the high seas. At best, chartered civilian aircraft might be considered. Therefore, it can be concluded that any rights under EU law in terms of the *forceful* protection of citizens abroad by *military* means do not exist. In addition, procedurally there is no forum to invoke such rights directly *vis-à-vis* the EU in view of the exclusion of jurisdiction of the ECJ from the realm of the CFSP.[77]

4. The Operational Mandate

Having considered the EU's constitutional framework, let us now turn to the mandate proper of Operation *Atalanta*, and see to which extent it lives up to the objective of protecting Union citizens. The mandate and operational parameters of are set out in Joint Action 2008/851.[78] Art. 1 of the Joint Action characterizes the mission as

> 'a military operation in support of Resolutions 1814 (2008), 1816 (2008) and 1838 (2008) of the United Nations Security Council (UNSC), in a manner consistent with action permitted with respect to piracy under Article 100 et seq. of the United Nations Convention on the Law of the Sea signed in Montego Bay on 10 December 1982 […] and by means, in particular, of commitments made with third States […].'[79]

Art. 1 then proceeds to set out the operation's basic objectives, of which there were initially two: First, protection of vessels of the World Food Programme (WFP) delivering food aid to displaced persons in Somalia, in accordance with the mandate laid down in UN Security Council Resolution 1814 (2008); secondly, the protection of vulnerable vessels and the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, in accordance with the mandate laid down in UNSC Resolution 1816 (2008).[80] A third objective was introduced on 8 December 2009 by amending Art. 1 of the Joint Action, stating that '[i]n addition, *Atalanta* shall contribute to the monitoring of fishing

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73 Decision 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations [2005] OJ L314/73.

74 Ianniello Saliceti, 'The Protection of EU Citizens Aboard' 97, referring also to European Commission, *Green Paper on Diplomatic and consular protection of Union citizens in third countries*, Brussels, 28 November 2006 COM(2006)712 final.

75 Ianniello Saliceti, 'The Protection of EU Citizens Aboard' 97.

76 Art. 1 of the ILC Draft Articles on Diplomatic Protection (see also *supra* section 2 on the debate within the ILC); and Art. 5 Vienna Convention on Consular Relations.

77 Art. 24(1) TEU and Art. 275 TFEU. The two exceptions provided, i.e. patrolling the border between CFSP and other Union competences (Art. 40 TEU) and the legality of restrictive measures (Art. 275 TFEU), would not apply in the present case.

78 Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJ L301/33.

79 Council Joint Action 2008/851/CFSP, Art. 1(1).

80 Council Joint Action 2008/851/CFSP, Art. 1(1).

activities off the coast of Somalia.'[81] This can be seen as showing awareness of the controversial fishing activities by European vessels and the intention to make clear that *Atalanta* is not there to act as a military shield for the illegal exploitation of Somalia's maritime resources.

Art. 2 of the Joint Action subsequently provides the specific objectives in the actual operational mandate. Essentially, *Atalanta* shall 'as far as available capabilities allow', provide protection to WFP vessels (including by placing armed units on board); provide protection of merchant vessels 'based on a case-by-case evaluation of needs'; take the 'necessary measures', i.e. also the use of force, to combat acts of piracy and armed robbery; detain and transfer piracy suspects for prosecution; 'liaise and cooperate' with other relevant actors in the theatre; and, at a later stage, lend assistance to Somali authorities 'by making available data relating to fishing activities compiled in the course of the operation'.[82]

A specific reference to the protection of Union citizens in the mandate is missing. It is clearly tied to the international legal framework, above all the relevant United Nations Security Council resolutions and the Law of the Sea. Especially the formulation of the mission as one 'in support of' UN Security Council resolutions suggests that Operation *Atalanta* functions as an executing arm of the Security Council. The EU is thereby – as the TEU puts it – contributing to 'multilateral solutions to common problems'[83] by addressing a threat to international peace and security. Consequently, it is to this universal end that it protects WFP ships, secures maritime traffic and pursues pirates.

Among the ships that are to be protected, WFP vessels enjoy priority. They are not only mentioned first, but are also given the express possibility to have armed units put on board. Most importantly, however, is the absence of a reference to 'a case-by-case evaluation of needs' which applies to merchant vessels. Among the merchant vessels, no distinction is made between ships sailing under EU Member State flags or those with Union citizens on board and the rest. The presentation of the operation by the Council further highlights this prioritization. Features like the 'food count' tables used on the factsheets about the operation, informing us that between the launch of the operation and the end of 2010 about 490000 tons of food have been delivered and 'on average, more than 1600000' Somalis have been fed each day,[84] foster the impression that this mission is of a primarily, if not exclusively, humanitarian character. A similar 'EU citizens rescued' count is nowhere to be found.

5. A Mismatch of Objectives?

The question now arises as to the relationship between the operational mandate and its specific objectives on the one, and the constitutional objectives of the EU Treaties on the other hand, and how they each frame the discretion of the EU forces assigned to Operation *Atalanta*. Even though, as was concluded earlier, there exist neither court jurisdiction nor individual rights here, objectives are still legally binding and serve as a normative framework for the actors called upon to pursue them.

At this point, it is worth drawing an analogy from Ianniello Saliceti's example for the application of the principle of non-discrimination in the context of an evacuation operation of EU citizens (see *supra*

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81 Art. 1(3) of the Joint action as amended by Council Decision 2009/907/CFSP of 8 December 2009 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2009] OJ L322/27, Art. 1.

82 Council Joint Action 2008/851/CFSP, Art. 2. Council Decision 2009/907/CFSP added the words 'and cooperate' to point (f) and added point (g) on data transfers.

83 Art. 21(1), second indent TEU.

84 Council of the European Union, *EU naval operation against piracy (EUNAVFOR Somalia - Operation ATALANTA)*, January 2011, EUNAVFOR/26, www.consilium.europa.eu/uedocs/cms_data/docs/missionPress/files/110104%20Factsheet%20EU%20NAVFOR%20Somalia%20-%20version%2026_EN.pdf, 2.

section 3.). He suggests that non-discrimination in such a case requires to 'take onboard an equal number of distressed EU citizens of each nationality' in a rescue operation by aircraft.[85] In this example, it seems to be implied that first EU citizens would have to be rescued, leaving only any potential spare seats for third country nationals. Even though it is difficult to agree with such a strict application of equality *among* EU citizens, it reveals nonetheless the assumption that the objective of citizen protection frames the discretion of the actors in a particular situation.

Let us assume then a situation in which an *Atalanta* warship receives distress calls from several vessels being attacked by pirates. On one ship, there are a number of EU citizens present, on the others not. There are no other warships available. For the warship, the distance to the distressed ships is about the same, and given time constraints, only one ship can be helped, leaving the others at the mercy of the pirates. It is a hypothetical example, but given the vastness of the area covered and the relatively little number of warships available,[86] it is not entirely far-fetched. In such a situation, depending on the features of the other ships, the mandate of *Atalanta* and the objectives of Art. 3(5) TEU, in particular with regard to the protection of citizens, might be at odds.

As was pointed out, the mandate of Joint Action 2008/851 prioritizes WFP ships, and provides as criterion to choose among merchant vessels a case-by-case evaluation of need. Thus, assuming there was a WFP ship among the distressed vessels, the operational mandate would unequivocally point to the WFP ship to be rescued, abandoning the EU citizens on the other ship to their fate. The general objectives of the Union, however, explicitly emphasize the protection of citizens in the EU's external action. This shifts the balance, if not towards favouring the ship with EU citizens onboard, at least to a less clear-cut priority structure. This result is a (also morally difficult) choice between either promoting the universal/altruistic value of ensuring the flow of humanitarian aid to the suffering population of Somalia or pursuing the self-interested objective of protecting one's own citizens.

What if, alternatively, the choice was between a cargo ship (with no crew members who are EU citizens) and a yacht with EU citizens? The mandate's case-by-case criterion is of little use here, as the need is equal in this example. Consequently, the mandate gives no further guidance, leaving it up to the commander of the warship to decide.[87] Art. 3(5) TEU, in turn, frames it as a choice between safeguarding the EU's interest in safe maritime trade by helping the cargo vessel or contributing to citizen protection by helping the yacht. Though it is as such also an open choice, the explicit reference to citizens as opposed to the wide notion of 'interest' might tilt the balance towards EU citizens.

Arguably, for a nation-state, the choice to give priority to its own citizens in both cases would not be objectionable. Universal and economic objectives are not to be discounted, but in this particular case they could not be served in view of the imperative of protecting one's own nationals first. Charity, so to say, begins at home. As a states 'will be placed under extreme political pressure to act to protect the safety of their nationals abroad' and cannot 'lightly refuse such protection when it lies within [their] powers to afford it',[88] one could imagine the domestic political outrage for a case in which the national military failed to prevent the kidnapping of nationals by pirates when it had the chance to do so. In the EU context, however, this is a more delicate matter. From a Member State perspective, helping

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[85] Ianniello Saliceti, 'The Protection of EU Citizens Aboard' 97. Arguably, this is somewhat reminiscent of Noah's Arc and the divine instruction to save 'two of every kind' (Genesis 6:19). Also, whether the EU law principle of equal treatment can overrule humanitarian considerations ('women and children first') or practical effectiveness ('first come, first served') can be questioned.

[86] The area of operation of *Atalanta* is about 2 million square nautical miles, i.e. an area comparable to twice that of the Mediterranean, and is being patrolled by about a dozen *Atalanta* warships and two to four reconnaissance aircraft. Even by adding the deployments of the other navies, the dispersion remains very thin.

[87] Among the merchant vessels, according to Sanchez Barrueco, the wording 'on a case-by-case' basis 'might suggest that ships carrying a European flag would prevail but to date this assumption has not proven to be correct.' Sanchez Barrueco, 'Reflections on the EU Foreign Policy Objectives Behind the "Integrated Approach"' 221.

[88] Bowett, 'The use of force for the protection of nationals abroad' 45.

another Member State's nationals is at the outset an act of altruism (e.g. the Dutch navy rescuing the German crew from the *MS Taipan*). But the fact that both of them are EU Member States and by virtue of the over-arching concept of Union citizenship, it becomes a self-serving act from the perspective of the outside, non-EU world.[89]

How can this tension between the Joint Action and Art. 3(5) TEU be resolved? Even though CFSP/CSDP acts are not qualified as 'legislative acts',[90] they are binding and the primacy of the primary law as *lex superior* applies.[91] The introduction of Union objectives of general application (Art. 3 TEU) by the Lisbon reform bolsters this conclusion. This means, in the absence of a clear conflict, that the secondary instrument, i.e. the Joint Action here, must be interpreted in conformity with the primary law. Hence, the objectives of the operation as set out in the mandate cannot be interpreted in such a way that the pursuit of any of the constitutional objectives as set out in Art. 3(5) TEU is undercut. Hence, Operation *Atalanta*'s mandate is not to be construed as neglecting the protection of Union citizens. Given its total absence from the mandate, there is in any event potential for disorientation or misunderstanding in critical situations where clear guidance from the legal framework would be highly desirable.

One may think about plausible reasons for the conspicuous absence of citizen protection in the mandate. One possible explanation may be the participation of third countries in the operation. To date, Norway, Croatia, Ukraine and Montenegro have contributed to *Atalanta*.[92] Therefore, one might consider it inappropriate to mandate these countries to help protect EU citizens. Here, the same logic applies: It would challenge the priority of protecting their own nationals (or interests) by committing themselves to *Atalanta*. Then again, it would not be inconceivable to simply add the protection of citizens of participating countries to the mandate as well. As we have seen, the 'Petersberg task' of rescue operations in Art. 43(1) TEU is deliberately left open to rescuing third-country nationals as well.

Another reason might be the political sensitivity of European countries regarding the issue of using military force to save their own nationals (and, *a fortiori*, other EU citizens). Therefore, the emphasis is put on the multilateral framework and universal objectives. Germany would be at the forefront of such considerations. It should be recalled that Federal President Köhler resigned from office in mid-2010 following protracted criticism for a statement that for a country like Germany, it might be necessary to also defend its interests such as free trade routes by force.[93] Subsequently, German Foreign Minister Westerwelle tried to clarify Germany's stance in a speech before the *Bundestag* on Operation *Atalanta* in November 2010. Regarding the protection of national interests (*Interessenwahrnehmung*) he underlined that the entire operation had as its rationale the guarantee of delivery of humanitarian aid, and only as a secondary goal there was also the protection of

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89 For an interesting discussion of the transformation of *bonum commune* to *bonum particulare* depending on the point of view, see J Isensee, 'Gemeinwohl im Verfassungsstaat' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol 4: *Aufgaben des Staates*, third edition (Heidelberg: C.F. Mülller 2010) 8-9 and 19-22.

90 Art. 24(1), second indent, TEU.

91 On the legal nature of CFSP acts and the hierarchy of norms see R Wessel, *The European Union's Foreign and Security Policy: A legal institutional perspective* (The Hague: Kluwer 1999) 198-204; also R Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 *Common Market Law Review* 337, 341-47.

92 See e.g. Council Decision 2010/199/CFSP of 22 March 2010 on the signing and conclusion of the Agreement between the European Union and Montenegro on the participation of Montenegro in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta) [2010] OJ L88/1.

93 For a reproduction of the original quote see T Mandalka, 'Krieg für Wirtschaftsinteressen?', *Tagesschau*, 27 May 2010, www.tagesschau.de/ausland/koehler370.html.

international maritime traffic.[94] As he put it, 'foreign policy that is committed to humanitarian values can, may, even must also take into account one's own interests.'[95] However, he then softened this reference to the 'own interests' by stating that freedom of movement on the high seas is a common interest of the international community and that Germany was acting under a mandate of the UNSC.[96] While we see here that the pursuit of the national interest is still a contentious issue, the protection of citizens did not figure as controversial in the discussion. It was rather the tension between economic and universal humanitarian considerations. As was mentioned earlier, the German government had planned and only narrowly avoided carrying out an operation of German special forces to rescue the partly German crew of the kidnapped container ship *Hansa Stavanger*.[97]

In other Member States, such controversies do not seem to arise at all either. The Swedish foreign ministry, for instance, also puts the protection of WFP ships first, whereas the presence of naval forces 'is also seen to make it easier for merchant shipping in the area, including vessels that fly the Swedish flag and that sail in the area.'[98] Here, the protection of Swedish ships serves as an indirect motivation. More explicit is the Spanish government's statement. The ministry of defence points out that 'the problem of piracy represented not just a threat to international maritime security, but also to national interests in the area, represented by the fishing activities of the Spanish tuna fleet in the Indian Ocean.'[99] For the Spanish government, the protection of Spanish fishermen and WFP ships appear side by side as motivation for sending ships to that area.[100] As was already mentioned earlier, the French already have a history of using force to rescue their nationals from pirates captured by Somali pirates.

Thus, neither third country participation nor political sensitivity plausibly explain the absence of citizen protection from the mandate of *Atalanta*. To the contrary, a look at the national stances of EU Member States rather indicates that the forceful protection of nationals is not controversial. But this equally shows that citizen protection, especially in the realm of security policy, is still seen from a strictly national viewpoint, which remains thus far unaffected by the concept of 'Union citizenship'. The elevation of the protection of EU citizens abroad to a constitutional objective of the Union does not seem to have altered this. Illustrative is here again the example mentioned at the outset, i.e. the rescue of German crew members of the hijacked *MS Taipan* by Dutch troops from the frigate *HNLMS Tromp* operating in the framework of *Atalanta*. Not even the Operation itself regarded this as an act of protecting EU citizens by CSDP assets. Instead, the press release by *Atalanta* on the successful rescue operation limited itself to stating that 'EU NAVFOR HNLMS Tromp retakes pirated MV Taipan',

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94 German Foreign Office, *Rede von Außenminister Westerwelle im Deutschen Bundestag zur deutschen Beteiligung an der Operation 'ATALANTA' am Horn von Afrika*, 24 November 2010, www.auswaertiges-amt.de/DE/Infoservice/Presse/Reden/2010/101124-BM-Atalanta-Rede.html?nn=339506.

95 'Eine Außenpolitik, die humanitären Werten verpflichtet ist, kann und darf, ja muss auch die eigenen Interessen im Blick behalten.' (translation by author) German Foreign Office, *Rede von Außenminister Westerwelle*.

96 German Foreign Office, *Rede von Außenminister Westerwelle*.

97 It should be noted that whereas the rescue team formed part of the German Federal Police, it was stationed on a US navy vessel, which was escorted by German warships. Historically, one could also recall here the rescue by German special forces of the kidnapped aircraft *Landshut* in 1977, which, coincidentally, took place on Somali soil as the plane had landed on the airport of Mogadishu.

98 Ministry of Foreign Affairs of Sweden, *Sweden to strengthen its commitment in Somalia*, press release, 21 January 2010, www.sweden.gov.se/sb/d/12653/a/138256.

99 '[...] el problema de la piratería en Somalia representaba, no sólo una amenaza para la seguridad marítima internacional, sino también para los intereses nacionales en la zona, representados por la actividad pesquera de la flota atunera española en el Índico.' (translation by author) Spanish Ministry of Defence, *Operación 'Atalanta' de lucha contra la piratería*, www.mde.es/en/areasTematicas/misiones/enCurso/misiones/mision_09.html?__locale=en.

100 See also Spanish Ministry of Defence, *'Atalanta' ha permitido detener a más de 1.000 piratas en siete meses*, press release 8 October 2010, www.mde.es/gabinete/notasPrensa/2010/10/DGC_101008_informe_atalanta.html.

thus identifying the warship as part of the EU operation.[101] Also in the national media of both countries, it was not portrayed in a European perspective.[102] Especially telling was the angle taken by an Associated Press reporter who subtitled his article on the incident: 'Dutch marines sidestep EU bureaucracy to rescue German container ship from Somali pirates'.[103] From this viewpoint, the EU does not appear as the actor or even facilitator for the Member States to act, but as an obstacle to achieving the goal of mutual protection of nationals.

6. Conclusion: *Civis Europaeus in Foro Interno, Externo Barbarus*

The discussion of this encounter between the *civis europaeus* and the *hostis humani generis* off the coast of Somali yields the following observations. First, in this particular setting, international law allows the protection by the use of force of victims of piracy by virtue of the Law of the Sea and the special regime imposed by the UN Security Council. Within this particular framework, states are allowed to use force *also* for the purpose of protecting their own citizens from pirates. Secondly, the concept of 'Union citizenship' gives us a new perspective to look at the challenge for the Member States to protect jointly their citizens abroad. The altruistic objective of protecting a foreigner is transformed into the Union's constitutionally entrenched self-interest to protect *its own* citizens. Union citizenship has now an explicit external dimension, which goes beyond diplomatic and consular assistance, and indeed includes also the use of the CFSP/CSDP. Thirdly, the mandate of Operation *Atalanta* clearly prioritizes the pursuit of universal objectives, above all the protection of WFP ships, and otherwise lumps together all merchant ships, making no reference to Union citizens at all. Therefore, fourthly, while the notion of EU citizenship looms large in the primary law and in Union's internal sphere, it is conspicuously absent in the implementing acts of the operation. This creates tension which in extreme situations can lead to putting the protection of Union citizens on the back seat. Whereas this would be politically highly controversial in a national setting, the salience of this issue appears not to have surfaced at the Union level.

In view of these observations, it can be concluded that there is a widening gap between the increasingly powerful notion of Union citizenship within the Union and its present weakness outside of it. Internally, the development of Union law makes it increasingly difficult to construe nationals from different Member States as proper 'foreigners'. The phrase *civis europaeus sum* carries weight *in foro interno*. Externally, we see that the *cives europaei* might receive consular assistance in case, for instance, they get jailed, are hospitalized or lose their passport. However, in the face of pirate attacks in the troubled waters off the Somali coast, *civis europaeus sum* remains thus far a call that falls on deaf ears.

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[101] EU NAVFOR Somalia, *Pirated German ship rescued – EU NAVFOR HNLMS Tromp retakes pirated MV Taipan*, press release, 5 April 2010, www.eunavfor.eu/2010/04/pirated-german-ship-rescue-eu-navfor-hnmls-tromp-retakes-pirated-mv-taipan/.

[102] See e.g. 'Mariniers ontzetten gekaapt Duits schip', *NRC Handelsblad*, 5 April 2010, vorige.nrc.nl/nieuwsthema/piraterij/article2518024.ece/Marinefregat_Tromp_pakt_tien_piraten; and 'Niederländer befreien deutsches Containerschiff', *Spiegel Online*, 5 April 2010, www.spiegel.de/panorama/0,1518,687323,00.html.

[103] M Corder, 'Dutch Sidestep EU Red Tape to Rescue German Ship', *ABC News*, 6 April 2010, abcnews.go.com/International/wireStory?id=10295582.


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