

EU External Relations Law

Text, Cases and Materials

Second Edition

Edited by
Ramses A Wessel
and
Joris Larik

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1

The European Union as a Global Legal Actor

Central Issues

- This chapter introduces the legal dimension of the EU as an international actor. We define this notion as an entity which interacts with third countries and international organisations (and even its own Member States) in ways which are legally and politically distinguishable from its constitutive Member States. In the global context, this entity thus has a stand-alone identity composed of values, interests, and policies which it seeks to define and promote internationally as its own.
- This chapter shows the importance of legal rules in organising EU international action and indicates that EU external relations law consists of an internal and an external dimension. In its internal dimension it consists of the set of rules which govern the constitutional and institutional legal organisation of this legal entity in pursuit of its interests in the world. The external dimension comprises the rules governing the relationship of the European Union with the international legal order in which it is active.
- In order to study EU external relations law in all its complexity, this Chapter provides an overview of the architecture of EU external relations. It outlines the existence of the European Union as an international organisation with legal personality, which exists legally distinctly from its Member States. It also shows that the European Union is based on the Treaty on European Union and the Treaty on the Functioning of the European Union, which each contain crucial legal principles constituting the body of EU external relations law.
- Finally, in order to carry out its external *action*, the European Union needs *actors* to make the decisions and represent the EU at the global stage. These include the EU institutions, but also other key players in the law of EU external relations.

I. The Nature of the European Union as an International Actor

A. An International Organisation or Something Else?

A textbook on EU external relations law is founded on the premise that the European Union can have legal relations with third states (non-Member States) and other international organisations. Hence, it is an international actor with a distinct legal existence akin to the EU Member States or international organisations such as the United Nations. What does it mean to say that the European Union is an international actor?

With the 1957 Rome Treaty having founded the European Economic Community, this new international organisation was explicitly given competence to conduct international trade relations through its Common Commercial Policy and to conclude international agreements through which it could associate itself with third countries. As European integration progressed, the EEC, later the European Community and now the European Union, acquired powers in other areas such as foreign and security policy, environmental policy, energy policy, and so on. Scholars have been struggling with the nature of the European Union as it is clearly different from other international organisations and has features that come close to a (federal) state. Often, the easy way out is to state that the Union is a *sui generis* international actor which cannot be defined by using any pre-existing terminology.

In this textbook we are primarily concerned with the rules and principles which govern the legal existence and functioning of this international actor. Consequently, we define the EU as an international actor in abstract terms as *an entity which interacts with third countries and international organisations (and even its own Member States), in ways which are legally and politically distinguishable from its constitutive Member States. In the global context, this entity thus has a stand-alone identity composed of values, interests, and policies which it seeks to define and promote internationally as its own.*¹

The term ‘entity’ may nevertheless not be too helpful to explain the nature of this ‘beast’ and the question emerges as to whether we can see the EU as an international organisation. To lawyers, being an international actor usually means being an international *legal* actor. This means that, although the European Union is not a state – which has been confirmed by the Court of Justice in its Opinion 2/13² – it is subject to the rules of international law when it wishes to take action on the global stage. International law, however, is still quite traditional. Created as ‘inter-state’ law, it continues to struggle with the presence of non-state actors in the international order. Yet, international

¹This definition is inspired by Cremona’s description of the different roles of the EU in the world. See M Cremona, ‘The Union as a Global Actor: Roles, Models and Identity’ (2004) 42 *Common Market Law Review* 553.

²Opinion 2/13 (*ECHR II*), ECLI:EU:C:2014:2454.

organisations have obviously found their place as international legal actors while other fora, networks and actors are also increasingly recognised as legally relevant. It is a truism that the European Union is not a regular international organisation. From the outset, Member States have been prepared to transfer important sovereign powers and pool them at the level of the Community and later the Union. The current EU Treaties again herald a new phase in which the Union's international actorness in the global legal order will be further developed. This is exactly why it is important to classify the European Union under international law.

C Eckes and RA Wessel, 'The European Union: An International Perspective' in T Tridimas and R Schütze (eds) *Oxford Principles of European Union Law – Volume 1: The European Union Legal Order* (Oxford, Oxford University Press, 2018) 74–102, 81

Most international rules apply to states, some (also) to international organisations and a limited set also to other internationally active entities (such as liberation movements or multinationals). Few would argue that the EU is a state; many would say that it is an international entity *sui generis*. International law, however, only works when it is applied across the board for certain categories of international actors. Its rationale is to offer clarity and set the conditions for a smooth cooperation between different subjects. At the same time, it is of course possible to create special rules for special entities. The clauses on Regional Economic Integration Organisations (REIOs) in some multilateral agreements are a good example.

The European Treaties are still silent on the international legal status of the Union. They do not give an answer to the classic question of whether the EU is an international organisation or something else. This may be the reason that also textbooks are still uncertain about the legal nature of the Union and seem to have a preference for more political notions. In their leading textbook, Chalmers et al. refer to the EU as 'amongst other things, a legal system established to deal with a series of contemporary problems and realise a set of goals that individual states felt unable to manage alone.'³ And, the 'nature of the Union's international presence' is related to its international legal personality only, whereas the nature of the entity as such is left open.⁴

In its famous ruling on the Lisbon Treaty, the German Federal Constitutional Court held that the Union was 'designed as an association of sovereign states (*Staatenverbund*) to which sovereign powers are transferred'. Yet, the further description by the Court

³ D Chalmers, G Davies and G Monti, *European Union Law*, 2nd edn (Cambridge, Cambridge University Press, 2010) 3.

⁴ *Ibid.*, 632.

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comes close to generally accepted definitions of international organisations: ‘The concept of *Verbund* covers a close long-term association of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the Member States alone and in which the peoples of their Member States (ie the citizens of the states) remain the subjects of democratic legitimisation.’⁵

Could the EU be qualified as an international organisation? When it looks like a banana and smells like a banana, it may very well be a banana.⁶ Indeed, many would agree with Curtin and Dekker ‘that the legal system of the European Union is most accurately analysed in terms of the institutional legal concept of an international organization’.⁷ But even this quote reveals how difficult it seems to simply argue that the European Union *is* an international organisation – albeit a very special one ‘of its own kind’.⁸ Throughout their handbook on the law of international organisations, Schermers and Blokker take the EU along as an international organisation, while noting, of course, the ‘stronger constraints on domestic policies of the member states’ and its ‘more far-reaching objectives’.⁹ The EU is indeed ‘considered special not because of its identity problems but because of the high degree of “constitutional” development, supranational components and the rule of law features within this organization making it look almost like a federation of states ...’, as argued by Bengoetxea in one of the few publications focussing on this question.¹⁰

As an international organisation, the European Union is subject to international law in its relations with third states and other international organisations. While international law can also be part of the EU’s internal set of rules (see Chapter 5), this chapter’s focus is on the external dimension. There we would need to start from the presumption that the EU is bound by the international agreements to which it is a party as well as to customary international law. Yet, third states experience that the EU remains special. It may be an international organisation, but the fact that it is exclusively competent to act in certain areas – at the expense of its own Member States – is unprecedented. The same holds true for the rule that EU Member States, in the end,

⁵ *Bundesverfassungsgericht*, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, ECLI:DE:BV erfG:2009:es20090630.2bve000208, para 229. See also A Steinbach, ‘The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration’ (2010) 11 *German Law Journal* 367.

⁶ As we will see in Chapter 7, the choice for ‘banana’ as a metaphor in a textbook on EU external relations law is less random than it seems.

⁷ DM Curtin and IF Dekker, ‘The European Union from Maastricht to Lisbon: Institutional and Legal Unity out of the Shadow’ in P Craig and G De Búrca (eds) *The Evolution of EU Law* (Oxford, Oxford University Press, 2011) 163.

⁸ Compare the qualification as ‘eine internationale Organisation eigener Art’ by W Schroeder, ‘Die Europäische Union als Völkerrechtssubjekt’ (2012) Beiheft 2 *Europarecht* 9, 18. More generally, the status of the EU as an ‘international organization’ seems to be accepted implicitly by many authors, see P Eeckhout, *EU External Relations Law*, 2nd edn (Oxford, Oxford University Press, 2011), who does not address the external legal nature of the EU, but merely refers to the fact that ‘[t]he EU is also a member of a number of other international organizations ...’ (at 3, emphasis added).

⁹ HG Schermers and NM Blokker, *International Institutional Law: Unity in Diversity*, 6th edn (Leiden, Martinus Nijhoff, 2018) 33.

¹⁰ J Bengoetxea, ‘The EU as (More Than) an International Organization’ in J Klabbbers and Å Wallendahl (eds) *Research Handbook on the Law of International Organizations* (Cheltenham, Edward Elgar Publishing, 2011) 449. The author argues that it is above all the ‘transitional’ status of the EU (from international organisation to federation) which justifies its ‘specialness’ (at 450).

should give priority to EU law in cases of a conflict with international law. Indeed, as underlined by case law, the loyalty towards the Union (*Unionstreue* in German) is believed to take precedence over international law obligations (see Chapter 5). While for EU Member States (and most EU lawyers) these may be logical consequences of a dynamic division of competences, third states (and most public international lawyers) would remind us of the rule of *pacta tertiis nec nocent nec prosunt*; third states are not, in principle, bound by the EU Treaties as to them these are agreements between others.¹¹ From a legal perspective, they should not be bothered with a complex division of competences that was part of a deal between the EU and its Member States. Yet, these days, one may expect a certain knowledge of the division of competences on the side of third states, not least because it would be useful to know which actors on the European side are the most appropriate interlocutors.

S Sheth, ‘Angela Merkel Reportedly Had to Explain the “Fundamentals” of EU Trade to Trump 11 times’, *Business Insider*, 22 April 2017

President Trump did not understand that the US cannot negotiate a trade deal with Germany alone and must deal with the European Union as a bloc, a senior German official told *The Times* of London.

‘Ten times Trump asked (German chancellor Angela Merkel) if he could negotiate a trade deal with Germany. Every time she replied, “You can’t do a trade deal with Germany, only the EU,”’ the official said.

They continued: ‘On the eleventh refusal, Trump finally got the message, “Oh, we’ll do a deal with Europe then.”’

Merkel reportedly told her cabinet members that Trump had ‘very basic misunderstandings’ on the ‘fundamentals’ of the EU and trade.

B. The EU and its Member States in the International Legal Order

The above discussion points to the core difficulty of EU external relations: who represents the ‘European interest’ on the international scene – the EU or its Member States? How do these actions relate to each other – are they coherent, mutually supportive or perhaps contradictory? The following excerpt serves as a good illustration of the diverse policy areas encompassed by the EU as an international actor. In this Communication, the European Commission provides a succinct summary of the diverse challenges facing the EU in the twenty-first century. Subsequently, it indicates the wide range of policies and instruments the EU has developed in the past six decades

¹¹This rule is laid down in Art 34 of the Vienna Convention on the Law of Treaties, adopted in Vienna on 22 May 1969 (hereinafter: VCLT): ‘A treaty does not create either obligations or rights for a third State without its consent.’

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in response, and how they could be improved.¹² Notice how the excerpt makes the distinction between ‘Europe’ and ‘EU’. The latter is a reference to the international organisation of which the Commission is an institution, the former is a reference to the EU and its Member States acting together across a vast range of subjects in a challenging global environment.

Communication from the Commission, *Europe in the World – Some Practical Proposals for Greater Coherence, Effectiveness and Visibility*, Brussels, 8 June 2006, COM(2006) 278 final, 2

Since the end of the Cold War, the world has changed very fast. Europe faces strong economic competition and new threats to its security. While Europe’s mature economies have many strengths, they also suffer from sluggish growth and ageing populations. The economic balance of power has shifted. Countries such as China and India are growing fast and there is increasing competition for access to raw materials, energy resources and markets. Terrorism, the proliferation of weapons of mass destruction, regional conflicts, failed states and organised crime remain as pressing as ever.

Europe has the potential to rise to these challenges and to share in the new opportunities created by emerging markets and globalisation. It has an open society that can absorb people, ideas and new technologies. Successive enlargements over the last three-and-a-half decades have demonstrated the EU’s ability to promote stability and prosperity and the success of this model of regional integration. With a combined population of 470m and a quarter of the world’s income, the EU now accounts for over a fifth of world trade. We provide more than half of development and humanitarian assistance worldwide. European countries make a central contribution to all the important global institutions. The EU model of co-operation and integration is a pole of attraction for countries in our neighbourhood and beyond.

Over the last fifty years the EU has developed a series of external policy instruments, political, economic, commercial and financial, which help us to protect and promote our interests and our values. More recently these instruments have been diversified in areas where member states felt they needed to work in common, and a High Representative for Common Foreign and Security Policy was appointed, to enhance the scope and effectiveness of the EU’s external action. Military instruments have been created to reinforce civil instruments of crisis management.

Increasingly the EU’s internal policies – for example the environment, energy, competition policy, agriculture and fisheries, transport, the fight against

¹²The quoted Communication followed in the wake of the Dutch and French referenda rejecting the Draft Constitutional Treaty. Through this document, the Commission sought to stimulate pragmatic advances in EU external relations without the need for changes to EU primary law.

terrorism and illegal migration, dealing with global pandemics – impact on international relationships and play a vital part in the EU’s external influence. Conversely, many of Europe’s internal policy goals depend on the effective use of external policies.

This paper seeks to ... make pragmatic proposals to enable the Union to define a strong sense of collective purpose in our external action and to ensure that this is backed by the necessary policy instruments.

The first two paragraphs are a highly dense summary of the vast range of policies pursued by the EU as an international actor. To explicitly name but three of them: First, it starts out by referring to access to raw materials and markets in a global competitive environment, which is generally within the purview of the EU’s Common Commercial Policy (Article 207 TFEU; see Chapter 7). Second, the Communication further mentions the challenge of terrorism and the proliferation of weapons of mass destruction, which falls within the scope of the EU’s Common Foreign and Security Policy (Article 24 TEU; see Chapter 9), but certainly also within the scope of Member States’ own foreign policies. Third and finally, the excerpt refers to the fact that ‘we’ provide more than half of global development and humanitarian aid, by which the document refers to funds dispersed by the Union and its Member States within their respective development policies (Article 208 TFEU; see Chapter 8). In sum, the excerpt illustrates that the European Union ‘as an international actor’ is an umbrella term for a set of external policies, instruments and actors across a vast range of substantive domains. It also illustrates the ambiguity as to who is acting: the European Union alone, the EU Member States, or both simultaneously.

Yet, from a legal perspective, it makes sense to continue to distinguish between the European Union as an international organisation of which states can be members, and the (Member) States themselves. In that sense, the EU is clearly something more than merely a collection of several states. It has a distinct legal status, both in relation to its own members as well as towards third states. The European Union as an international actor then refers to the entity which has express legal personality and capacity to act in the international legal order.

Article 47 TEU

The Union shall have legal personality.

Despite this autonomous legal standing, like any other international organisation, the EU is based on the principle of conferred powers (eg it can only act where its Member States have given it the competence to do so). But, importantly, the Member

States may no longer be allowed to act once competences have been transferred and have been placed ‘exclusively’ in the hands of the Union. As a consequence, depending on the legal existence, scope and nature of the EU’s external powers (a synonym for competence, see Chapter 3), the Member States have, to a greater or lesser degree, a prominent role in the formation and execution of international action in the relevant area. Conversely, the role of the European Union (as the legal person) and its supranational institutions will then shift depending on the policy area at issue. This is why it possesses significant legal competences and political clout which is distinct from that of its Member States. However, its Member States remain equally significant on the international scene and the core of EU external relations law is based on finding out who is competent to act externally: the EU, its Member States or both together. Perhaps ironically, this has turned EU *external* relations law largely into a story about *internal* competence battles; either between the EU and its Member States or between the different EU institutions.

II. EU External Relations in the Treaties

A. A Tale of Two Treaties

The European Union is a single legal person, but it is not based on a single constitutive document. In the following sections we explain the legal structure of the Treaty on European Union and the Treaty on the Functioning of the European Union – with specific emphasis on how external relations are organised in EU primary law.¹³

The European Union and its competences are based on the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). These are not in a relationship of hierarchy but have the same legal value; together they constitute ‘the Treaties’ on which the Union is founded (Article 1 TEU and Article 1 TFEU). The Treaties are supplemented by the Charter of Fundamental Rights (‘the Charter’) and the Treaty establishing the Atomic Energy Community Treaty (‘Euratom’). The latter still exists as a separate legal instrument which has not been merged with the TEU and TFEU. Though it shares the EU’s institutions, Euratom exists as a distinct legal personality from the European Union. In this book, the focus is on the Union as based on the TEU and TFEU; we only discuss Euratom and the Charter in an ancillary fashion.

The Treaties are the result of numerous modifications over the years. These changes are usually implemented based on separate modification treaties that contain changes that take effect after their entry into force. The 2007 Treaty of Lisbon (entry into force in 2009) was the latest modification treaty and the modifications it contained led to

¹³In referring to the Treaties, this book will use the following acronyms: For the pre-Lisbon, post-Nice situation this text refers to ‘TEC’ for the EC Treaty and ‘EU’ for the EU Treaty. For the post-Lisbon situation, the text uses ‘TFEU’ for Treaty on the Functioning of the European Union and ‘TEU’ for the Treaty on European Union.

the new and current consolidated versions of the TEU and the TFEU. References are always to these consolidated treaties and not to the modification treaties (eg, a reference to ‘Article 50 of the Lisbon Treaty’ does not make any sense; the actual Lisbon Treaty only contains seven articles¹⁴).

The TEU with its 55 articles is the shorter of the two EU Treaties and is considered the framework treaty. It sets out the most fundamental legal properties of the European Union: the aims and objectives for which it was set up, which of its organs has what role in making decisions binding the legal person, essential principles of conduct within the organisation, how to leave or become a member of the Union and how its constitutional rules can be changed. In the TEU, the key provisions of EU external relations are those stating the core legal principles governing all EU action, including its international relations; the values and objectives of the EU in conducting its international relations; the EU institutions’ roles in pursuing EU foreign policy; and the relationship between the TEU and the TFEU. For historical reasons (examined in Chapter 9), the TEU also contains the rules and procedures governing the EU’s common foreign and security policy, the only substantive EU competence to be found in the TEU. Similarly, for reasons pertaining to the drafting of the Treaty of Lisbon, following the failed Constitutional Treaty, the TEU contains an article on the European Neighbourhood Policy, examined in Chapter 13.

The Treaty on the Functioning of the European Union, in comparison, as is clear from its name and with its 358 articles, ‘fleshes out’ the functioning of this international organisation. In which areas can the EU institutions adopt measures in pursuit of the external objectives set out in the TEU? Which procedures should its institutions adhere to? Which (legally binding) instruments can they use? Furthermore, the TFEU contains crucial provisions governing the relationship between the EU and international law both as regards itself, its own international agreements and the legal position of the Member States and their international commitments. Finally, relevant to both the TEU and the TFEU are the legally binding protocols attached to the TFEU, and the political declarations, which serve to interpret or contextualise some of the provisions in the TEU and TFEU.

B. Values and Objectives

The objectives of EU external relations deserve an in-depth look for two reasons. First, they govern the inner workings of the entire EU machinery: the principles of conferral, cooperation and institutional balance (see Chapter 2) exist in light of them. Second, they shape the EU’s relationship to the legal and political global reality in which it exists. Articles 3(5) and 21 TEU mention the key external objectives of the Union.

¹⁴Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007 [2007] OJ C 306/1.

Article 3(5) TEU

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

Article 21 TEU

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

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

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
 - (a) safeguard its values, fundamental interests, security, independence and integrity;
 - (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
 - (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
 - (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

- (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
 - (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
 - (g) assist populations, countries and regions confronting natural or man-made disasters; and
 - (h) promote an international system based on stronger multilateral cooperation and good global governance.
3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

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

Articles 3(5) and 21 TEU give a double response to the question as to what kind of international actor the EU is and how it relates to the international order. On the one hand, there is the substantive answer. As explained in the extract below, these provisions in the TEU impose substantive requirements on EU international relations by stating that there are certain fundamental objectives which shall guide its internal and external policies. On the other hand, these provisions also impose a strong methodological imperative upon EU international action: it must pursue its action through a multilateral approach based on the rule of law. It is then also clear that the scope of objectives which EU action in the world must pursue is extraordinarily broad. Aside from perhaps issuing a declaration of war, there is very little that does not fall within the purview of these objectives. In order to legally and conclusively establish what the EU can do in international relations, Chapter 3 will examine the existence, nature and scope of EU external competence, in light of these objectives. Chapter 5 will examine the relationship between the EU and international law. On the basis of Articles 3(5) and 21 TEU and, as a creation of international law, we may assume that the Union legal order should be open, supportive and receptive to international legal norms. This is partially true but must be qualified in many respects.

J Larik, ‘Entrenching Global Governance: The EU’s Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality’ in B Van Vooren, S Blockmans and J Wouters (eds) *The Legal Dimension of Global Governance, What Role for the EU?* (Oxford, Oxford University Press, 2013) 10–12

The Lisbon Treaty has both expanded and streamlined the Union’s global objectives. The EU Treaties include now a set of general objectives of the Union, including their external dimension (Art. 3(5) TEU), an article containing general principles and goals of EU external action (Art. 21 TEU), and in some cases objectives specific to certain external policies (Arts. 206, 207, 208, 214 TFEU) ...

While being careful to refer also to the pursuit of ‘interests’ (Arts. 3(5) TEU and 21(2)(a) TEU), thus keeping the door open for the pursuit of ‘possession goals’, the Treaties contain a wealth of substantive objectives that squarely fall into the category of milieu goals. These include contributions 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’ (Arts. 3(5) TEU and 21 TEU). The Treaties also make clear that this is largely an extrapolation of the Union’s internal values to the outside world (Art. 21(1) TEU). Nevertheless, these goals are not all autonomously defined by the Union, but are indeed open to input from external sources by drawing on internationally-defined concepts such as sustainable development, universal human rights or internationally agreed goals for development cooperation (Art. 208(2) TFEU).

In addition, we find a strong emphasis on law-based goals. The various references to human rights (Arts. 3(5); 21(1), first subpara; 21(2)(b) TEU), as *rights*, can also be seen as a matter of law. More straightforwardly, the Treaties oblige the Union to contribute ‘to the strict observance and the development of international law’ (Art. 3(5) TEU) and to spread and consolidate the rule of law in the world at large (Arts. 3(5) and 21(2)(b) TEU). They furthermore identify the United Nations as the forum of choice to ‘promote multilateral solutions to common problems’ (Art. 21(1), second subpara TEU and 220(1) TFEU), which suggests abiding by and utilising the procedures and means provided under its Charter. Indeed, according to the Treaties ‘stronger multilateral cooperation and good global governance’ (Art. 21(2)(h) TEU) go hand in hand ...

In sum, we see that the EU Treaties codify a range of global objectives both in terms of substance but also specifically harnessing law ... Together, these elements coincide with the idea of the Union as a ‘transformative power’, changing not only fundamentally the relations among its members but also of the world around it ...

C. Protocols and Declarations

Attached to the TEU and TFEU are no fewer than 37 legally binding Protocols, as well as 65 political Declarations. Many of these are of indirect relevance to EU external relations,¹⁵ but of direct interest are the following Protocols: Protocol No 2 on the application of the principles of subsidiarity and proportionality; Protocol No 7 on the privileges and immunities of the European Union; Protocol No 8 relating to accession to the European Convention on Human Rights; Protocols 19, 21, 22 and 23 as regards the external dimension of the area of freedom, security and justice; and Protocol 25 on the exercise of shared competence. The most pertinent Declarations are 13 and 14 on the common foreign and security policy; Declaration 15 concerning establishment of the European External Action Service; Declaration 18 on the delimitation of competences; Declaration 24 on legal personality of the Union; Declaration 36 on the negotiation and conclusion of international agreements by Member States relating to the AFSJ; Declaration 37 concerning the solidarity obligation in Article 222 TFEU; and finally, Declaration 41 stating for which objectives of Article 3 TEU Article 352 TFEU can be used. We discuss these in more depth in the relevant chapters.

Protocols form an integral part of the Treaty structure on which the Union is based. They are as such equal to the TEU and the TFEU. Declarations are not legally binding, though have an important interpretative effect in relation to the TEU or TFEU provisions to which they refer.

III. Introducing the Key Players

A. The European External Action Service and the High Representative

In dealing with the institutions, textbooks usually follow the order presented in Article 13 TEU which lists the EU institutions starting from the European Council. Given the external relations angle of this book, we focus first on the European External Action Service (EEAS) and the role of the High Representative of the Union for Foreign Affairs and Security Policy (HR) as envisaged by the post-Lisbon EU Treaties. This will be followed by an analysis of the role of the traditional institutions (European Council, Council, Commission, European Parliament and Court of Justice) in EU external relations. The reason is that the EEAS and the HR both play a pivotal role in EU external relations, to which can subsequently be referred when analysing the actual EU institutions.

¹⁵Though some can be of direct relevance, they are not further discussed in this book, such as Protocol 31 concerning petroleum imports into the EU from the Netherlands Antilles and Protocol 34 on special arrangements for Greenland. See further D Kochenov (ed) *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (The Hague, Wolters Kluwer, 2011).

Article 27 TEU

1. The High Representative of the Union for Foreign Affairs and Security Policy, who shall chair the Foreign Affairs Council, shall contribute through his proposals to the development of the common foreign and security policy and shall ensure implementation of the decisions adopted by the European Council and the Council.
2. The High Representative shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences.
3. 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.

The EEAS, mentioned only in Article 27(3) TEU, was formally established by a Council Decision in 2010 and was officially launched in January 2011.

Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L201/30

...

Article 1

Nature and scope

1. This Decision establishes the organisation and functioning of the European External Action Service ('EEAS').
2. The EEAS, which has its headquarters in Brussels, shall be a functionally autonomous body of the European Union, separate from the General Secretariat of the Council and from the Commission with the legal capacity necessary to perform its tasks and attain its objectives.
3. The EEAS shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy ('High Representative').

4. The EEAS shall be made up of a central administration and of the Union Delegations to third countries and to international organisations.

Article 2

Tasks

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

...

The way the position of the Union as an autonomous international actor developed could only partially be said to be by purposive design. By most standards, it is a piecemeal construction of political and legal developments pushed forward by geopolitical and socio-economic *stimuli*. As will be further elaborated in Chapter 9, the early years of European Political Cooperation coincided with the process leading up to the Helsinki Final Act, as well as events in the Middle East. The birth of CFSP in the Maastricht Treaty is intimately connected to the collapse of the Soviet Union and the Gulf War. The subsequent failure to formulate a common response to the conflicts in the former Yugoslavia gave impetus to CFSP reforms in the Amsterdam Treaty. This dynamic has continued in the twenty-first century. For example, the first ever European Security Strategy was drawn up after deep disagreement among EU Member States over the 2003 Iraq War. Each of these geopolitical realities prompted EU-internal change to the legal and political machinery making up 'European Union' external action. The EEAS is, then, a continuation of that process: a new institutional structure set up against a decades-old struggle of the Union seeking to project a strong,

coherent voice on the international scene; counterbalanced by the Member States' wish to retain control over various aspects of international relations. The EEAS was created to overcome this fragmentation. The idea is to bring together policy preparation and implementation on external relations into one new body, under the auspices of the High Representative for Foreign Affairs and Security Policy, who is also vice-President of the Commission and Chairperson of the Foreign Affairs Council (Article 18 TEU). This is referred to as 'triple-hatting', and together with an EU external action service is hoped to support attaining consistency in EU external relations (Article 21(3) TEU).

In terms of policy fields covered by the new EEAS, the current structure is a typical EU-type compromise. It is *not* an EU institution, which significantly constrains its power to legally influence EU external decision-making. Furthermore, the EU external action service has no say whatsoever in the Common Commercial Policy ('the mother of all EU external policies', see Chapter 7), where the Commission remains very firmly in the driver's seat. Development policy is opaquer, where both the EEAS and the Commission have been given a role in the policy-making process (see Chapter 8).

Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L201/30

Preamble

...

(2) In accordance with the second subparagraph of Article 21(3) TEU, the Union will ensure consistency between the different areas of its external action and between those areas and its other policies. The Council and the Commission, assisted by the High Representative, will ensure that consistency and will cooperate to that effect ...

The preamble of the Council Decision reaffirms that coherence remains the final objective of setting up the EEAS and does this by copying and pasting the text of Article 21(3)(2) TEU. Article 2 of the EEAS Decision then describes the two tasks of the EEAS attaining that objective: first, Article 2(1) states that it 'shall support' the High Representative in fulfilling his mandates as outlined in Articles 18 and 27 TFEU. Three indents follow that statement, one for each of the HR's hats. The first requires the EEAS to support the High Representative while carrying out CFSP and ensuring the consistency of the Union's external action. The second and third indents require the EEAS to support her in her mandate as President of the Foreign Affairs Council and as Vice President of the Commission, respectively. All of this is in function of a coherent EU international policy, though each time qualified by stating that 'this is without prejudice to the normal tasks' of the General Secretariat of the Council and the 'normal tasks' of the Commission services respectively. Article 2(2) adds that the EEAS also function to assist the President of the European Council, the President of

the Commission, as well as the Commission itself, ‘in the exercise of their respective functions in the area of external relations’.

Article 1(2) of the EEAS Decision (see above) provides: ‘The EEAS, which has its headquarters in Brussels, *shall be a functionally autonomous body* of the European Union, *separate* from the General Secretariat of the Council and from the Commission with the *legal capacity necessary* to perform its tasks and attain its objectives’ (emphasis added). Deep disagreement existed throughout the negotiation process on the EEAS’ position in the EU institutional set-up. On the one hand, there was Member State agreement that ‘the EEAS should be a service of a *sui generis* nature separate from the Commission and the Council Secretariat’.¹⁶ On the other hand, the European Parliament’s opinion was that it should be connected to the Commission. The final result laid down in Article 1(2) of the Decision reveals that Parliament has lost out in the final compromise.

In Article 1 of the EEAS Decision we found that the EEAS is ‘functionally autonomous’ and ‘separate’ from the Council Secretariat and Commission. Given the negotiation history to the EEAS, these notions should be interpreted as meaning that in supporting the High Representative, the EU diplomatic service does not take instructions from either the Council or the Commission (‘equidistance’). Its instructions come from the *office of the High Representative*,¹⁷ who is accountable to the EU institutions proper – notably also the Parliament. The EEAS is certainly part of a ‘command structure’ which runs vertically via the High Representative, then through to the Council and up to the European Council, with a strand of accountability connecting it to Parliament. However, the EEAS is horizontally not an institutional participant in the EU’s institutional balance nor part of an institution itself.

M Gatti, *European External Action Service: Promoting Coherence through Autonomy and Coordination* (Leiden, Brill/Nijhoff, 2016) 1

The EEAS is one of the most significant innovations introduced by the Lisbon Treaty and constitutes the first case of a non-national ‘foreign ministry’.

Given the idea behind the establishment of the EEAS, does setting up such a complex new body do anything to resolve decades-old tensions of EU external relations? No inter-institutional reconfiguration is perfect, and the EEAS is clearly a compromise between the many different interests involved.

¹⁶October 2009 Presidency Report, DOC 14930/09, 6.

¹⁷Heads of the EU delegations can also receive instructions from the Commission ‘in areas where they exercise powers conferred upon it by the Treaties’. Otherwise, the Delegations only receive instructions from the High Representative (Art 5(3) EEAS Decision).

Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L201/30

...

Article 3

Cooperation

1. 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, in order to ensure consistency between the different areas of the Union's external action and between those areas and its other policies.
2. The EEAS and the services of the Commission shall consult each other on all matters relating to the external action of the Union in the exercise of their respective functions, except on matters covered by the CSDP. The EEAS shall take part in the preparatory work and procedures relating to acts to be prepared by the Commission in this area.

This paragraph shall be implemented in accordance with Chapter 1 of Title V of the TEU, and with Article 205 TFEU.

3. The EEAS may enter into service-level arrangements with relevant services of the General Secretariat of the Council, the Commission, or other offices or interinstitutional bodies of the Union.
4. The EEAS shall extend appropriate support and cooperation to the other institutions and bodies of the Union, in particular to the European Parliament. The EEAS may also benefit from the support and cooperation of those institutions and bodies, including agencies, as appropriate. The EEAS internal auditor will cooperate with the internal auditor of the Commission to ensure a consistent audit policy, with particular reference to the Commission's responsibility for operational expenditure. In addition, the EEAS shall cooperate with the European Anti-Fraud Office ('OLAF') in accordance with Regulation (EC) No 1073/1999. It shall, in particular, adopt without delay the decision required by that Regulation on the terms and conditions for internal investigations. As provided in that Regulation, both Member States, in accordance with national provisions, and the institutions shall give the necessary support to enable OLAF's agents to fulfil their tasks.

Article 3 of the 2010 EEAS Decision on the duty of cooperation is exemplary of the carefully crafted new institutional balance in EU external relations: links have been established with national diplomatic services, though practice will show whether that is a reciprocal cooperative relationship. The legal obligations of cooperation are the strongest between the Commission and the EEAS, while relations with the Council

and its ‘normal tasks’ are less clear. Accountability of the EEAS to Parliament is extensive but will have to be given form and substance in practice. In many areas the new diplomatic service has merged elements that used to function separately, while past tendencies of delimitation remain. Undoubtedly, the EEAS has also created new schisms, and new ‘institutional interests’. While the EEAS’s role as an interlocutor provides good ground to work towards a single EU voice, the legal and institutional innovations are far from perfect and will require further legal and practical elaboration in the near future.

A key role is indeed played by the High Representative. After Javier Solana as the first HR, Catherine Ashton was the first person appointed in the new system both as High Representative and as Vice President of the Commission at the end of 2009. She was succeeded by Federica Mogherini in 2014 and by Josep Borrell in 2019. This combination of the functions of HR and Vice-President of the Commission is, without doubt, one of the key innovations of the Lisbon Treaty. Since the entry into force of that Treaty the High Representative for the Common Foreign and Security Policy has been renamed *High Representative of the Union for Foreign Affairs and Security Policy*. The name change reflects the fact that it has become clear that the HR indeed represents the Union and not the (collective) Member States. The HR’s powers are clearly laid down in the EU Treaty and form part of the institutional framework. Although the term ‘Foreign Minister’, which was used in the Constitutional Treaty, has been abandoned, the new provisions make clear that the HR will indeed be the prime representative of the Union in international affairs. 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’ (Article 15(6)(d) TEU).

The HR is appointed by the European Council (with the agreement of the President of the Commission) by qualified majority voting (QMV). This again underlines the HR’s role as a person who can act on behalf of the Union and who is perhaps competent to act even in the absence of a full consensus among the Member States.

Article 18(2) TEU

The High Representative shall conduct the Union’s common foreign and security policy. He shall contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council. The same shall apply to the common security and defence policy.

In addition, the HR’s *de facto* membership of the European Council is codified in Article 15 TEU (although strictly speaking it is stated that the HR only ‘takes part in the work’ of the European Council). The HR is further to assist the Council and the Commission in ensuring consistency between the different areas of the Union’s external action (Article 21 TEU) and, together with the Council, ensures compliance

by the Member States with their CFSP obligations (Article 24(3) TEU). All in all, the position of HR has been upgraded to allow for stronger and more independent development and implementation of the Union's foreign, security and defence policy, which – potentially – allows for a more coherent and more effective role for the EU in the world.

B. The European Council

Article 22(1) TEU

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

The European Council is one of the EU institutions and adopts its own 'Decisions'. However, most often, this institution carries out this task through the adoption of 'Conclusions' at the end of its meetings. These can be considered an 'instrument' of EU external relations, though they are not listed in Article 288 TFEU alongside the legal instruments. They are thus not considered to be legally binding instruments as the European Council does not 'exercise legislative functions' (Article 15(1) TEU). Yet, what is certain is that they are 'politically important' for EU external relations because the European Council is the top EU institution tasked with setting out the future policy direction of EU external action. Procedurally, it is clear that we cannot neatly capture EU external policymaking through the ordinary legislative procedure for internal instruments, or the Article 218 TFEU procedure for international agreements (see Chapter 4). Conclusions of the European Council may trigger action at all levels of governance within the EU as an international actor: both within the Member States themselves and within and between the EU institutions. It may lead the Commission to propose a new Regulation (eg, autonomous internal legally binding instrument) or lead to the proposition by the Commission and/or EEAS of the negotiation of an international agreement (eg, conventional external legally binding instrument). However, it may also lead to non-legal but important foreign policy activity: for example, the opening of a political dialogue with an important strategic partner (eg, the USA or Russia), the adoption of a political *démarche* rejecting a certain international state of affairs (eg, Iran's pursuit of nuclear weapons). Thus, different 'actors' will be implementing the strategic vision set out by the European Council in accordance with Article 22 TEU. In order to implement European Council Conclusions adopted in carrying out Article 22 TEU, the High Representative, the European External Action Service or the President of the European Council may all have an important function.

Article 15(6) TEU

The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

The President of the European Council is thus one of the Union's external representatives. Article 15(6) TEU explicitly refers to the fact that the President ensures the representation *at his level*. The President would therefore be the contact person for heads of state of third countries, whereas the High Representative would generally act at the level of ministers.

C. The Council**Article 16(6) TEU**

The Council shall meet in different configurations, the list of which shall be adopted in accordance with Article 236 of the Treaty on the Functioning of the European Union.

The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission.

The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent.

In general, the Council of the European Union, which meets at the level of ministers in the Member States' governments, exercises legislative and budgetary functions and carries out policy making and coordinating functions, jointly with the European Parliament (Article 16(1) TEU). This is not different in the area of external relations. Like the European Council, the Council also adopts 'Conclusions' which will reflect what has been discussed and decided during each meeting. Again, these are not legally binding instruments of the Union, but they are crucial in driving forward the decision-making process that underpins EU external action. As will be illustrated in Chapter 13 on 'The EU and its Neighbours', the European Neighbourhood Policy was originally crafted entirely on the basis of a succession of non-legally binding policy documents, with the Council firmly directing the heading of EU policy in this domain.

Article 16(6) TEU points to the ‘Foreign Affairs Council’ (FAC) as the key configuration in the area of external action. In this configuration, the Council is generally composed of the Ministers for Foreign Affairs, but it is up to the Member States to decide to send either their Minister for Foreign Affairs or, for instance, a Minister or Deputy Minister for European Affairs. The Council deals with the whole of the EU’s external action, including Common Foreign and Security Policy, Common Security and Defence Policy, foreign trade and development cooperation, which occasionally calls for other ministers (Development or Trade) to join in. Defence Ministers traditionally participate in Foreign Affairs Council meetings twice a year, in addition to their informal meetings (also twice a year). In contrast to other Council configurations – which are presided by the six-monthly Presidency held by the Member States representatives in the Council on the basis of equal rotation (Articles 16(9) TEU and 236 TFEU) – the FAC is chaired by the High Representative. Given the busy schedule of the High Representative, (s)he may, where necessary, ask to be replaced by the member of the FAC holding the rotating Presidency (Article 2(5) of the Council’s Rules of Procedure).

As indicated above, however, external relations not only relate to CFSP, but also include other external policies and can be considered a dimension of most other EU policies. This implies that other Council configurations have an external dimension and it would be mistaken to only take account of the FAC Council’s work in analysing EU external relations. Thus, negotiations on EU enlargement are dealt with by the General Affairs Council and issues concerning borders and visas may be on the agenda of the Justice and Home Affairs Council (see Chapter 12). The same holds true for the other configurations (Economic and Financial Affairs; Transport, Telecommunications and Energy; Agriculture and Fisheries; Environment; Education, Youth, Culture and Sport; Employment, Social Policy, Health and Consumer Affairs; and Competitiveness).

The role of the Committee of Permanent Representatives (COREPER) is similar in external relations issues as in other policy areas. There are two COREPER configurations, named COREPER I and COREPER II. COREPER I consists of EU Member State representatives at ambassadorial level and deals with political, commercial, economic or institutional matters. COREPER II consists of representatives at deputy ambassadorial level, dealing with what are considered ‘technical matters’.

D. The Commission

In terms of decision-making, the area of external relations does not differ from internal policies in the sense that, generally, the Commission is in the lead and should initiate new decisions and legislation. With the introduction of the EEAS, the dedicated external relations Directorate General was removed from the Commission. Yet, given the external dimension of most policy areas (energy, environment, financial system etc), the Commission has remained a key player. Apart from its general role in negotiations with third states and other international organisations, some external relations domains were not transferred to the EEAS, but maintained in the Commission, including Trade, Energy or Humanitarian Aid.

Article 17(1) TEU

With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation.

Apart from the general role of the Commission in the decision-making process, this provision allows the Commission to represent the Union externally. This is only the case with respect to non-CFSP issues and 'other cases provided for in the Treaties'. A clear example of such an 'other' case is formed by Article 218 TFEU. This provision addresses the specific cases of negotiation of international agreements and expression of the EU's position in international bodies in certain circumstances (see Chapter 4). It clearly indicates the many roles of different institutions: it is for the Council to authorise the opening of negotiations, to adopt negotiation directives and to authorise the signing of agreements and conclude them (with the consent or consultation of the European Parliament). Yet, the negotiations themselves are conducted by the Commission and in certain cases by the High Representative. Subsequently, the Council exercises a certain control over the negotiations by addressing directives to the negotiator and designating a special committee which is to be consulted during the negotiations. Moreover, the European Parliament should be immediately and fully informed at all stages (see further Chapter 4).

Most importantly, however, the Commission's competences are defined by the principle of conferral, which may limit the Commission's powers in international conferences and international organisations. Thus, the Commission represents the Union in the areas of exclusive Union competence listed in Article 3 TFEU (customs union, competition, monetary policy for Member States whose currency is the euro, the conservation of marine biological resources under the fisheries policy, the common commercial policy); whereas in the areas of shared competence of the Union with the Member States listed in Article 4 TFEU, both the Commission and the Member States have powers of representation in respect of their respective competences (see also Chapters 3 and 4 on mixed agreements).

E. The European Parliament

Despite its formally modest role in the area of external relations, the European Parliament has maximised the use of its powers and has proven itself to be a very active player. After the entry into force of the Lisbon Treaty this was supported by a number of innovations:

- For basically all a wide range of international agreements, Parliament is required to give consent before the agreement can be concluded by the Council (Article 218(6)(a) TFEU).
- The TFEU foresees a Multiannual Financial Framework for at least a period of five years (Article 312 TFEU), which is adopted by the Council but following consent

of the EP. The latter now has a say, as the Council, on expenses related to the EU external relations, in particular concerning CFSP.

- A specific section of the EU budget (Section X) relates to the EEAS, which implies that the EP has to agree with this part of the budget. It also has competence to decide on the discharge of the EEAS, which provides a degree of political control on how the EEAS is organised. The EP Committee on budgetary control is particularly concerned with verifying how the EU budget is spent on external relations, in particular regarding CFSP.
- ‘The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament’ (Article 17(7) TEU).

In general, the European Parliament is regularly consulted by the High Representative on the main aspects and basic choices of CFSP and is informed of how those policies evolve (Article 36 TEU) (Chapter 9). Throughout this book, there are many examples whereby the Parliament has proactively sought to defend and even expand its influence on EU external policymaking. For example, in Chapter 7 on the Common Commercial Policy, we illustrate that the Parliament does not hesitate to remind the Commission that its consent will be required for the Union to conclude trade agreements. In other policy fields the Parliament has shown that it will, in fact, utilise its veto power if its views are not taken into account. This, together with its budgetary powers, render the Parliament a force to be reckoned with in EU external decision making. Beyond these formal aspects, the European Parliament has Committees such as the AFET (foreign affairs) or DEVE (development) committees, which are proactive in commissioning studies, adopting non-binding Resolutions, organising hearings, carrying out fact-finding missions and so on, to place a parliamentary stamp on EU external relations. In its view, this provides an important element of democratic input to EU external action.

F. The Court of Justice

Since, in particular in the early years, references to external relations in the Treaties were minimal, the role of the Court in this area simply cannot be overstated. Large parts of what we now consider to be part and parcel of the external relations legal doctrine find their basis in CJEU case law. Throughout this book we will come across many key examples: the doctrine of implied powers, the exclusive nature of the Common Commercial Policy, the scope of development policy, the effects of international law (United Nations, WTO, law of the sea, etc) on the EU legal order and many other crucial elements of EU external relations law, are all based on judge-made law – parts of which were later codified in the Treaties.

The Court’s jurisdiction with respect to CFSP is limited. Its main tasks include monitoring compliance with the dividing line between CFSP and non-CFSP matters laid down in Article 40 TEU and reviewing the legality of the external restrictive measures laid down in Article 275(2) TFEU (Article 24(1) TEU). Yet, as Chapter 9 will reveal, the Court does also have jurisdiction in relation to general EU rules and principles even when these emerge in a CFSP context.

A core task of the Court has been (and still is) to decide on the delimitation of external competences between the Union and its Member States. With the further intensification of the European integration process, more and more internal competences ended up in the hands of the European institutions. This, in turn, also led to an incremental transfer of external powers from the Member States to the Union. After all, once competences have become ‘exclusive’ internally, there is not much left for Member States to decide on externally (see also Chapter 3).

G. The Member States

While we will further elaborate on the issue of competences (exclusive, shared, etc) in Chapter 3 it is clear that, despite their membership of the European Union, the Member States have not ceased to be international actors in their own capacity. In fact, all Member States would argue that statehood – rather than EU membership – is still their primary identity. The principle of conferral means that the European Union is only competent to act once a competence exists (see further Chapter 2). In principle, this implies that where the Union is not competent to act or where it shares its competences with the Member States, the latter can engage in legal relations with third states and other international organisations. As we will see throughout this book, it is this tension in particular (between being a state and being a *Member State*) which lies behind many of the rules in EU external relations law. The irony seems to be that Member States are generally happy with the benefits of European integration, in particular the internal market, but are not always equally happy with the consequences this entails in terms of losing (external) powers.

IV. The Broader Picture of EU External Relations Law

This chapter has provided a roadmap explaining the reasons why EU external relations law is such a complex field and subsequently pointing to the essential features of the EU’s architecture and the key institutional actors in this area. The starting point is the peculiar nature of the Union itself; neither state nor classic international organisation, it is a unique species of international (integration) organisation with a legal existence distinct from that of its Member States and with a standalone identity – and legal personality – composed of values, interests and policies which it promotes internationally as its own. EU external relations law, then, is the body of law that governs the actions of the European Union in the world both internally and externally. In its internal dimension, it consists of the set of rules which governs the constitutional and institutional legal organisation of this legal entity in pursuit of its interests in the world. In its external dimension, it includes the rules which govern its relationship and interaction with other entities of the international (legal) order.

What renders this field particularly complex is the fact that the functioning, interpretation, and application of the rules it comprises is shaped by its specific *telos* as well as the context of progressing integration. The purpose of EU external relations law is

to organise the European Union and its Member States to exert their influence on the world stage in a coherent and effective fashion. This *telos* is then deeply intertwined with the project of European integration and debates how far this process should continue. The consequence is then that law, even constitutional law, plays a far more significant role in international relations of the Union than is common at the national level. First, a large body of legal rules is required to ensure that this *sui generis* entity is a sufficient coagulant to ensure effective external action. Secondly, this internal law-based integration experience is then also translated into substantive external relations. Indeed, EU Treaty objectives also point to the Union as seeking to contribute ‘to the strict observance and the development of international law’ and to spread and consolidate the rule of law in the world at large.

Taking a step back and looking at the broader picture of the material presented in this first chapter, we can now ask the following tantalising question raised by Bruno de Witte: Is there too much constitutional law in the European Union’s foreign relations?

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) 5–15

The argument that there is ‘too much constitutional law’ in the EU is mainly based on the overabundance of primary law norms, which unduly constrains the normal democratic process. It is made worse by two other elements, namely the structural complexity of EU constitutional law which leads to a lack of ‘legibility’ for citizens, and the rigidity of the EU’s rules of change ...

EU primary law tends to deal with many [issues of EU external relations] in a much more detailed way than national constitutions. In purely quantitative terms, a greater proportion of articles of the founding Treaties deal, entirely or in part, with foreign relations. This overabundant written text is complemented by an unusually abundant case law which has designed a fine pattern of rules on such foreign relations matters as the implied powers doctrine, the distinction between exclusive and shared competences, the duty of sincere cooperation in the context of mixed agreements, and the conditions under which international agreements have direct effect in the EC legal order ...

[T]here are too many ‘un-fundamentals’ in the foreign relations constitution of the EU. The formal constitutional law of the EU, which consists of the primary law of the Treaties as interpreted by the Court of Justice and supplemented by general principles, contains many norms that are not constitutional in their substance. They do not serve the useful purpose of constitutional rules, namely to limit and steer the activity of the institutions, but are merely obstructive ... [T]he drafters of the Treaties have not sufficiently reflected on the need for constitutional parsimony.

V. Sources and Further Reading

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