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THE UNITED KINGDOM AND THE COMMON FOREIGN AND SECURITY POLICY OF THE EU: FROM PRE-BREXIT 'AWKWARD PARTNER' TO POST-BREXIT 'FUTURE PARTNERSHIP'?

Paul James Cardwell*

Summary: The UK's decision to leave the European Union (EU) has presented innumerable challenges for both the leaving state and the EU. In these uncharted waters, the future of UK involvement in EU policies is very much in doubt. The Common Foreign and Security Policy (CFSP) has not been at the forefront of the debates about Brexit, despite the increasing focus on the EU's global role, and the UK's own vision of a 'Global Britain'. The purpose of this article is to consider the past, present, and future role played by the UK in the CFSP since its inception in the Treaty on European Union. This necessitates consideration of how the CFSP might develop in the future and fulfil the goals of the recent Global Strategy. The article explores the UK's constant opposition to greater integration in EU foreign policy and how it has purported to distance itself from the CFSP machinery. This can be contrasted with the UK's apparent post-referendum enthusiasm for pursuing shared foreign policy goals. The future direction of the CFSP may not be affected to a significant degree by the UK's departure. However, the CFSP will not necessarily become more integrated after Brexit. To achieve this, greater commitment will need to be shown by the EU27 to the aims of the CFSP, and other Member States will no longer be able to count on the UK as the lead voice of opposition or 'brake' on integration. If there is a continued desire for the UK to be involved in the CFSP, finding an acceptable model for cooperation is likely to prove a substantial, long-term challenge.

* Professor of Law, University of Strathclyde, Glasgow, UK. This paper was presented at EURINT Iasi, Romania, May 2017; ANTERO Conference, University College Dublin, Ireland, June 2017; and as a keynote address at the symposium 'Brexit in a Changing Geopolitical Context', Liverpool John Moores University, UK, June 2017. I am grateful to the participants in these events and the anonymous referees for their comments. Some of the findings below were presented as evidence to the UK Parliament's Foreign Affairs Committee inquiry into 'The future of Britain's diplomatic relationship with Europe' <www.parliament.uk/business/committees/committees-a-z/commons-select/foreign-affairs-committee/inquiries1/parliament-2017/britains-diplomatic-relationship-with-europe-17-19/publications/> accessed 5 December 2017.

1 Introduction

Constructing a coherent and viable Common Foreign and Security Policy (CFSP) for the European Union (EU) has been a longstanding component of the European integration process. The search for such a foreign policy for the Union has been at times tortuous, with the perceived ‘failures’ in terms of the EU’s inability to react to global events overshadowing any of its successes. The latest effort to push the process forward in establishing and consolidating the EU as a meaningful international actor is the ‘Global Strategy’, published in June 2016.¹ However, in a case of unfortunate timing, on 23 June 2016, the electorate of the United Kingdom voted to leave the EU in a referendum by a narrow majority of 51.9%. The departure of one of the largest Member States of the EU has overshadowed much of what the Global Strategy has set out to do, as well as absorbing institutional resources. As the UK embarks on the process of leaving the EU, a whole range of complex legal issues need to be urgently resolved. These issues illuminate the extent to which national law and EU law have been intertwined since the UK joined in 1973, but also show that accounts of the development and nature of the EU legal system are not singular.

The CFSP does not follow the same script of legal integration as in other areas. Discussion of familiar concepts of direct effect and supremacy is largely irrelevant in this area. Indeed, whether the CFSP can be said to generate ‘law’ has been the subject of debate since the CFSP was created in the Treaty on European Union 1992. Nevertheless, as Member States who have joined the EU since 1992 can testify, the CFSP forms part of the EU *acquis* and there are therefore specific challenges to consider relating to the UK’s withdrawal, not least the ways in which the CFSP is linked to other legal dimensions of the EU integration process. The dividing lines between legal competence in the CFSP and other, overlapping areas continue to generate case law in the Court of Justice of the EU (CJEU). The legal dynamics of the CFSP in the EU’s legal order are therefore not settled. The future of the UK outside the EU (and potential models for UK-EU cooperation within the CFSP) is closely related to these legal dynamics. Much will depend on the political will of the UK and EU to cooperate in matters of foreign policy, though there is no obvious model of a cooperation framework readily available.

The article considers how the history and practice of UK engagement in the CFSP suggests how both the policy and the relationship might take shape in the future. This article first considers the specific nature of the

¹ High Representative of the Union for Foreign Affairs and Security Policy, ‘A Global Strategy for the European Union’s Foreign and Security Policy: Shared Vision, Common Action: A Stronger Europe’ (Brussels 2016).

CFSP as a legal construct, and the UK's role in influencing the policy and its legal status as we know it today. The question posed therefore has two related parts: what effect could Brexit have on the CFSP itself, and what role (if any) might the UK play in the future? To appreciate both the future of the UK's foreign policy outside of the EU, and the CFSP itself, it is necessary to trace the history of the policy in detail, followed by the UK's involvement in it and influence over – in particular – its legal status. Considering the place of the CFSP in the run-up to and aftermath of the referendum is necessary. In doing so, the argument made here is threefold.

First, the UK has been at the forefront of efforts to keep the CFSP separate within the EU's legal order. It has also, in the pre-referendum period, sought to downplay the role of the CFSP in the pursuit of its national foreign policy goals. Therefore, the departure of the UK may allow for a potentially more integrated CFSP to take shape in the absence of the UK as an 'awkward partner', but this is far from guaranteed. Rather, it will require much more commitment to the CFSP's goals from the remaining 27 Member States who will no longer have the barrier to further cooperation and integration that the UK represented.

Second, the Global Strategy emphasises the promotion of long-term changes via concepts such as 'resilience', and particularly in the EU's neighbourhood. The EU's strengths in securing cooperation from third states often relies on other aspects of EU law, of which the UK was not fully part. This also suggests that the EU will not unduly suffer from the departure of the UK, but that the UK will find it more difficult to upload any national foreign policy goals given its absence from the decision-making and policy-making institutions.

Third, unlike in other areas of EU integration, the departure of the UK as seen through the prism of the CFSP shows that it is akin to a logical 'next step'. This is due to the gradual ambivalence to foreign policy coordination shown by the UK in recent years and even efforts to demonstrate a foreign policy strategy which does not prioritise an EU focus. The UK government has shown a post-referendum enthusiasm for a 'deep' partnership with the EU in the CFSP but with little in the way of concrete proposals for operationalisation. Whilst nevertheless following a complex process of extraction, the specificity of the CFSP means that leaving is likely to prove to be less of a 'shock' to the EU system. Future cooperation in the CFSP will be dependent on general agreements underpinning a new UK-EU relationship, and as the process of the Brexit negotiations so far demonstrates, it is a process fraught with difficulty.

2 The CFSP in the EU's legal order: law, but not as we know it

The CFSP was one of the major innovations contained in the Treaty on European Union, signed at Maastricht in 1992. Accompanied by

much fanfare, the EU was now going to be endowed with the ability to establish an identity as a global *political* actor as well as an *economic* one. According to the Treaty, 'The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security' (article 24(1) TEU). It is thus an expansive provision that gives the impression of a major shift in the role of the EU into the realm of (non-economic) international affairs. In reality, the CFSP codified informal practices and discussions on foreign policy between the Member States dating back to the 1970s. This became known as European Political Cooperation in the 1980s but operated on a largely informal, incremental basis.² Against the background of the fall of the Berlin Wall and collapse of the Soviet Union, the TEU's grand statements about the emergence and capacity of the EU as a foreign policy actor were immediately tested in the Balkans and Rwanda, and were found to be lacking. The mismatch between the aims and the ability of the EU to be seen as an effective, coherent actor has plagued the CFSP since its inception – whether or not one considers if it should be judged against the benchmark of what is expected of a nation state's foreign policy.³

The characterisation of the post-Maastricht Treaty arrangements as a 'pillar' structure, with the CFSP as the second, 'intergovernmental' pillar, has been analysed in depth by legal scholars.⁴ Subsequent Treaty revisions have attempted to address institutional weaknesses in the CFSP. One of the main weaknesses is the confusion over which institutions (and what powers they have) represent or act on behalf of the EU. After all, the CFSP is only one of the EU's external facing policies, despite its expansive definition in the Treaty. The revised provisions and practices following the entry into force of the Treaty of Lisbon emphasise greater *coordination* of the EU's external competences as a means of ensuring

² For a comprehensive history of EPC, see Simon J Nuttall, *European Political Cooperation* (OUP 1992).

³ The earliest and most widely cited statement relating to this is that of Christopher Hill and his 'capability-expectations' gap: Christopher Hill, 'The Capability-Expectations Gap or Conceptualising Europe's International Role' (1993) 31 *Journal of Common Market Studies* 305. This concept led to a stream of literature during the 1990s and 2000s which has characterised the general academic approach to the CFSP. See also: Roy H Ginsberg, 'Conceptualizing the European Union as an International Actor: Narrowing the Theoretical Capability-Expectations Gap' (1999) 37 *JCMS: Journal of Common Market Studies* 429; and Kristian L Nielsen, 'EU Soft Power and the Capability-Expectations Gap' (2013) 9 *Journal of Contemporary European Research* 723.

⁴ See, in particular, Eileen Denza, *The Intergovernmental Pillars of the European Union* (OUP 2002); Ramses A Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (Kluwer Law International 1999); and Ricardo Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 *Common Market Law Review* 337. For a more recent analysis, Ramses A Wessel, 'Lex Imperfecta: Law and Integration in European Foreign and Security Policy' (2016) 1 *European Papers* 439.

coherence.⁵ The scope of the CFSP did not change drastically, but its status and place within the EU's institutional arrangements were altered quite significantly. The CFSP is also listed as a separate Union competence in article 2(4) of the Treaty on the Functioning of the European Union (TFEU) to distinguish it from other, 'general' competences.

This distinguishing of the CFSP from other policies continues a strong tradition of 'otherness' of the policy in the legal order of the EU. The CFSP is generally, and accurately, characterised as a legal expression of (some of) the Member States' fear of the encroachment on national sovereignty. A particular fear is that the Court of Justice, which does not enjoy the same level of oversight of the CFSP as in other areas, would attempt to extend supranational EU legal principles to the CFSP. Bearing in mind the history of institutional 'spillover' in EU competences over the years, the Treaty amendments appear to attempt to stem the 'Brusselsisation' of the CFSP where 'the member states have in practice entered a slippery slope of integration with decision-making competence "creeping" to Brussels'.⁶ That is not to say that the role of the CJEU is negligible, however, insofar as it maintains a role in policing the parameters of the CFSP and other competences. Neither can it be said that the attempted exclusion of the CJEU from the CFSP is straightforward in a practical sense, as the case law since Lisbon demonstrates.⁷

The Treaty, as amended at Lisbon, commits the EU to a strong, value-led approach to external relations (article 21(1) TEU). The Court has confirmed that the CFSP is an integral part of the EU's legal order, and is thus subject to the EU's constitutional values and norms.⁸ The Treaty articles which govern the entirety of the CFSP and non-CFSP dimensions to the Union's activities are wide in scope and give some indication to the EU's purported values, though only a few are aimed towards specific

⁵ See, for example, Hartmut Mayer, 'The Challenge of Coherence and Consistency in EU Foreign Policy' in Mario Telò and Frederik Ponjaert (eds), *The EU's Foreign Policy: What Kind of Power and Diplomatic Action?* (Routledge 2013) 105.

⁶ Helen Sjørnsen, 'Not So Intergovernmental After All? On Democracy and Integration in European Foreign and Security Policy' (2011) 18 *Journal of European Public Policy* 1078, 1090.

⁷ Case C-455/14 P *H v Council of the European Union, European Commission and European Union Police Mission (EUPM) in Bosnia and Herzegovina*, Judgment of the Court (Grand Chamber) of 19 July 2016 ECLI:EU:C:2016:569. This case concerned the competence of the CJEU in hearing an action for annulment directed against decisions taken by the Head of an EU mission established under the CFSP. The CJEU, unlike the General Court, confirmed that it is competent. See the casenote by Peter Van Elsuwege (2017) 54 *Common Market Law Review* 841. See also Christophe Hillion, 'A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy' in Marise Cremona and Anne Thies, *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014).

⁸ Case C-455/14 *H v Council of the European Union, European Commission and European Union Police Mission (EUPM) in Bosnia and Herzegovina* ECLI:EU:C:2016:569.

goals.⁹ Leading the application of foreign policy in the field falls to an EU diplomatic service and Foreign Minister in all but name (respectively, the European External Action Service (EEAS)¹⁰ and the High Representative for Foreign and Security Policy).¹¹ A related innovation in the attempt to bring together the CFSP and other externally focused competences was the new TEU section on consistency and coherence.¹² Article 23 TEU makes the CFSP subject to new, general provisions on the Union's external action (articles 21–46 TEU).

The position of the CFSP in the constitutional order is the most obvious area where stated aims lack the legal structures to bring about effective 'supranational' policies. The 'Common' in CFSP can be something of a misnomer since the same word is associated with the Common Commercial Policy and the Common Agricultural Policy, both of which indicate *integration* of EU law and policy (and are therefore suggestive of something more than 'common'). Rather, the CFSP is the only area which applies to all Member States where 'specific provisions' for decision-making apply.¹³ This does not require Member States to subscribe to a 'common' policy in the same way as in the other areas.¹⁴ Article 24(1) TEU makes clear that unanimous voting in the Council remains the core of CFSP decision-making. Furthermore, even when abstaining, Member States are provided a further opportunity to signal their lack of agreement: article 31(1) TEU allows a Member State to 'qualify its abstention by making a formal declaration'. This is unique in the Treaty¹⁵ and thus

⁹ For example, in art 21(2)(e) TEU: 'the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade'.

¹⁰ For a comprehensive analysis of the EEAS, see the contributors to David Spence and Jozef Batora (eds), *The European External Action Service: European Diplomacy Post-Westphalia* (Palgrave Macmillan 2015).

¹¹ See, for example, Eileen Denza, 'The Role of the High Representative of the Union for Foreign Affairs and Security Policy' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Springer 2011) 481; and Uwe Puetter, 'The Latest Attempt at Institutional Engineering: The Treaty of Lisbon and Deliberative Intergovernmentalism in EU Foreign and Security Policy Coordination' in Paul James Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (Springer/Asser Press 2012) 17.

¹² On coherence, see Marise Cremona, 'Coherence in European Union Foreign Relations Law' in Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar 2011); Christophe Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law* (OUP 2008); and Simon Duke 'Consistency, Coherence and EU External Action' in Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar 2011).

¹³ Arts 136–138 TFEU are also defined as 'specific provisions' but only for those Member States whose currency is the euro: the specificity is due to their application to certain Member States only rather than the policy area itself, as for the CFSP.

¹⁴ Paul James Cardwell, *EU External Relations and Systems of Governance: The CFSP, Euro-Mediterranean Partnership and Migration* (Routledge 2009) 47.

¹⁵ Robert Schütze, *European Constitutional Law* (CUP 2012) 207.

allows any Member State to free itself from the obligation to apply a CFSP decision, even though that decision will bind the EU.¹⁶ The special nature of foreign policy at the heart of the Treaty arrangements is thus evident and one which the UK has been particularly protective of, as examined below.

Common strategies, created in Treaty of Amsterdam as an instrument for structuring EU action in specific areas, remain unchanged. But in practice they are hardly ever used. The EU has preferred to agree 'strategic' documents which do not rely on a specific legal basis, including the European Security Strategy (2003), the Stabilisation and Association Process for South-East Europe (2003), and now the Global Strategy (2016).¹⁷ 'Actions to be undertaken' and 'positions to be taken' which are made on the basis of 'decisions of the European Council on the strategic interests and objectives of the Union' are adopted by qualified majority in the Council (article 31(2) TEU), as an exception to the usual rule of unanimity (article 31(1) TEU). This provision appeared to offer an opportunity for majority voting which could have developed into the 'norm' of CFSP decision-making and signal its move away from intergovernmentalism as its hallmark. Article 32 TEU points to the possibility of a 'common approach' on CFSP matters which could therefore be used for a similar purpose. However, a Member State may block a decision taken by qualified majority if it conflicts with 'important and stated reasons of national policy' (article 23(2)). This again underlines the unique nature of the CFSP, since such a provision allowing a national veto in spite of majority voting is found nowhere else in the Treaty.¹⁸

Even when decisions under the CFSP are taken, which article 28(2) TEU specifies 'commit the Member States in the positions they adopt and in the conduct of their activity', practice shows that decisions have a narrow scope which does not therefore prevent Member States operating parallel national policies.¹⁹ Although criticism of the CFSP has long been levelled at the instruments lacking the enforceability of regulations and directives, contemporary criticism tends to focus on the difficulty of

¹⁶ Piris notes that this provision has only been used once, by Cyprus in 2008 regarding the EU Rule of Law mission in Kosovo. Jean-Claude Piris, *The Future of Europe* (CUP 2012) 77.

¹⁷ This is explored further in Paul James Cardwell, 'EuroMed, ENP and the Union for the Mediterranean: Overlapping Policy Frames in the EU's Governance of the Mediterranean' (2011) 49 *JCMS: Journal of Common Market Studies* 219. See also Geert De Baere, *Constitutional Principles of EU External Relations* (OUP 2008) 115; Simon Hix, *The Political System of the European Union* (Palgrave Macmillan 2005) 391; Panos Koutrakos, *EU International Relations Law* (Hart 2006) 399; and Stephan Keukeleire and Jennifer MacNaughtan, *The Foreign Policy of the European Union* (Palgrave Macmillan 2008) 154-156.

¹⁸ Paul James Cardwell, 'On Ring-Fencing the Common Foreign and Security Policy in the Legal Order of the European Union' (2013) 64 *Northern Ireland Legal Quarterly* 443-463.

¹⁹ Bart Von Vooren and Ramses A Wessel, *EU External Relations Law* (CUP 2014) 398.

EU institutions acting coherently.²⁰ Institutional ‘fuzziness’ in the complex arrangements in external representation of the EU in the post-Lisbon era,²¹ stemming from overlap in competences under the CFSP and elsewhere in the Treaties, has given rise to a string of cases before the CJEU.²² There is also a conceptual link with the opt-outs from the area of Freedom, Security and Justice secured by the UK (along with Denmark and Ireland), which the UK has, unsuccessfully, attempted to defend in the CJEU where the legal basis of external agreements are concerned.²³

If the CFSP was originally promoted as a means for the EU to ‘act’, which suggests quick responses to the global issues of the day, then it has failed to live up to this promise. Where the EU has been more successful in putting words into action has been where the CFSP draws on the EU’s established and recognised strengths – primarily economic ones – in order to bolster its international identity and capacity for action. This is significant for the debate on the future of post-Brexit relations between the UK and the EU since any cooperation within the CFSP relies on co-operation elsewhere.

Two points can be made in support of this assertion. First, the vast majority of CFSP instruments used in the post-Lisbon period concern the use of restrictive measures (sanctions). These are imposed on third countries (for a variety of reasons) or on individuals suspected of involvement in terrorism.²⁴ There are over 30 active sanctions regimes in place. Sanctions are both a foreign policy tool and a legal instrument, capable in some circumstances of being challenged in the courts and following an (albeit unique) legislative process. Typically, sanctions cover limitations on imports and exports of goods, the provisions of services, embargoes on dual-use goods and travel bans on named individuals. Some, such as the sanctions on Iran regarding its nuclear programme, were agreed in

²⁰ Stefan Lehne, ‘Is There Hope for EU Foreign Policy?’ (2017) <http://carnegieendowment.org/files/CP_322_Lehne_EU1.pdf> accessed 3 December 2018.

²¹ Geert De Baere and Ramses A Wessel, ‘EU Law and the EEAS: Of Complex Competences and Constitutional Consequences’ in David Spence and Jozef Bátora (eds), *The European External Action Service: European Diplomacy Post-Westphalia* (Palgrave Macmillan 2015) 175.

²² In particular, Case C-658/11 *Parliament v Council* ECLI:EU:C:2014:2025, para 45.

²³ Case C-656/11 *United Kingdom v Council* ECLI:EU:C:2014:97 and Case C-81/13 *United Kingdom v Council* ECLI:EU:C:2014:2449. For more detailed analysis, see Ricardo Gosalbo-Bono and Frederik Naert, ‘The Lisbon Treaty and Council Practice’ in Piet Eeckhout and Manuel Lopez-Escudero (eds), *The European Union’s External Action in Times of Crisis* (Hart/Bloomsbury 2016) 13, 50–53.

²⁴ Christina Eckes ‘EU Counter-Terrorist Sanctions against Individuals: Problems and Perils’ (2012) 17 *European Foreign Affairs Review* 113; and Paul James Cardwell, *The Legalisation of European Foreign Policy and the Use of Sanctions* (2015) 17 *Cambridge Yearbook of European Law Studies* 287.

a UNSC resolution,²⁵ but the EU has also added individuals to the sanctions list unilaterally.²⁶

Sanctions connect foreign policy actorness with the EU's considerable economic weight and in many cases have become the 'go to' remedy. 'Smart' sanctions are emphasised as a means of avoiding negative economic consequences on vulnerable populations and to affect only those in power. There is, however, considerable debate as to whether the dependency on sanctions as punitive measures draws away from the normative 'values' the EU is supposed to promote.²⁷ Yet, in a measure such as a travel ban on officials from a third country, the sheer weight of 28 Member States acting together increases their effectiveness. The extent to which sanctions have been imposed, or at the very least discussed in the Council, means that it is little exaggeration to say that the CFSP has become oriented towards sanctions as an appropriate response to global or regional problems in many different scenarios. As discussed below, the UK has been forthright in promoting the imposition of sanctions on third countries, most notably on Russia after its annexation of Crimea in 2014.²⁸

Second, the EU has gradually moved the emphasis of its international role towards longer-term strategy building, and using its economic strength to support foreign policy goals. Seen in this light, the Global Strategy is therefore the latest attempt to focus the minds of the Member States in ways which draw on the EU's supposed strength in pursuing longer-term goals and drawing on its economic standing. This is particularly in evidence in the emergence of 'resilience' in the Global Strategy and EU policy-making. 'Resilience' has become a fashionable buzzword in international relations and particularly in policy formation towards the global South. It suits the EU's self-proclaimed emphasis on (its) 'values' in international relations and characterisation as a 'normative power'. As well as its theoretical connotations, putting 'resilience' into practice suits a practical approach: avoiding the thorny issues of military engagement, the EU (or, correctly put, its participating Member States) can focus on humanitarian efforts, including those relating to climate change. As an approach to complex problems, Joseph has claimed that resilience-building has evolved to the extent that is now best conceived as a 'distinct form of governance'.²⁹

²⁵ United Nations Security Council Resolution S/RES/1737 (2006).

²⁶ Charlotte Beaucillon 'Comment choisir ses mesures restrictives?' (2012) EUISS Occasional Paper No 100, 15.

²⁷ Klaus Brummer 'Imposing Sanctions: The Not So "Normative Power Europe"' (2009) 14 *European Foreign Affairs Review* 191.

²⁸ Council Decision (EU) 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/13.

²⁹ Jonathan Joseph, 'The EU in the Horn of Africa: Building Resilience as a Distant Form of Governance' (2014) 52 *JCMS: Journal of Common Market Studies* 285.

As a result of what it perceives to be successful efforts and an ability to gain its own identity, 'resilience' plays a central part in the Global Strategy. It is mentioned 34 times in total. It appears in almost every aspect of the strategy which has been put in place so far, according to the first annual progress report.³⁰ 'Resilience' relates to 'states and societies' and 'democracies'.³¹ Of particular significance here, however, is the regional focus on the EU's 'near abroad' in South-east Europe and Turkey.³² 'Resilience' is also explicitly linked to migration to Europe, in the following terms: 'The EU will support different paths to resilience, targeting the most acute cases of governmental, economic, societal and climate/energy fragility, as well as develop more effective migration policies for Europe and its partners.'³³ There is also mention of the importance of resilience 'of critical infrastructure, networks and services, and reducing cybercrime'. A joint statement from the Commission and High Representative points to specific instances where the EU has already had success, or to particular ways that the strategy can be operationalised.³⁴ These are found in the Commission's Action Plan for Resilience in Crisis-Prone Countries 2013-2020, which emphasises resilience in selected African countries in the Sahel and Horn of Africa.³⁵

What is notable about both the Global Strategy and the documents which put in place the promotion of resilience is that they do not rely solely on competences under the CFSP. Rather, and reinforcing the paradox of an all-inclusive CFSP (in the terms of the Treaty) which leaves out important areas such as development cooperation, the various Action Plans do not mention the CFSP at all. Instead, the extent to which co-operation between the various institutions of the EU is stressed: a point made in direct response to the criticisms made of the EU since the inception of the CFSP that it is a vague policy without teeth, belonging to an unwieldy and inefficient polity. The UK has consistently underlined the specific nature of the CFSP as immune to the same type of integration as in, for example, the single market. Since the UK has now opted to leave the EU, the character, dynamics, and the future direction of the CFSP are brought into question.

³⁰ High Representative of the Union for Foreign Affairs and Security Policy, 'From Shared Vision to Common Action: Implementing the Global Strategy – Year 1' (Brussels 2017).

³¹ High Representative of the Union for Foreign Affairs and Security Policy (n 1) 2-3.

³² *ibid.*, 4.

³³ *ibid.*, 7.

³⁴ Joint Communication from the High Representative and the Commission to the European Parliament and the Council, 'A Strategic Approach to Resilience in the EU's external action' JOIN(2017) 21 final.

³⁵ Commission, 'Commission's Action Plan for Resilience in Crisis-Prone Countries 2013-2020' SWD (2013) 227 final.

3 The United Kingdom and the CFSP: awkward partner, or just awkward?

Successive UK governments have resisted any attempts to allow the CFSP to become less intergovernmental. Partly this can be explained by the UK's belief in the value of the EU as a trade-focused polity, which provided its motivation for eventually joining the club. But also because of the UK's own long-standing place on the global stage, as demonstrated by its permanent UN Security Council seat, role in NATO and close alliance with the United States and, to a lesser and declining extent, countries of the Commonwealth. Unlike smaller EU states, the UK has seen no need to use the CFSP as a means of gaining visibility in international affairs (though this does not preclude the ability to use CFSP to amplify national foreign policy, as discussed below).³⁶ The UK has expressed a constant fear from the outset of the institutionalisation of EPC into the CFSP that it would be used as a means of usurping national foreign policy prerogatives.

During the negotiations which led to the Treaty of Maastricht, the UK was, however, not alone in insisting that the structure of the EU architecture emphasised the 'otherness' of the CFSP. As Wallace has explained:

On institutional reform, the British government sided with France against Germany, arguing vigorously for an intergovernmental 'three-pillar' structure to bring foreign and security policy and police and judicial cooperation within a single treaty framework, rather than the integrated Community accountable to a strengthened European Parliament for which Chancellor Kohl and his government had pressed.³⁷

Neither were France and the UK unsupported in their efforts to permit only an intergovernmental CFSP in the Treaty. A Dutch proposal to integrate CFSP into what became the 'Community' pillar in September 1991 was opposed by Denmark, Greece and Portugal as well as France and the UK.³⁸ The stark division into two camps of 'Communitarists' and 'PESCalists' crystallised the national views of where foreign policy and European integration meet.³⁹ This has seemingly not subsisted over time as the divisions between Member States on headline foreign policy issues

³⁶ See, for example, Ben Tonra, *Europeanisation of National Foreign Policy: Dutch Danish and Irish Foreign Policies in CFSP* (Ashgate 2001); Henrik Larsen, *Analysing the Foreign Policy of Small States in the EU* (Palgrave 2005).

³⁷ William Wallace, 'Foreign Policy' in Dennis Kavanagh and Anthony Seldon (eds), *The Major Effect* (Macmillan 1994)

³⁸ Michael E Smith, *Europe's Foreign and Security Policy: the Institutionalisation of Cooperation* (CUP 2004), 181

³⁹ Yves Buchet de Neuilly, *L'Europe de la Politique Etrangère* (Economica 2005) 53. 'PESC' is the French-language acronym of 'CFSP'.

has not only been a matter of perception, but of actual practice too. The 2003 invasion of Iraq was perhaps the starkest example, dividing 'old' and 'new' Europe and placing UK and France on opposing sides in supporting US actions. Smith and Steffenson noted soon after that:

The collapse of European solidarity in the height of the Iraq crisis, leading to the stand-off between 'old' and 'new' Europe and to intense frictions between Britain and France in particular, seemed to indicate that wherever the US placed intense demands on the EU's foreign policy system there would be the likelihood of disintegration rather than a great leap forward in cooperation.⁴⁰

The UK's support of EU enlargement to the East was largely based on the belief that a larger, diverse Union would make deeper integration, including in foreign policy, less likely.⁴¹ Coupled with the concurrent enlargement of NATO to the East, the UK was consistent in stating its commitment to the defence and security aspects being centred on NATO rather than the EU.

The consistency has transcended Conservative (until 1997 and since 2010) and Labour-led (1997-2010) governments. The Treaty of Amsterdam, signed whilst the UK was under the leadership of PM Tony Blair during his most pro-EU phase, contained a 'convoluted formula' in the Treaty ('in accordance with the second sub-paragraph, which might lead to a common defence...') which was inserted at the insistence of the UK. As Wall recalls, the formula

papered over a gap between those, led by the British, who wanted to ensure the primacy of NATO in European territorial defence and to limit the role of EU forces to peacekeeping tasks, and those such as the French who wanted Europe to assume great autonomy in defence.⁴²

The same arguments about the CFSP were playing out between the Member States, despite the changes in government. Furthermore, the Treaty of Nice did not allow the provisions of 'enhanced cooperation' to apply in the CFSP because of pressures during the Intergovernmental Conference coming from the UK. Once again, the fault line was the role of NATO in ensuring Europe's defence.⁴³

⁴⁰ Michael Smith and Rebecca Steffenson, 'The EU and the United States' in Christopher Hill and Michael Smith (eds), *International Relations and the European Union* (OUP 2005) 351.

⁴¹ Karen E Smith, 'Enlargement and European Order' in Christopher Hill and Michael Smith (eds), *International Relations and the European Union* (OUP 2005) 276.

⁴² Stephen Wall, *A Stranger in Europe: Britain and the EU from Thatcher to Blair* (OUP 2008) 169.

⁴³ Giandomenico Majone, *Europe as the Would-be World Power* (CUP 2009) 65.

The UK also insisted that the Treaty of Lisbon maintained the separateness of the CFSP order, despite the ‘collapse’ of the pillar system installed in the TEU. David Miliband, the (then) UK Foreign Secretary, was at pains to stress this legal complication in the following terms to the UK Parliament:

Common foreign and security policy remains intergovernmental and in a separate treaty. Importantly ... the European Court of Justice’s jurisdiction over substantive CFSP policy is clearly and expressly excluded. As agreed at Maastricht, the ECJ will continue to monitor the boundary between CFSP and other EU external action, such as development assistance. But the Lisbon treaty considerably improves the existing position by making it clear that CFSP cannot be affected by other EU policies.⁴⁴

As noted above, this risked oversimplifying the status of the CFSP, especially since the CJEU has now held⁴⁵ that it is competent to deal with CFSP subject matter when referred to it from a national court via the preliminary reference.⁴⁶ But the statement speaks to the consistent claims in the UK that EU foreign policy can only go so far and must exist – at best – in parallel to national policy.

On the institutional arrangements and competences, therefore, the UK has been one of the Member States preventing further integration, and doing so in a very public way. However, accounts of the UK as a singular blocking force overstates the reticence which other Member States shared about foreign policy integration as distinct from almost all other areas where sovereignty has been pooled. As Allen noted in 2005:

When both France and Germany intervened to veto the application of QMV [qualified majority voting] to areas of policy where they had their own domestic concerns, it became clear that they had been ‘free riding’; that is hiding behind Britain’s obstruction of further integration.⁴⁷

The ‘otherness’ of the CFSP could continue to be seen when the ‘third pillar’ on justice and home affairs was brought more fully into the EU’s

⁴⁴ Secretary of State for Foreign and Commonwealth Affairs (David Miliband), HC Deb, 20 February 2008, col 378 (emphasis added).

⁴⁵ Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty’s Treasury and Others* ECLI:EU:C:2017:236. See Graham Butler, ‘The Coming of Age of the Court’s Jurisdiction in the Common Foreign and Security Policy’ (2017) 13 *European Constitutional Law Review* 673; Sara Poli, ‘The Common Foreign and Security Policy after Rosneft: Still Imperfect but Gradually Subject to the Rule of Law’ (2017) 54 *Common Market Law Review* 1799.

⁴⁶ Art 267 TFEU.

⁴⁷ David Allen, ‘The United Kingdom: A Europeanized Government in a Non-Europeanized Polity’ in Simon Bulmer and Christian Lequesne, *The Member States of the European Union* (OUP 2005) 125.

mainstream legal order. However, the UK negotiated an opt-out which has not therefore prevented other Member States from closer cooperation and integration. The reticence amongst other Member States regarding the ‘communitarisation’ of the CFSP suggests that the UK has not been the only stumbling block.

Neither does a singular account take into consideration where the UK has taken a proactive stance in functional or strategic cooperation. As with other Member States, the UK has used the CFSP as a conduit for amplifying its own foreign policy voice.⁴⁸

Of the numerous practical examples, Bickerton highlights the (as it was) European Security and Defence Policy (ESDP) operation Artemis in the Democratic Republic of the Congo in 2004. This was conducted outside the auspices of NATO but relied on UK support for the French proposal for an EU force. The timing was significant, coming soon after the public divisions over Iraq.⁴⁹ UK support for the French-led intervention in Mali in 2014 was an even more recent underlining of this point.

On the policies put in place under the CFSP, including those such as the European Neighbourhood Policy which relied on ‘cross pillar’ competences, the UK has generally been supportive if not always at the forefront of efforts. The efficiency and effectiveness of the CFSP appear to have been the UK’s main concerns, and whilst insisting on a separate national foreign policy and institutional apparatus, ‘it long ago recognized the fact that the EU is Britain’s “point of departure” when it comes to foreign policy rather than the first thing that Britain bumps into’.⁵⁰ This point was reinforced in the government’s own ‘Balance of Competences’ review on the benefits and drawbacks of EU membership in 2012 which found that the evidence pointed to a strengthened role in world affairs via EU membership and that ‘it was generally strongly in the UK’s interests to work through the EU in foreign policy’.⁵¹ This included the opportunity to ‘upload’ UK priorities via the CFSP, with sanctions on Myanmar/Burma cited as being a case in point.⁵² The comparative advantages and disadvantages of UK involvement in the CFSP, and the relationship of the policy with other aspects of European integration, merit setting out in full:

⁴⁸ Hylke Dijkstra and Sophie Vanhoonacker, ‘The Common Foreign and Security Policy’ (2017) *Oxford Research Encyclopedia of Politics* (forthcoming) 7.

⁴⁹ Christopher J Bickerton, *European Union Foreign Policy: From Effectiveness to Functionality* (Palgrave Macmillan 2011) 128.

⁵⁰ Allen (n 47) 138-39.

⁵¹ HM Government, ‘Review of the Balance of Competences between the United Kingdom and the European Union - Foreign Policy’ 87 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/227437/2901086_Foreign_Policy_acc.pdf> accessed 3 November 2017.

⁵² *ibid.*, 87.

The key benefits included: increased impact from acting in concert with 27 other countries; greater influence with non-EU powers, derived from our position as a leading EU country; the international weight of the EU's single market, including its power to deliver commercially beneficial trade agreements; the reach and magnitude of EU financial instruments, such as for development and economic partnerships; the range and versatility of the EU's tools, as compared with other international organisations; and the EU's perceived political neutrality, which enables it to act in some cases where other countries or international organisations might not.

Again according to the evidence, the comparative disadvantages of operating through the EU are: challenges in formulating strong, clear strategy; uneven leadership; institutional divisions, and a complexity of funding instruments, which can impede implementation of policy; and sometimes slow or ineffective decision-making, due to complicated internal relationships and differing interests. One commentator summarised it thus: 'The issue is not legal competence, but competence in general.' Some argued that the EU is at its most effective when the Member States, in particular the UK, France and Germany, are aligned and driving policy.⁵³

This final point is supported by the former head of MI6, the UK's international intelligence service:

The common thread in British influence since the end of the cold war is our co-operation with France and Germany. The three powers, working in the framework of a common European policy, represent Europe and together count for something in the world.⁵⁴

Many of the advantages cited in the Review relate less to the CFSP in isolation but as a counterpart of the economic dimensions of the EU's external relations. Indeed, in the period following the entry into force of the Treaty of Lisbon, the UK government (a Conservative-led coalition with the Liberal Democrats) made clear its intention to regard the CFSP and the new European External Action Service (EEAS) as merely one point in a 'networked approach'⁵⁵ to national foreign policy. Rather, the government (and particularly the Conservative party within it) was at pains to demonstrate the development of a national foreign policy 'which does not see EU foreign policy as a key prerogative'.⁵⁶

⁵³ *ibid*, 7.

⁵⁴ John Sawers, 'Britain on Its Own Will Count For Little on the World Stage' *Financial Times* (London, 20 June 2017) <www.ft.com/content/1e11c6a0-54fe-11e7-80b6-9bfa4c1f83d2> accessed 3 November 2017.

⁵⁵ Richard G Whitman, 'The UK and EU Foreign Security and Defence Policy: An Optional Extra' (2016) 87 *Political Quarterly* 254.

⁵⁶ Richard G Whitman and Ben Tonra, 'Western EU Member States Foreign Policy Geo-

This indifference to the EU and the CFSP manifested itself in several ways. For example, in an era of threats from international terrorism, the government emphasised the role of the 'five eyes' security community (with four English-speaking, non-EU countries: USA, Canada, Australia and New Zealand) as a cornerstone of UK foreign and security policy. This emphasis as a cornerstone of UK security was used in the run-up to the Scottish independence referendum of 2014.⁵⁷ Membership of the 'five eyes' group is not open to other states, as Germany has discovered.⁵⁸ A further example was a much-trumpeted agreement with Canada to share diplomatic resources, announced by the Foreign Secretary in 2012.⁵⁹ The agreement has not, it seems, led to any concrete initiatives, other than UK and Canadian citizens being able to rely on each other's consular services in third countries.⁶⁰ Nevertheless, the publicity surrounding the announcement seemed to be designed to underline the UK's continued attachment to non-EU powers and a willingness to distance itself from greater EU cooperation in foreign and security policy.

Recent UK strategy documents issued before the referendum, including the National Security Strategy and Strategic Defence and Security Review (2015), did not prioritise involvement in EU frameworks in the UK's defence and security.⁶¹ Rather, the national strategy notes the EU's considerable capabilities to 'build security and respond to threats', but these should be seen merely as 'complementary to those of NATO'.⁶² Although the EU is mentioned at other points in the document, these are generally where the internal market competences overlap with foreign policy (such as sanctions and arms embargoes) and the UK would be Treaty-bound not to act unilaterally.

The fact that the Treaty does not formally constrain Member States in policy-making outside the framework of EU law allowed the UK government to demonstrate (to both a national audience and the EU institutions) that it was still capable of being an independent player. As Wallace has noted, this view is not new but in many ways a continuation of Churchill's view of the post-war United Kingdom:

orientations' in Amelia Hadfield, Ian Manners and Richard G Whitman (eds), *Foreign Policies of EU Member States: Continuity and Europeanisation* (Routledge 2017) 38, 49.

⁵⁷ HM Government, 'Scotland Analysis: Security' (Cmd 8741).

⁵⁸ Richard McGregor, 'Intelligence: the All Seeing Eyes' *Financial Times* (London, 13 December 2013) <www.ft.com/content/719f86bc-63ea-11e3-98e2-00144feabdc0?mhq5j=e2> accessed 3 November 2017.

⁵⁹ James Blitz and Hannah Kuchler, 'UK and Canada to Share Embassies' *Financial Times* (London, 24 September 2012) <<https://www.ft.com/content/4a31dcac-0625-11e2-a28a-00144feabdc0>> accessed 3 November 2017.

⁶⁰ I am grateful to Charles Tannock MEP for his help on this point.

⁶¹ HM Government, 'National Security Strategy and Strategic Defence and Security Review' (Cmd 9161).

⁶² *ibid.*, 53.

Britain remained a global power, in Churchill's encapsulation, because it retained unique influence in 'three circles' of global politics: the Anglo-American special relationship, the British Commonwealth and Europe – the first of these bringing us the most advantages, the last carrying the most military and other burdens.⁶³

Beyond the rhetoric of the government, analysis of UK foreign policy on global issues in recent years does not bring to the fore the European dimension. For example, in Ralph and others' detailed analysis of UK policy regarding the Syrian crisis,⁶⁴ the EU is only mentioned once in relation to the sanctions measure of arms embargos (a CFSP decision subsequently followed by a regulation). Similarly, Daddow's examination of the ideational underpinnings of the Conservative–Liberal Democrat coalition government's foreign policy from 2010 to 2015 focuses on only the UK's relationship with the EU rather than EU foreign policy (and the UK's contribution to it).⁶⁵

Once again, although this was disappointing from the perspective of those in the UK and EU who feel the UK should play a fuller part in driving forward the CFSP, there are always likely to be problems in doing so given the overlapping nature of other foreign-policy-focused international organisations in Europe. As Benediek has noted, and returning to the new-found emphasis on resilience in EU policy-making,

[t]he EU is only one pillar – and far from an autonomous one – in a European security architecture that also encompasses NATO, the OSCE and the Council of Europe, to name but the most important instances. It is an obvious conclusion that the EU's future resilience efforts should concentrate on civil emergency response while military action is conducted in the scope of transatlantic cooperation in close collaboration with NATO.⁶⁶

Neither can CFSP as a 'political' foreign policy, which includes the Common Security and Defence Policy (CSDP) as an integral part,⁶⁷ be

⁶³ William Wallace, 'Losing the Narrative: The United Kingdom and the European Union as Imagined Communities' (2017) 31 *International Relations* 192–209, 198.

⁶⁴ Jason Ralph, Jack Holland and Kalina Zhekova, 'Before the Vote: UK Foreign Policy Discourse on Syria 2011–13' (2017) *Review of International Studies* (forthcoming) 17.

⁶⁵ Oliver Daddow, 'Constructing a 'Great' Role for Britain in an Age of Austerity: Interpreting Coalition Foreign Policy, 2010–2015' (2015) 29 *International Relations* 303–318.

⁶⁶ Annegret Benediek, 'The Global Strategy for the EU's Foreign and Security Policy' (2016) *Stiftung Wissenschaft und Politik* [German Institute for International and Security Affairs] *Comments* 38/2016, 3 <www.swp-berlin.org/fileadmin/contents/products/comments/2016C38_bdk.pdf> accessed 3 November 2017.

⁶⁷ As per art 42(1) TEU: 'The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international

fully separated from the commercial interests of the Union. For example, the CSDP mission EUNAVFOR Somalia ('Atalanta') was designed to fight piracy in the Gulf of Aden, explicitly for the purpose of protecting merchant ships in the area, transporting goods from Europe to Asia.⁶⁸

In short, therefore, the UK's track record vis-à-vis the CFSP is one which demonstrates that it has been relatively engaged in practice. The evidence suggests that it has more to gain than to lose by projecting its own foreign policy via the prism of the EU, since it is difficult to detect any foreign policies which strictly separate the UK from the rest of the EU27. However, any enthusiasm demonstrated for foreign policy action under the EU banner is tempered by a consistent need to satisfy a (perceived) sceptical domestic audience. Successive governments thus have maintained a distance in their discourse on the benefits of the CFSP in order to appear to be not *too* involved or sacrificing UK interests. As Witney states, 'the rising toxicity of the "E-word" ["European"] in domestic politics' meant that in the run-up to the 2015 general election, neither of the two main UK political parties (the Conservatives and Labour) were prepared to 'do anything, however sensible, which could open them to the charge of pro-Europeanism'.⁶⁹

In many ways, this official stance is representative of the UK's relationship with the EU more generally: though the special nature of foreign policy at the heart of state sovereignty perhaps means that the spotlight is shone more brightly on any moves towards foreign policy integration than other areas, even externally focused ones. With its consistent history of reluctance towards institutional changes to the CFSP, the UK could be assumed to lead any opposition to change during the periodic Treaty reviews.

4 The EU referendum and the invisibility of foreign policy

Foreign policy was not an area of discussion in Prime Minister Cameron's drive for a new settlement between the UK and the EU after he was re-elected (with a Parliamentary majority) in 2015.⁷⁰ Although immigration was the most contentious issue in both the renegotiation and the eventual referendum campaign, the focus was mainly on free movement

security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States'.

⁶⁸ Joris Larik, 'Much More than Trade: The CCP in a Global Context' in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Hart 2011) 12, 30.

⁶⁹ Nick Witney, 'The United Kingdom and the CSDP' in Daniel Fiott (ed), *The Common Security and Defence Policy: National Perspectives* (Academia Press 2015) 16.

⁷⁰ European Council, 'European Council meeting conclusions, 18 and 19 February 2016' EUCO 1/16.

rights within the EU and was not therefore within the scope of foreign policy.⁷¹ There was some conflation of external migration as a result of EU foreign policy, particularly refugee resettlement, but this was largely ignorant of the opt-outs the UK already had in this area. Finally, there was some debate over the likelihood of further enlargement of the EU, particularly regarding Turkey, but this was also related to free movement and immigration, rather than foreign policy *per se*.

The only relevant point in the final settlement for the discussion here was a more general one. The Treaty provisions on an 'ever closer union', which had become to be regarded as a potential threat of further integration in sensitive areas including foreign and security policy, were clarified. According to the Council conclusions on the new settlement, the provisions 'do not offer a legal basis for extending the scope of any provision of the Treaties or of EU secondary legislation. They should not be used either to support an extensive interpretation of the competences of the Union or of the powers of its institutions as set out in the Treaties'.⁷² Prime Minister Cameron and his government therefore did not seek to make an issue of the CFSP or to substantially alter the UK's role in it.

As such, the CFSP did not play a major role in the referendum campaign. Neither the 'remain' nor 'leave' campaigns made great attempts to extol the virtues or drawbacks of EU foreign policy coordination or actions, beyond general considerations of whether it is better to work within a coordinated European framework to confront global issues or not. There was more discussion of defence policy. The leave campaign attempted to highlight moves towards establishing a European army to replace national armies, which resulted in the remain camp having to (ironically) go on the defensive to point out that defence integration can only move forward with the express permission of the Member States, and one which the UK was not prepared to give. The same can also be said of the 'threat' posed by an emergent European foreign policy to the UK's permanent UN Security Council (UNSC) seat. Although an 'EU seat' in the UNSC has been mooted for some time by various EU institutional actors (such as the former High Representative for Foreign Policy, Javier Solana) it has never reached the stage of a formal proposal.⁷³ Prompting discussion of these issues did propel, at least to some degree, the CFSP into the debate, but largely on dimensions which are highly unlikely ever to be realised.

⁷¹ Kenneth A Armstrong, *Brexit Time: Leaving the EU – Why, How and When?* (CUP 2017) 32.

⁷² European Council, 'European Council meeting conclusions, 18 and 19 February 2016' EUCO 1/16, 16.

⁷³ Jan Wouters and Anna-Luise Chané, 'Brussels Meets Westphalia: The EU and the UN' in Piet Eeckhout and Manuel Lopez-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart/Bloomsbury 2016) 299, 309.

5 'Brexit means Brexit', 'Global Britain' and other slogans in search of a policy

Following the referendum, there has similarly been little discussion of CFSP, either in terms of what the UK expects to do after leaving or what it would mean for the UK's relationship with the EU. Much more focus, both domestically and in the 'phoney war' pre-phase of discussions, has been given to external *commercial* relations. Yet, given the UK's strengths in foreign policy, global resources and military resources, there was early recognition that this could be used as a means of facilitating negotiations in other areas.⁷⁴ This is supported by the speed at which Prime Minister David Cameron, before his resignation in the aftermath of the referendum, tried to assure EU Members that the UK would continue to play a key role in the CFSP and CSDP until Brexit.⁷⁵

In Prime Minister May's letter to Council President Tusk which triggered article 50 TEU of 29 March 2017, there was no mention of the words 'foreign policy'. However, the following extract gained significant attention:

We want to make sure that Europe remains strong and prosperous and is capable of projecting its values, leading in the world, and defending itself from security threats. We want the United Kingdom, through a new deep and special partnership with a strong European Union, to play its full part in achieving these goals. We therefore believe it is necessary to agree the terms of our future partnership alongside those of our withdrawal from the European Union.⁷⁶

These words were taken in some quarters to mean the UK using its relative military and security/intelligence strengths as a means of threatening the EU to offer a 'good' exit deal. For the purposes of the argument here, whether or not this point should be taken as a threat, this part of the letter reveals that (a) there is an inherent recognition of the need for cooperation, and (b) foreign policy is strongly linked to 'internal' policies and the internal resilience of the Union.

For its part, the EU's negotiating guidelines for Brexit note that the 'EU stands ready to establish partnerships in areas unrelated to trade,

⁷⁴ Patrick Wintour, 'Defence Cooperation Talks with EU Could Delay Brexit Process' *The Guardian* (London, 18 November 2016) <www.theguardian.com/politics/2016/nov/18/defence-cooperation-talks-with-eu-could-delay-brexit-process> accessed 3 November 2017.

⁷⁵ Charles Tannock MEP, 'Brexit: The Security Dimension' (2016) <www.charlestannock.com/brexit-security-dimension.pdf> accessed 3 November 2017.

⁷⁶ Prime Minister's Office, 'Prime Minister's letter to Donald Tusk triggering Article 50' <www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50/prime-ministers-letter-to-donald-tusk-triggering-article-50> accessed 3 November 2017.

in particular the fight against terrorism and international crime, as well as security, defence and foreign policy'.⁷⁷ The framing of 'areas unrelated to trade' clearly demonstrates that the CFSP, including defence, are not likely to be the primary areas for negotiation (or indeed difficulty) during the Brexit negotiations. Indeed, the categorisation of foreign policy here as the 'other' suggests that the CFSP is not an area where the EU expects great attention to be devoted. As such, this supports the argument here that Brexit and the CFSP can be seen as more of a process of gradual decoupling than a 'cliff edge' or 'shock' as is the case in many other areas of integration.

As is the case in so many areas in which UK policy has been entwined with that of the EU over more than 40 years, a new model for cooperation in the CFSP requires careful thought – assuming that both parties wish to do so. In theory, this should be less problematic than in many other areas: since diplomatic missions, armed forces and even policy statements have remained separate from the CFSP and EEAS, 'extraction' from the EU should not entail lengthy debates.

The UK government set out a 'future partnership' paper on Foreign Policy, Defence and Development in September 2017.⁷⁸ This was one of seven such papers contributing to the UK's vision of a 'new, deep and special partnership' with the EU. The document is notable for the similarity it bears to the previous Balance of Competences review,⁷⁹ insofar as the UK and the EU's foreign policy priorities appear to be almost completely aligned. In fact, in stressing the UK's contribution to the CFSP and ability to project its own priorities and set the debate (such as in imposing sanctions, as discussed below) the document seems as though it is a case for being part of the EU, rather than setting out a 'new' arrangement.

Even if the future partnership paper is enthusiastic for continued cooperation in this dimension of European governance, the discussion above of the links between CFSP and other areas of EU integration demonstrate that removing the UK should nevertheless not be underestimated. This is implicit in the partnership paper, which considers the CFSP alongside development, defence and aspects of external migration. There is no comprehensive assessment of how the UK will extract itself from the CFSP. Whilst from a legal perspective this is certainly less problematic than in many other areas (such as the single market), there are nevertheless important and potentially complex issues to resolve and which,

⁷⁷ European Council, 'Conclusions: Negotiating Guidelines for Brexit' EUCO XT 20004/17, 7.

⁷⁸ HM Government, 'Foreign Policy, Defence and Development: A Position Paper' <www.gov.uk/government/uploads/system/uploads/attachment_data/file/643924/Foreign_policy_defence_and_development_paper.pdf> accessed 3 November 2017.

⁷⁹ HM Government (n 51).

in addition to the points raised above, connect the CFSP to policies on aid and development, trade, sanctions, climate change, and energy, all of which rely on overlapping competences in the Treaties.⁸⁰ Therefore, whilst it might be debated what the 'law' in the CFSP consists of, there is little doubt that the regular 'law' in other dimensions of integration will not make extraction from the CFSP straightforward in reality.

In particular, the extensive use of restrictive measures (sanctions) by the European Union over the past 15 years is a case in point. There are over 30 sanctions regimes in place, some of which are the result of UN sanctions, but others (such as on Russia) are the product of autonomous EU measures. The latter are put in place by the combination of a CFSP instrument, followed by a regulation. The UK will need to find a way to replicate these, which will also depend heavily on the relationship – should there be one – between the UK and EU single market and/or customs union, and whether this is a temporary or permanent solution. Restrictive measures are therefore an extremely diverse category and represent a highly complex legal issue to be resolved, in addition to the administrative, budgetary and operational issues of the CFSP. The UK government's future partnership paper refers to 'its own national legal framework for sanctions' whilst highlighting 'a strong mutual interest in cooperation and collaboration with European partners'.⁸¹ Whilst this indicates the potential for alignment between EU and UK sanctions, the paper correctly notes that such alignment would require information sharing. The UK would thus be in a substantially different position to other non-Member States who align with EU sanctions as a *fait accompli*.

The situation that the UK and the EU find themselves in is thus unprecedented. Furthermore, there is no obvious model upon which future EU-UK relations regarding CFSP can easily be based. Much depends on the political will of two sides to decide to work on areas of common interest which would therefore provide an impetus to resolve the institutional questions. This is dependent of course on the UK's own vision (albeit one which has not yet been precisely defined) of a 'Global Britain' which prioritises relations with countries across the globe at the expense of prioritising European relations.

As the discussion above demonstrates, the CFSP is not a hermetically sealed category within the EU legal order. Various non-EU states have a form of relationship with the CFSP. The candidate states become gradually more involved as their candidacy moves forward as part of the *acquis*, and

⁸⁰ Karen E Smith, 'Brexit and British Foreign Policy: Between a Rock and a Hard Place' (*UK in a Changing Europe*, 20 June 2017) <<http://ukandeu.ac.uk/brexit-and-british-foreign-policy-between-a-rock-and-a-hard-place/>> accessed 3 November 2017.

⁸¹ HM Government (n 78) 18.

so do states including Norway and Iceland. These, and other associated states in the EU's neighbourhood (including states in the Western Balkans and the Caucuses), have aligned themselves with various CFSP policies, including sanctions regimes. There is thus a possibility that the UK might continue to play a part in the CFSP in some form after Brexit. And of course the UK would join several states including Norway and Turkey as a NATO member in Europe which is not part of the EU, or in the process of joining. This is significant, because NATO is mentioned 16 times in the Global Strategy, with great emphasis on cooperation with non-EU NATO members. However, cooperation via NATO is fraught with difficulty, with political deadlock the norm (largely due to the dispute between Cyprus – an EU Member State, but not a NATO Member – and Turkey) even though organisational cooperation can be effective.⁸²

Whitman identifies three possible scenarios for the UK in the CFSP post-Brexit: as an 'integrated player', an 'associated partner', or a 'detached observer'.⁸³ In the first, the UK would have a bespoke, special status in which it would retain involvement in battlegroups, CSDP operations (as a 'reverse Denmark position'⁸⁴) and participation in the Foreign Affairs Council for relevant matters. But it would be outside the mainstream fora for discussion and strategic direction. As an 'associated partner' its position would be closer to that of Norway, having no membership of the Foreign Affairs Council but participating in a 'dialogue' with the EU on related issues.⁸⁵ Whilst it would still have the opportunity to participate in battlegroups and the European Defence Agency via specific agreements, this would likely be a functional arrangement with little or no influence over policy-making. At the lowest end of the scale, being a 'detached observer' would mean that the UK would not participate in any institutional formats and would probably be limited to participation in civilian missions on a case-by-case basis.

In any of these scenarios, Brexit means that the UK would lack any capability to steer the direction of the CFSP. Even being free of the 'political' baggage of being too closely associated with EU missions in this area of closely guarded national sovereignty, we do not yet know to what extent the UK could conceivably play a constructive role and how receptive the rest of the EU27 will be. The operational, technical, and administrative

⁸² Carmen Gebhard and Simon J Smith, 'The Two Faces of EU-NATO Cooperation: Counter-piracy Operations off the Somali Coast' (2015) 50 *Cooperation and Conflict* 107.

⁸³ Richard G Whitman, 'The UK and EU Foreign, Security and Defence Policy after Brexit: Integrated, Associated or Detached?' (2017) 238 *National Institute Economic Review* 43, 48.

⁸⁴ Sten Rynning and Jon Rahbek-Clemmensen, 'The Absentee: Denmark and the CSDP' in Daniel Fiott (ed), *The Common Security and Defence Policy: National Perspectives* (Academia Press 2015) 97.

⁸⁵ Thierry Tardy, 'CSDP: Getting Third States on Board' (2014) 6 *European Institute for Security Studies Brief* 6.

implications cannot be fully considered until the ‘big picture’ political questions are settled.⁸⁶

For its part, the UK government’s future partnership paper gives few concrete details about how the mooted ‘deep and special partnership’ between the UK and the EU could be forged in legal or institutional terms. It reiterates the desire for ‘close collaboration’ and ‘cooperation’ in almost all the key areas covered by the CFSP and Global Strategy and relies on an assumed desire that the UK’s individual diplomatic and military strength would be a strong motivating factor for the EU. It would therefore appear that the government’s aim is somewhere between the models of ‘integrated player’ and ‘associated player’ as identified by Whitman. However, although the paper expresses the desire for the UK’s involvement with EU foreign policy to go beyond its relationship with any other third country, it is difficult to imagine how, in the words of the paper, a future partnership ‘unprecedented in its breadth’⁸⁷ can be reconciled with the end result of the UK as a third country.

As the history of the CFSP demonstrates, cooperation in this policy area, no matter how strong a common political desire, is contingent on agreement on many other areas – including those which the UK government appears unwilling to compromise on, such as the jurisdiction of the CJEU.⁸⁸ Whilst at the meta-level it might, in theory, be possible for a joint dialogue between the UK and EU on an agreed strategic approach to foreign policy – including emphasising resilience – this would seem to be counter-intuitive to the purpose of Brexit and the mantra of ‘taking back control’ which was so prominent in the referendum campaign. Since the effectiveness of placing resilience at the core of EU foreign relies on the coherence of the EU’s institutions, instruments, and policies, an agreed approach with an outsider would not seem the opportune means to do this.

6 Conclusion

It is ironic that in the domain of foreign and security policy where there is little evidence that the material interests of the UK and the rest of the EU differ, the UK is set to leave the institutional mechanisms which might help turn the Global Strategy into reality. It is also unfortunate that the institutional changes to the EU’s foreign policy structure, including the creation of the EEAS, came into being at a time of major foreign policy challenges⁸⁹ and which are only now beginning to be consolidated.

⁸⁶ Hylke Dijkstra, ‘UK and EU Foreign Policy Cooperation after Brexit’ (2016) 36 *RUSI Newsbrief* 1.

⁸⁷ HM Government (n 78) 18.

⁸⁸ Prime Minister’s Office (n 76).

⁸⁹ Moritz Pieper, ‘Taking Stock of the “Common” in the European Union’s Common Foreign and Security Policy’ in Jaap Zwaan and others (eds), *Governance and Security Issues of the European Union* (Springer/Asser Press 2017) 273, 278.

The process of Brexit is likely to prove to be another major challenge to the workings of the CFSP and fulfilment of the goals of the Global Strategy. Nevertheless, the UK's departure from the EU has the potential to 'radically alter the EU debate' in both tone and substance.⁹⁰

Outside the EU and with a relationship as yet to be determined, the extent to which the UK can advance its own agenda through the EU will be severely diminished. And even if associated in some way with the EU, the UK would have to accept a foreign policy role as a 'rule taker' rather than as a 'rule maker', and as a follower rather than as a leader. Although the UK government's future partnership paper is optimistic about the role to be played by the UK, this appears to be only aspirational. The history of the CFSP tells us that its 'intergovernmental' label is not a fully accurate characterisation within the EU's legal order. In the absence of complex agreements setting out the broader nature of future UK-EU relations, it is difficult to see how the UK could play a meaningful role in CFSP, even if the political will to do so exists.

Even some Eurosceptics in the UK find reason to suggest that without the UK as an awkward partner, the EU will be able to forge ahead in integrating foreign policy or other areas that it chooses.⁹¹ The UK meanwhile will be left to forge new alliances in the context of its 'Global Britain' image, though it is by no means clear what these will be in foreign policy or security terms any more than in the economic fields. Since a 'Global Britain' relies on a particular kind of identity, much will also depend on the way in which the rest of the world reacts to the consequences of Brexit and subsequently sees the UK.⁹² The UK may have underestimated the willingness of individual Member States to deal with the UK bilaterally if involvement or cooperation in the CFSP context is not possible. France is a case in point:

France has persisted with the idea of Anglo-French coordination at the heart of a successful EU foreign, security and defence policy despite the reticence of recent British governments in respect of an EU defence policy. It is not yet clear as to whether Brexit would reduce the tempo of collaboration.⁹³

⁹⁰ Richard G Whitman and Ben Tonra, 'Western EU Member States Foreign Policy Geo-orientations' in Amelia Hadfield, Ian Mannings and Richard G Whitman, *Foreign Policies of EU Member States: Continuity and Europeanisation* (Routledge 2017) 38, 43.

⁹¹ John Redwood MP, 'It's Not Just the UK That Will Benefit from Brexit - The EU Will Too' *The Guardian* (London, 20 June 2017) <www.theguardian.com/commentisfree/2017/jun/20/not-just-uk-benefit-brexit-eu> accessed 3 November 2017.

⁹² Rebecca Adler-Nissen, Charlotte Galpin and Ben Rosamond, 'Performing Brexit: How a Post-Brexit World Is Imagined Outside the United Kingdom' (2017) *British Journal of Politics and International Relations* (forthcoming).

⁹³ Whitman (n 69) 45.

That would leave open the question of who the UK would cooperate with, and to what ends.

For the CFSP itself, however, the argument has been made here that Brexit should not unduly affect the policy. There are much fewer risks associated with the UK leaving the CFSP than, in particular, the single market, without a comprehensive future arrangement. Although the CFSP is unlikely to occupy a major part of the UK-EU negotiations before the exit date of March 2019, Brexit appears almost as a ‘natural’ progression of policies already put in place by previous UK governments with the EU as only one of its points in a network.

The emphasis on ‘resilience’ in the CFSP as a long-term goal places the focus squarely on the EU neighbourhood, which the UK has had much less direct involvement in than many other Member States. Furthermore, successful neighbourhood policies rely on what the EU can offer. The EU would retain the ability to potentially offer a ‘way in’ to its lucrative internal market to neighbourhood states in exchange for cooperation. Visa facilitation could be on offer to key partners, and since the UK was not part of these aspects of EU policy, it will not affect the EU’s ability to pursue them if it wishes.

But neither will the departure of the UK necessarily remove the obstacles for the EU27 to pursue greater integration of foreign policy. Although there is always the potential for the CFSP to move forward, caution must be exercised. The UK has been a difficult partner in the EU and has been vocal about how the CFSP’s role should be limited. But it is by no means the only Member State which has had reservations about the policy. It is not conceivable that the UK alone has prevented integration in foreign policy: other areas where the UK has been reticent (eg Schengen, the single currency, justice and home affairs) have not prevented treaty dispositions which have allowed the other Member States to move integration forward. Further to this, we might add the lack of enthusiasm for use of the ‘enhanced cooperation’ provisions in the Treaty, which were extended to the CFSP in the Treaties of Nice (except for matters with military or defence implications) and Lisbon (removing the Nice exceptions)⁹⁴ and which would enable a minimum of only nine Member States to pursue advanced integration.

Therefore, we find ourselves returning to the familiar standpoint of CFSP. Greater institutional coherence and the realisation of the aims of the Global Strategy will only come about if the remaining EU27 Member States make greater use of the dispositions on offer and commit more fully to the text of the Treaty, in particular its spirit as encapsulated in article 24(1) TEU.

⁹⁴ Art 20 TEU and arts 326-334 TFEU.