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THE EUROPEAN UNION
AFTER THE
TREATY OF LISBON

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the Council are a real obstacle to progress in a policy area as controversial and difficult to navigate as asylum and migration. Even though the Polish Presidency prioritized the asylum agenda, it eventually did not make much progress during its time in office. The limitations of the six-month Presidencies are particularly important to note insofar as it was hoped that the introduction of a permanent head of the Council after Lisbon would end the problem of short-lived Councils. But while the permanent head has been a first step towards greater institutional continuity, as long as political leaders continue to see the Presidencies as opportunities to advance the particular agendas of their country, long term policy making remains extremely difficult.

While it is quite possible that the Council will continue to delay the migration and asylum agenda, there is little doubt that the Lisbon Treaty has empowered the European Parliament. As the Parliament and the Commission are in a good working relationship, their joint position towards the Council has been strengthened significantly. The next few months will begin to tell us whether the impact of the Lisbon Treaty, together with the current political urgency of making progress on a common policy, will have sufficiently helped to overcome the resistance of Council in asylum and legal migration policy, and whether we come closer to the common EU migration policy envisaged by Tampere.

In sum, the Lisbon Treaty has certainly put a formal end to the issue of whether or not the EU is competent to legislate on both common asylum and immigration policy. But while there has been more movement and a much clearer sense of political importance given to these policy areas in the Commission, Council and Parliament since the adoption of the Treaty, the political obstacles to greater cooperation remain high and have arguably grown higher in the face of the economic crisis and austerity packages introduced by many governments across Europe. The right and far right in Europe have, if anything, grown stronger over the last years, and with it the tough rhetoric on immigration. Whatever the arguments presented for managed immigration which the EU needs, arguing for it in the middle of EU austerity clearly remains politically difficult.

The European Union's common foreign and security policy after Lisbon

PANOS KOUTRAKOS*

1. Introduction

The European Union has been going through a long group therapy process since the end of 2001. This culminated in a treaty which died a long and slow death following two referenda (the Treaty Establishing a Constitution for Europe), another treaty (the Lisbon Treaty), and two further referenda in Ireland before the new constitutional arrangements entered into force in December 2009.

Throughout these eight years of self-reflection, the foreign affairs of the Union were at the centre of interest and debates. This was made clear in the Laeken Declaration, which kick-started the process in 2001, and raised this question: 'Does Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a stabilising role worldwide and to point the way ahead for many countries and peoples?'¹ Once the Constitutional Treaty was signed, the then President of the Commission, Romano Prodi, stated that 'today, Europe is reaffirming the unique nature of its political organization in order to respond to the challenges of globalisation, and to promote its values and play its rightful role on the international scene'.²

This emphasis on the EU's international role also informed the Lisbon Treaty. Launching the Intergovernmental Conference which led to the drafting and adoption of the Lisbon Treaty, the European Council stated that, '[i]n order to secure our future as an active player in a rapidly

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1 European Council, December 14–15, 2001, p. 2.

2 Speech delivered in Rome at the ceremony on the signing of the Constitutional Treaty.

changing world and in the face of ever-growing challenges, we have to maintain and develop the European Union's capacity to act...³

This focus aimed to address a number of concerns about how the Union acted in the world. Two of these were about the complexity of the legal arrangements governing the Union's foreign affairs and the ensuing coherence of the relevant policies. In relation to the former, the pillar structure, established at Maastricht and maintained by the Amsterdam and Nice Treaties, the dichotomy between the European Community which carried out external economic relations and the Union, responsible for external political relations, were seen as increasingly difficult to defend in the light of the multiplicity of actors and roles which they entailed. As for the latter, Timothy Garton-Ash makes the following observation: 'Europe has a hundred left hands and none of them knows what the right hand is doing. Trade, development, aid, immigration policy, education, cultural exchange, classic diplomacy, arms sales and anti-proliferation measures, counter-terrorism, the fight against drug and organized crime: each European policy has an impact, but the effects are fragmented and often self-contradictory'.⁴

In other words, the Union's foreign affairs were viewed to be carried out on the basis of complex and obscure legal rules, involving a range of institutions which interacted with very little coordination and in a way which deprived the Union of both clarity as to its policies and clout as to its presence. Indeed, the Mandate of the 2007 Intergovernmental Conference which led to the drafting of the Lisbon Treaty mentioned coherence as an imperative for the EU's foreign affairs in its very first paragraph.⁵ In addition to these concerns, the new Treaty aimed to meet the ambitions which the Union had been articulating in the last ten years. The European Security Strategy, for instance, states that 'Europe should be ready to share in the responsibility for global security and in building a better world'.⁶

The Union's institutions have been tireless in their praise for the significance of the new provisions. According to the European Council, the

Lisbon Treaty would 'bring increased efficiency to our external action'.⁷ In its Opinion on the 2007 Intergovernmental Conference, the European Commission stated that the latter 'will give Europe a clear voice in relations with our partners worldwide, and sharpen the impact and visibility of our message... This will mean an EU able to play a more responsive and effective part in global affairs'.⁸ And President Sarkozy of France wrote during the Russia-Georgia crisis in August 2008 that, had the new Treaty entered into force, the Union would have had the institutions it needed in order to cope better with international crisis.⁹

It is against this background that this Chapter focuses on the main changes introduced at Lisbon in relation to the Union's Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP). It is structured as follows: First, it examines the structural changes introduced at Lisbon and assesses them in the light of their declared objectives as well as the broader constitutional context set out by the Treaties. Second, it analyses the institutional innovations, with special emphasis on the High Representative, and the European External Action Service. Third, it focuses on the CSDP, an area of increasing topicality on which the Lisbon Treaty puts considerable emphasis.

2. Structural changes

There are two main changes in the structure of the system of EU foreign affairs, namely, the abolition of the pillar structure and the re-organisation of all the external policies of the Union within a unitary system of principles and objectives.

The pillar structure of the Union has been a constant since the Maastricht Treaty. It divided the activities of the Union in three distinct sets of rules, the European Community, the Common Foreign and Security Policy, and Police and Judicial Cooperation in Criminal Matters (the latter succeeding the Justice and Home Affairs framework originally established at Maastricht). The logic of the pillar structure was simple: The Member States want to cooperate in a wide range of areas (economic, political, social, and criminal), albeit at differing paces, following different models

7 EU Declaration on Globalisation, annexed to Brussels European Council Presidency Conclusions, December 14, 2007, p. 25.

8 Opinion of the European Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of representatives of the governments of the Member States convened to revise the Treaties, July 13, 2007, Council 11625/07 POLGEN 83, p. 8.

9 *Le Figaro*, 18 August 2008.

3 European Council Conclusions (21–2 June 2007), para. 2.

4 T. Garton-Ash, *Free World* (London: Penguin, 2005), 218.

5 See IGC 2007 Mandate, Council SG/11218/07, POLGEN74, para. 1.

6 *A Secure Europe in a Better World – European Security Strategy* (Brussels, 2003), 1. See also the *Report on the Implementation of the European Security Strategy – Providing Security in a Changing World* (Brussels, 2008), and the Brussels European Council Conclusions (16 September 2010), para. 2.

of integration, decision making, and judicial control, all depending on the political sensitivity of the subject-matter in question. Viewed from this angle, the pillar structure conveyed this reality clearly: The CFSP, for instance, was deemed so central to the core of the sovereignty of the Member States that the legal framework set out in the old second pillar (ex Title V TEU) was organised on the basis of predominantly intergovernmental features: Decision making was mainly by unanimity, the CFSP measures were distinct from those adopted pursuant to the traditional Community method, the Court of Justice was expressly excluded from exercising its jurisdiction over such measures, the Commission did not have the exclusive right of legislative initiative, and the role of the parliament was peripheral at most.

However, the coexistence of different sets of rules made the Union legal system complex and, to outside observers, puzzling. This was exacerbated by the existence of legal linkages between them. The Union was based on a single institutional framework,¹⁰ and the Council and the Commission were responsible for ensuring the consistency between the various external policies, irrespective of the legal framework within which they were carried out.¹¹ Therefore, whilst governed by distinct sets of rules which differed considerably in their legal effects, the pillars were viewed as part of a functional whole, the life of which depended on the interactions between a single set of institutions, which would exercise different powers depending on whether they acted under the first or the second pillar.

The Lisbon Treaty dealt with the complexities raised by the coexistence of distinct, albeit interacting, legal frameworks by abolishing the pillars altogether. This change, otherwise known as 'depillarization',¹² led to the integration of CFSP, as well as the Judicial and Police Cooperation in Criminal Matters, into a unitary framework, the EU one, hence rendering the European Community a thing of the past.

However, to what extent has the formal abolition of the pillars given rise to a truly integrated legal order? Has it established a framework where foreign policy is carried out on the basis of similar rules as the other Union's external policies? Or has it merely abolished the appearance of separate sets of rules, whilst in reality maintaining the distinct characteristics of the CFSP?

¹⁰ ex Art. 3 TEU.

¹¹ Ibid.

¹² See Editorial, 'The CFSP under the EU Constitutional Treaty – Issues of Depillarization', (2005) 42 *CMLRev* 325–329.

As far as the old third pillar is concerned, there is no doubt that it has been fully integrated within the Union legal order; hence, its distinct pillar structure has been abolished both formally and substantively.¹³ The CFSP framework, however, maintains its very distinct legal character which differentiates it from all other EU external policies. The structure and wording of the Treaty on the European Union leaves no doubt about this. Firstly, the substantive provisions of the CFSP are still set out in a separate instrument, the Treaty on European Union, whilst all the other EU policies are set out in the Treaty on the Functioning of the European Union (TFEU). Secondly, Article 2(4) TFEU refers to the Union's competence in the area of the CFSP as a category distinct from all the other categories of competence.¹⁴ Furthermore, Article 24(1) TEU states that the 'common foreign and security policy is subject to specific rules and procedures'.

This clear sense of distinctiveness, albeit within a unitary structure, is reinforced by the provision of Article 40 TEU. This illustrates clearly the distinct nature of the CFSP within the EU constitutional architecture, and is worth citing in full:

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

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

The preceding provision builds on the Nice arrangements which provided that 'nothing [in the second and third pillar] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them'.¹⁵ However, it goes considerably further: Whilst the previous constitutional arrangements protected the unique character of the Community legal order from any intrusion from

¹³ See Memoranda by M. Fletcher and V. Mitsilegas, House of Lords European Union Committee, 10th Report of Session 2007–08, *The Treaty of Lisbon: An Impact Assessment* – Vol II: Evidence, E149 and E166, respectively.

¹⁴ These include exclusive (Art. 2(1) and 3 TFEU), shared, (Art. 2(2) and 4 TEU), coordinating competence (2(3) and 5 TEU), and competence to support, coordinate or supplement the actions of the Member States (Art. 2(5) and 6 TEU). See R. Schütze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis', (2008) 33 *ELRev* 709.
¹⁵ ex Art. 47 TEU.

intergovernmental forms of cooperation, the Lisbon amendment in Article 40 TEU protects the unique character of the CFSP too. Therefore, rather than integrating it seamlessly into the overall Union constitutional structure, the new provision underlines the distinct legal nature of the CFSP set of rules and renders its preservation a matter of constitutional significance.

The distinct nature of the CFSP is also maintained in the way in which its conduct is governed by the Lisbon arrangements. First, in terms of decision making, the prevailing role of unanimity is maintained,¹⁶ whilst any derogations from this requirement are limited and clearly prescribed, as was the case under the Nice Treaty. In accordance with Article 31(2) TEU, derogations from the principle of unanimity are provided in cases where

- the Council adopts a decision defining a Union action or position on the basis of a previous decision of the European Council relating to the Union's strategic interests and objectives,
- where the Council adopts a decision implementing a previous decision defining a Union action or position, and
- where the Council adopts a decision appointing a special representative.

It becomes apparent that the preceding derogations are of limited significance insofar as their exercise depends on the prior adoption of a CFSP measure by unanimity. To the list, the Lisbon Treaty adds two further derogations: The first applies to the adoption of any decision defining a Union action or position on a proposal which the High Representative has presented following a specific request from the European Council, the latter made either on its own initiative or that of the High Representative; the second is in cases where the European Council decides unanimously that the Council may act by a qualified majority.¹⁷ Both are entirely consistent with the logic of the exceptions introduced by the previous constitutional arrangements and maintained at Lisbon, hence further confirming the dominant role of unanimity in the area of foreign and security policy. In any case, the Lisbon Treaty maintains the 'emergency break' provided under Nice, which enables Member States to oppose the adoption of a decision to be taken by qualified majority 'for vital and stated reasons of

¹⁶ Art. 31(1) TEU.

¹⁷ Art. 31(3) TEU.

national policy'.¹⁸ Finally, the derogations are not applicable to decisions with military or defence implications.¹⁹

Second, the CFSP is still excluded from the jurisdiction of the Court of Justice. Article 24(1) TEU which sets out this provision refers to two exceptions: firstly, the monitoring of compliance with Article 40 TEU and, secondly, the review of legality of CFSP decisions adopted by the Council and providing for restrictive measures against natural or legal persons.²⁰ However, in effect, neither of these provisions deviates from the constitutional logic of excluding CFSP from the jurisdiction of the Court of Justice. The former has always been considered to fall within the purview of the Court, which has produced, over the years, a number of important judgments on the dividing line between the CFSP (and the old third pillar) and the (old) Community legal framework.²¹ As for the latter, it is significant and follows the logic of the jurisdiction which the Court has already exercised in the area of economic sanctions targeting individuals in cases where these are adopted in accordance with prior CFSP measures.²²

Third, in relation to instruments available to the Union to carry out its foreign and security policy, the Lisbon Treaty appears to change things. Recall that, under the previous arrangements, the instruments used in the (old) Community legal order (regulations, directives, decisions) were not available in the second pillar. Instead, CFSP-specific measures were provided, mainly joint actions, common positions, and common strategies. The Lisbon Treaty replaced these special instruments with 'decisions'.²³ However, these measures are set out to do precisely what their precursors were doing: A decision may define an action to be undertaken by the

¹⁸ Art. 31(2) second subpara. TEU which provides that the High Representative will search for a solution acceptable to the State in question, failing which the Council may decide by a qualified majority to refer the matter to the European Council for decision by unanimity.

¹⁹ Art. 31(4) TEU.

²⁰ This is set out in Art. 275(2) TFEU to which Art. 24(1) TEU refers.

²¹ See Case C-417/96 *Commission v. Council (re: Airport Transit Visas)* [1998] ECR I-2763, Case C-176/03 *Commission v. Council (re: criminal law and environmental protection)* [2005] ECR I-7879, joined Cases C-317/04 and C-318/04 *Parliament v. Council (re: Passenger Name Record Agreement)* [2006] I-4721, Case C-440/05 *Commission v. Council (criminal environmental sanctions)* [2007] ECR I-9097, Case C-403/05 *Parliament v. Commission (re: border support to Philippines)* [2007] ECR I-9045, Case C-91/05 *Commission v. Council (re: small arms and light weapons)* [2006] ECR I-1145.

²² This was the case under ex Art. 301 EC, and now under Art. 215 TFEU. See, for instance, the long line of cases about smart sanctions, such as the much-discussed *Joined Cases C-402/05P and C-415/05 P Kadi and Al-Barakat* [2008] ECR I-6351.

²³ Art. 25 TEU.

Union,²⁴ a position to be taken, or the approach of the Union to a particular matter of a geographical or thematic nature,²⁵ functions assumed by joint actions, common positions, and common strategies, respectively, under the previous constitutional dispensation. Furthermore, Article 24(1) TEU rules out expressly the adoption of legislative acts.

The preceding brief overview suggests that the Lisbon Treaty abolishes the pillar structure only in name. Indeed, it transposes the previous set of rules in a unitary structure, with all its legal characteristics intact. This is explained by the logic of the pillar structure which still permeates the Union constitutional order as set out at Lisbon: Whilst Member States are determined to broaden the scope of their cooperation in areas deemed to be closer to the functions traditionally carried out by states, and whilst they deem it sensible to rely upon institutions and processes of what used to be the Community legal order, they wish to do so at a different pace, in accordance with a different model of integration, and in order to achieve qualitatively different objectives. The establishment of the complex pillar structure sought to convey this fundamental differentiation, and the abolition of the appearance of that structure by no means makes it any less valid or present. Similarly, whilst the previous pillar structure was viewed as complex, the removal of the appearance of complexity does not necessarily make the new legal structure any easier to manage.

The second structural change introduced at Lisbon is the reorganisation of all the EU external policies, including the CFSP, under a common set of values, principles, and objectives. These policies include the Common Commercial Policy (CCP);²⁶ development cooperation;²⁷ economic, financial, and technical cooperation with third countries;²⁸ humanitarian aid;²⁹ sanctions;³⁰ the CFSP;³¹ and the CSDP.³² Whilst they were set out in different parts of primary law, each carried out in order to pursue its specific objectives, the Lisbon Treaty brings them together and lays down a set of common principles and objectives which all these policies should pursue, irrespective of their specific legal characteristics.

24 Art. 28(1) TEU.

25 Art. 29 TEU.

26 Arts 206–7 TFEU.

27 Arts 208–11 TFEU.

28 Arts 212–13 TFEU.

29 Art. 214 TFEU.

30 Art. 215 TFEU.

31 Arts 23–41 TEU.

32 Arts 42–6 TEU.

The principles are set out in Article 21(1) TEU and include, rather predictably, 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 objectives are set out in Article 21(2) TEU and are noteworthy for both their range and ambition:

1. safeguard its values, fundamental interests, security, independence and integrity;
2. consolidate and support democracy, the rule of law, human rights and the principles of international law;
3. 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;
4. foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
5. encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
6. 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;
7. assist populations, countries and regions confronting natural or man-made disasters; and
8. promote an international system based on stronger multilateral cooperation and good global governance.

These principles guide not only the conduct of the Union's external policies, but also the external aspects of the Union's other policies.³³ Finally, Article 21(3) TEU spells out the requirement of consistency between the different external policies, and between these and the Union's other policies, compliance with which it entrusts to the Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy.

Whilst the 'depillarization' of the Union seeks to signify the formal integration of its foreign affairs system, the above provisions aim to bring

33 Art. 21(3) TEU.

about its substantive integration. To that effect, the Lisbon Treaty introduces the term *external action*, rather than *external relations* or *policies*, which covers all external economic, political, and security strands. This term, and the singular in which it is couched, signifies the design, and therefore the conduct, of the Union's foreign affairs as a coherent whole. As it relates to all the different facets of the Union's international posture, it reflects their singular focus. This is yet another indication that, in the process of European integration and the drafting of the relevant primary rules, semantics matter.

3. Institutional changes

The Lisbon Treaty has a visible impact on the institutional machinery of the Union in the area of foreign affairs by establishing the post of the High Representative of the Union for Foreign Affairs and Security Policy and by assigning to it a new service, the European External Action Service (EEAS).

The aim of this innovation is to provide the Union's foreign affairs with a face. By providing an answer to the perennial question which Henry Kissinger is purported to have raised, this new post is also intended to facilitate the coherence of external policies and provide a single point of contact. Under the Constitutional Treaty, the post holder would have had a different title, namely, Minister for Foreign Affairs. However, this proved to be controversial, as it was a title associated with States. Therefore, following the negative referenda in the Netherlands and France in 2005, and the scaling down of the express constitutional ambitions of the Treaty amendments,³⁴ the Member States opted for the current, rather innocuous, title.

The High Representative is responsible for the conduct of the CFSP. In order to ensure the coherence of that policy, it was decided that the holder of the post should have two institutional affiliations: On one hand, he or she is a Vice President of the Commission, and on the other hand, he or she chairs the Foreign Affairs Council. This dual institutional configuration links this new post with both the supranational and intergovernmental facets of the Union's institutional structure, and is, therefore, intended to ensure the coherence and consistency of the EU's international action. There is some merit in this thought. The Commission and the Council

³⁴ See the mandate for the 2007 Intergovernmental Conference (Council Doc. 11218/07, Brussels, 26 July 2007, para. 1).

represent different interests which often clash: As the Commission is the guardian of the Treaty and the Council the forum where Member States represent and protect their own interests, they waste too much time and energy in legal and policy disputes. The establishment of a post which would straddle these institutions may justifiably give rise to hope that it would reduce the scope for such disputes, and perhaps make their conflicting interests meet.

However, a closer look reveals a more nuanced picture. Three observations are worth making. First, the Treaty is strikingly vague about the role of the High Representative. Whilst it is stated that the holder is responsible for the conduct of the CFSP,³⁵ and for representing the Union for matters relating to this policy,³⁶ Article 18(4) TEU provides that he or she 'shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action'. This is silent on which specific areas of EU foreign affairs are under High Representative's supervision, and provides no guidance as to how he or she is to interact with other EU institutions and bodies. Therefore, the Union's primary law sets a blank canvas on which the first High Representative is to write his or her job description. In doing so, this person cannot act on his or her own. After all, the role is shaped by the other EU actors with whom the High Representative interacts, namely, the Member States (which appoint him or her), the Commission (of which he or she is a Vice President), the President of the Commission (who decides for the allocation of portfolios), and the President of the European Council. It is rather curious that the post of High Representative, which purported to bring clarity and coherence in the EU's foreign affairs, should be defined in such unclear terms.

Second, the institutional affiliations of the High Representative may prove to be deeply problematic on grounds of both institutional loyalty and substantive efficiency. For instance, Article 218(3) TFEU provides that the High Representative, rather than the Commission, would recommend that the Council authorise the opening of negotiations of international agreements in areas where the subject matter of the agreements relates exclusively or principally to the CFSP. Whilst in principle a positive proposition, in practice it is precisely the question of the delimitation between the CFSP and other external policies which has given rise to very

³⁵ Art. 18(2) TEU.

³⁶ Art. 27(2) TEU.

considerable inter-institutional disputes.³⁷ This new provision of the Lisbon Treaty by no means makes it easier to determine whether an agreement is principally about the CFSP, or whether it is about other aspects of the Union's external action with merely CFSP implications, an issue in relation to which the case law of the Court has been distinctly unhelpful.³⁸ As for the internal dynamics which shape the post and its function, the experience of the appointment of the first High Representative, Baroness Ashton, is indicative of the ample scope for the relevant actors to hone their skills in horse-trading, as it involved intense haggling between EU institutions (the European Parliament included), and Member States. Furthermore, that the President of the Commission, Manuel Barroso, did not give the European Neighbourhood Policy to Baroness Ashton, but to the Commissioner responsible for enlargement did not go unnoticed, and political circles in Brussels thought it interesting that Baroness Ashton appointed most of her staff from her previous Commission cabinet and that she chose to be based in the Commission building.

Third, whilst the appointment of the High Representative was intended to bring clarity to the Union's international posture and coherence in the conduct of its external action, in practice he or she is not the only player active in the area of foreign affairs. The High Representative coexists with the President of the European Council who, according to Article 15(6) TEU, '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'. Furthermore, the Treaty also assigns a role to the President of the Commission, as the latter, '[w]ith the exception of the common foreign and security policy,

37 See Case C-403/05 *Parliament v. Commission* (re: border support to Philippines) [2007] ECR I-9045, Case C-91/05 *Commission v. Council* (re: small arms and light weapons) [2006] ECR I-1145.

38 See P. Koutrakos, 'The nexus between development and CSDP', in A. Arnall, C. Barnard, M. Dougan, and E. Spaventa, (eds.), *A Constitutional Order of States: Essays in EU Law in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011), 589. For an analysis of the relevant case-law, see A. Dashwood, 'Article 47 TEU and the Relationship between First and Second Pillar Competences', in A. Dashwood and M. Mareseanu (eds.), *Law and Practice of EU External Relations* (Cambridge: Cambridge University Press, 2008), 70; J. Heliskoski, 'Small Arms and Light Weapons within the Union's Pillar Structure: An Analysis of Article 47 TEU', (2008) 33 *ELRev* 898; C. Hillion and R. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?', (2009) 46 *CMLRev* 551.

and other cases provided for in the Treaties, it shall ensure the Union's external representation'.³⁹ In addition, the rotating Presidency still chairs all Council meetings, except for the Foreign Affairs one, and is therefore involved in the external aspects of all other Union policies. Therefore, the international representation of the Union is still not the responsibility of just one actor, and the determination of who speaks for the Union would depend, again, on the interaction between various actors and their ability and willingness to delineate their roles.

It follows from the preceding brief overview that the Lisbon Treaty does not define a legal system which would ensure the effectiveness and coherence of the EU's external action, increase clarity, and raise its visibility. Instead, it sets out a broad and flexible framework which may allow the various institutional actors to act in a way that may enhance effectiveness and coherence. The scope for compromise, political disagreements, and inter-institutional skirmishes which this framework entails is illustrated clearly by the process of establishing the EEAS.

The setting up of this body is considered 'one of the most significant changes introduced by the Treaty of Lisbon'.⁴⁰ Aiming to assist the High Representative by working in cooperation with the diplomatic services of the Member States, the EEAS consists of Commission and Council officials, as well as diplomats seconded from the Member States.⁴¹ The introduction of the EEAS was not uncontroversial – in the United Kingdom, for instance, the then Conservative Shadow Foreign Secretary William Hague (now Foreign Secretary) saw it as yet another illustration of 'a power grab by the EU'.⁴² And yet, the idea of the EEAS is sensible, as it is intended to provide a focal point for the EU as an international actor, to make coordination easier, and to foster a culture of cooperation between officials from Member States and the EU institutions.

However, not for the first time, the Lisbon Treaty is silent on the specifics about the Service's function: The distribution of posts amongst the Council, the Commission, and the Member States; the scope of the policies it shall oversee; the definition of the lines of authority between the Union institutions involved; and its precise function in the conduct of the Union's foreign affairs are all left open. Against this blank canvas, the organisation and management of the EEAS provided the playground for

39 Art. 17(1) TEU.

40 Council Conclusions of 26 April 2010 (8967/10), p. 8.

41 Art. 27(3) TEU.

42 *The Daily Telegraph*, 3 May 2008.

the kind of inter-institutional disputes its establishment had purported to address.

In particular, two controversial issues arose. The first was about development cooperation and the various financing instruments it covers, such as the Development Cooperation Instrument and the European Development Fund: Should it be integrated in the tasks entrusted to the EEAS, or should it become a distinct and autonomous policy within the Union's external action? The Commission was hostile to the former, as it felt that it would undermine its powers as set out in Article 17(1) TEU: These include the Union's external representation, with the exception of the common foreign and security policy, the execution of the budget and the management of programmes, and the exercise of coordinating executive and management functions as laid down in primary law. These are sensitive matters: Their resolution touches upon issues of efficiency, effectiveness, and practical considerations (the development budget is very considerable), as well as institutional powers deeply entrenched through successive rounds of Treaty amendments. The proposal made by the High Representative in March 2010 suggested the integration of development policy in the functions of the EEAS, and turned out to be controversial. Most non-governmental organisations viewed it as a Trojan horse which would undermine both the integrity of development policy and the powers of the Commission.⁴³ The Parliament, on the other hand, was keen not only to avoid the contamination of the Community (now Union) method which governs development cooperation by the intergovernmental features of the EEAS, but was also keen to increase its leverage in the conduct of the EU's external action by intervening directly on the funding of the Service and the appointment of Heads of Delegation.

The input of the Parliament turned out to be the second controversial issue because, in addition to the previously mentioned point, the only directly elected Union institution was keen to underline the political accountability of EEAS and ensure that the latter would not be diluted by the management structure of the Service. One of the issues about which it felt strongly was ensuring that the person being deputised for the High Representative before the Parliament would be politically accountable,

43 See, for instance the press statement of 26 April 2010 issued by CIDSE, Oxfam International, APRODEV, CONCORD, EUROSTEP and One International, www.concordeurope.org/Files/media/0_internetdocuments/ENG/5_Press/1_Press_releases/5_Press_releases_2010/MEDIA-STATEMENT-on-EEAS-26-04-2010-EN.pdf (last accessed on 1 August 2010).

and not an official. In order to appreciate its role in the establishment of the EEAS, recall that, whilst required only to be consulted on the establishment of the Service,⁴⁴ the Parliament is to give its consent to the amendments of the Staff and Financial Regulations necessary for the EEAS to become operational. Therefore, not for the first time following the introduction of the Lisbon Treaty, the Parliament saw it fit to flex its muscle.⁴⁵

Following intense inter-institutional haggling, the final outcome, set out in Decision 2010/427/EU establishing the organisation and functioning of EEAS,⁴⁶ followed the logic of integrating development in the EEAS functions. However, it does so by seeking to square the circle and engaging in a very delicate balancing exercise. The High Representative is responsible for the coordination between all the EU financial instruments, but the management of these programmes remains under the responsibility of the Commission,⁴⁷ and the EEAS shall 'contribute to the programming and management cycle' of these instruments, and shall be responsible for 'preparing Commission decisions on the strategic, multi-annual steps within the programming cycle'.⁴⁸ All proposals are to be prepared following Commission procedures, and the role of the Commissioner responsible for development is pronounced; for instance, in relation to the European Development Fund and the Development Cooperation Instrument in particular, that is the programmes involving the majority of the development policy budget, both the EEAS and the Commission are to make any proposals under the supervision of the Development Commissioner.⁴⁹ Furthermore, the High Representative adopted a Declaration on political accountability in which she sets out the practicalities of her interactions with the Parliament.⁵⁰ These include an exchange of views for newly appointed Heads of Delegations to countries and organisations which the Parliament considers strategically important (whilst the latter had argued originally, and rather bizarrely, for all Heads of

44 Art. 27(3) TEU.

45 See its rejection of the EU-US SWIFT Agreement in February 2010.

46 [2010] OJ L 201/30. This Decision is accompanied by a Declaration by the High Representative on political accountability ([2010] OJ C 210/1, and [2010] OJ C 217/12) which sets out the practicalities of the interactions between the High Representative and the European Parliament.

47 Ibid., Art. 9(1) and (2).

48 Ibid., Art. 9(3).

49 Ibid., Art. (4).

50 [2010] OJ C 210/1, and [2010] OJ C 217/12.

Delegations). It also provides for the person who would deputise the High Representative before the Parliament, namely, a Commissioner or a minister from the rotating Presidency (or the trio Presidencies) depending on the subject matter of discussion.

Whether the preceding compromise outlined is workable remains to be seen.⁵¹ For the purpose of this analysis, suffice it to point out its vague language, the complex arrangements it sets out, and its underlying effort to strike the balance between competing claims to influence by interacting Union institutions. Whilst understandable for practical reasons and political expediency, this compromise cannot hide the fact that its success in practice depends on too many variables: the willingness of the Union institutions to take a leap of faith and cooperate in order to make the policies in which the EEAS participates truly coherent, the personality of the relevant post holders and their ability to navigate their way through the compromises enshrined in Decision 2010/427/EU, and the vague language in which these are couched. Another consideration to be taken into account is the response of diplomats of Member States. Both Article 27(3) TEU and the Decision refer to the cooperation of the EEAS with the diplomatic services of the Member States. How easy will it be for the missions of the big Member States to share information, given that their foreign policy stature depends on it and that the Lisbon provisions on CFSP enable them to retain their foreign policy role?

All in all, one need not be a cynic to have serious doubts about whether this system is workable, given the energy and time wasted by the Union institutions in turf wars about the legal basis of external measures in other areas.⁵²

The brief overview in this section suggests that the institutional innovations introduced by the Lisbon Treaty in the area of foreign affairs by no means provide a definitive answer to the Union's problems in foreign affairs; neither do they change fundamentally the factors which have been shown to slow the Union's ability to act. Instead, they set out a new framework within which all the different interests and factors which shape the Union's foreign affairs are rearranged. It is a new terrain which enables

51 See S. Duke, 'A Difficult Birth: The Early Days of the European External Action Service', in P. Koutrakos (ed.), *The European Union's External Relations a Year after Lisbon*, 2011/3 GLEER Working Papers 69.

52 An example is provided in the areas of trade and environment; see P. Koutrakos, 'Legal Basis and Delimitation of Competence in EU External Relations', in M. Cremona and B. De Witte (eds.), *EU Foreign Relations Law – Constitutional Fundamentals* (Oxford: Hart Publishing, 2008), 171.

the Union's actors to reconstitute their role in a way which, depending on a range of variables, might enhance the Union's ability to act as a credible international partner.

4. Common security and defence policy

Since December 1998, when President Chirac and Prime Minister Blair met at St Malo, the development of the security and defence policy has gained considerable momentum. The Union has carried out a significant number of missions around the world, ranging from border control missions (in Georgia and Palestine), to military missions (for instance, in Chad), to police missions (for instance, in Bosnia and Herzegovina), to rule-of-law missions (for instance, in Iraq), to maritime missions (in Somalia).⁵³

The Lisbon Treaty pays considerable attention to the area of security and defence. This becomes apparent not only from the substance of the relevant TEU provisions but also from their general scheme, as well as the very title of the policy. While, under the previous constitutional arrangements, the policy was titled 'European Security and Defence Policy', it has now become 'Common Security and Defence Policy'. Furthermore, the TEU provisions on security and defence are grouped together under a distinct section within Title V TEU (the latter setting out the general provisions of the Union's external action and specific provisions on the CFSP). Finally, Article 42(1) TEU states that the CSDP 'shall be an integral part of the common foreign and security policy'.

In terms of substantive content, the Lisbon Treaty expands the range of activities which fall within the scope of the CSDP, albeit merely formalising existing practice.⁵⁴ In the light of the limited length of this chapter, the following analysis focuses on three specific issues, namely, military

53 See G. Grevi, D. Helly, and D. Keohane (eds.), *ESDP: The First Ten Years* (Paris: ISS, 2009); S. Blockmans (ed.), *The European Union and Crisis Management-Policy and Legal Aspects* (The Hague: T. M. C. Asser Press, 2008); and S. Blockmans, J. Wouters, and T. Ruys (eds.), *The European Union and Peacebuilding: Policy and Legal Aspects* (The Hague: TMC Asser Press 2010).

54 Art. 43(1) TEU provides that the CSDP tasks shall include joint disarmament operations; humanitarian and rescue tasks; military advice and assistance tasks; conflict prevention and peace-keeping tasks; and tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. It also provides that '[a]ll these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.'

capabilities, flexibility, and the mutual assistance clause. These are the most interesting changes introduced at Lisbon in this area.

A. Military capabilities

The ambition of the Union to play an important security role in the world, and the range of missions it has carried out, has brought to the fore the issue of military capabilities. Following the end of the Cold War, the European defence industries have been facing very serious problems (including underfunding, shortages in certain areas and oversupply in others, and insufficient funding of research and development), and the financial crisis has imposed further constraints on national defence budgets. The perilous state of the defence capabilities in Europe was highlighted with brutal honesty in a widely discussed speech by the then outgoing United States Defence Secretary Gate on the future of NATO in which he referred to 'the very real possibility of collective military irrelevance'.⁵⁵

The emphasis the Lisbon Treaty places on this aspect of security policy is illustrated in two ways. First, it imposes a duty on Member States to 'make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council'.⁵⁶ Second, it provides for a special intergovernmental body, namely, the European Defence Agency (EDA) which is intended to be active in the area of defence capabilities development, research, acquisition, and armaments.⁵⁷

Both developments are actually less spectacular in their implications than they might appear at first sight. On one hand, whilst suggesting a degree of impetus in this area, the duty imposed on Member States is vague in its scope, and silent in its implications. Most importantly, it needs to be considered in the light of the numerous reminders in the Treaty and its attached Declarations that the Member States are the locus for the

⁵⁵ Speech delivered on 10 June, <http://blogs.wsj.com/washwire/search/gates%20nato%20future/?s=gates+nato+future> (last accessed on 30 June 2011).

⁵⁶ Art. 42(3) TEU which also provides that Member States 'shall undertake progressively to improve their military capabilities'.

⁵⁷ Art. 42(3) second subpara. TEU provides that EDA 'shall identify operational requirements, shall promote measures to satisfy those requirements, shall contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, shall participate in defining European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities'. See also Art. 45 TEU.

organisation of their defence.⁵⁸ Viewed from this angle, the provision of Article 42(3) TEU is more interesting at the level of semantics, rather than of substance.

As for the EDA, its story provides a useful reminder of the limits of legal rules. In fact, it was established in 2004, well before the Lisbon Treaty was even drafted and even before it became clear that the Constitutional Treaty was dead.⁵⁹ Furthermore, whilst the work that the Agency has been doing is largely positive, sensible, and well received, it is also limited in its scope and has been marred by disagreements between Member States as to its approach (whether it should focus on developing synergies in order to deal with short-term issues or long-term projects) and budget.

It is noteworthy that, in the area of defence industries more generally, the more important developments originate beyond the Lisbon Treaty altogether. After a series of initiatives assessing the serious economic problems facing the European defence industries,⁶⁰ and advocating the adoption of a wide range of measures,⁶¹ the Commission put forward its so-called defence package in December 2007, following which two specific measures have been adopted by the Council, namely, Directive 2009/43 on intra-EU transfers of defence products⁶² and Directive 2009/81 on public procurement in the fields of defence and security.⁶³ These aim to bring the benefits of the internal market to this sensitive area whilst acknowledging that the relevant products have special characteristics which may not be addressed by EU secondary legislation governing the movement and procurement of other, non-strategic goods. Another related development is about the only primary law provision which refers to the defence industries and which has long been interpreted by the Member States as *carte blanche* to exclude them from the application of Union law, namely,

⁵⁸ See, for instance, Declarations 13 and 14 concerning the common foreign and security policy.

⁵⁹ See Council Joint Action 2004/551/CFSP [2004] OJ L 245/17. For an early analysis, see S. N. Ferraro, 'The European Defence Agency: Facilitating Defence Reform or Forming Fortress Europe', (2006–2007) 16 *Transnat'l L. & Contemp. Probs* 549; and M. Trybus, 'The New European Defence Agency: A Contribution to a Common European Security and Defence Policy or a Challenge to the Community *Acquis*?' (2006) 43 *CMLRev* 667.

⁶⁰ COM(96) 10 final *The Challenges Facing the European Defence-Related Industry. A Contribution for Action at European Level* (adopted on 24 January 1996).

⁶¹ COM(97) 583 fin *Implementing European Union Strategy on Defence Related Industries* (adopted on 12 December 1987). See also COM(2003) 113 final *European Defence – Industrial and Market Issues. Towards an EU Defence Equipment Policy* (adopted on 11 March 2003).

⁶² [2009] OJ L 146/1.

⁶³ [2009] OJ L 216/76.

Article 346 TFEU.⁶⁴ Ending years of abuse and confusion as to its proper interpretation, the Commission suggested, in December 2006, that Article 346 TFEU (ex Article 296 EC) should be interpreted strictly and made it clear that any abusive practice by the Member States would be brought before the Court of Justice.⁶⁵

It becomes thus clear that, whilst indicative of the focus of the momentum that the CSDP has gathered over the recent years and the focus of the EU on its further development, the Lisbon provisions on military capabilities may play only a very limited role in progress on the ground in that area. Given the nature of security and defence at the very core of national sovereignty, the acknowledgement of the role of the States as fully responsible for their defence as well as for prioritising their defence spending and the availability of resources, the financial crisis and the ensuing cuts in the defence budgets of the EU military powers, and the distinctly inter-governmental character of cooperation set out in primary law, that the role of legal provisions such as those in the Treaties is inherently limited is hardly surprising.

B. Flexibility

The second interesting innovation introduced at Lisbon is the formalisation of flexibility. In other words, it sanctions formal arrangements which would enable groups of Member States to act together on their own. These may take different forms. On one hand, the Treaty introduces a 'willing and able' clause: The Union may entrust the execution of a task to a group of countries which are willing and have the necessary capabilities 'in order to protect the Union's values and serve its interests'.⁶⁶ Such execution would be done in accordance with the standard voting requirement, namely, unanimity,⁶⁷ and following a proposal by the High Representative or an initiative by a Member State. There are two substantive conditions which need to be met cumulatively: The first is subjective, and requires that the Member States involved be willing to implement the

64 ex Art. 296 EC.

65 COM(2006) 779 fin *Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement* (adopted on 7 December 2006). See P. Koutrakos, 'The Application of EC Law to Defence-Related Industries – Changing Interpretations of Article 296 EC', in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009), 307.

66 Arts 42(5) and 44 TEU.

67 Art. 42(4) TEU.

task in question; the second condition is objective, and requires that the Member States involved have the necessary capability for such a task. It is for the participating Member States to agree among themselves about the management of the task entrusted to them, albeit in association with the High Representative, whilst keeping the Council regularly informed.⁶⁸

On the other hand, the Treaty provides for 'permanent structured cooperation': This is about groups of Member States which meet certain criteria and have made certain commitments on military capabilities.⁶⁹ These commitments are set out in a Protocol annexed to the Treaty and are about coordinating investment expenditure on defence equipment; encouraging cooperation in the training and logistics; enhancing the availability, interoperability, flexibility and deployability of their forces; and participating in joint equipment programmes in the framework of the EDA.⁷⁰

That flexibility mechanisms should be viewed as a necessary component of an effective security and defence policy is entirely proper. In an entity as diverse in membership and defence capacity as the European Union is, flexibility would enhance its ability to assert its identity on the international scene. What is noteworthy in the mechanisms set out in the Lisbon Treaty, which originated in the Constitutional Treaty, is the increasing tendency in the EU towards not only an expansion of the scope of flexibility but mainly its formalisation. This is an important point because, as a matter of fact, there is a considerable degree of flexibility in how the Union carries out its defence policy anyway. For instance, not all Member States participate in all CSDP missions, and in any case, Member States have already pooled resources together and organised joint units (such as the battle groups).⁷¹ The other factor which needs to be taken into account when assessing the CSDP flexibility provisions is the vague wording. Much as the commitment to cooperation and coordination among the participating States is commendable, the requirements set out in the Treaty itself as well as the accompanying Protocol are couched in such broad terms that there are hardly any solid criteria to assess compliance – once again, it is for the Member States to determine what to make of them. In this respect, there has been some discussion amongst Member States

68 According to Art. 44(2) TEU, they 'shall keep the Council regularly informed'.

69 Art. 46 TEU.

70 See Art. 2 of the Protocol on permanent structured cooperation established by Article 42 of the Treaty on European Union.

71 See S. Biscop, 'Permanent Structured Cooperation and the Future of the ESDP: Transformation and Integration', (2008) 13 *EFA Rev* 431.

during the Belgian Presidency in the latter part of 2010, and a German-Swedish proposal for closer military cooperation.⁷² However, all these developments have been brought up by Member States, rather than by the Union institutions, and are more geared towards the rationalisation of military cooperation.

C. *The mutual assistance clause*

For the first time in the Union's constitutional history, the Lisbon Treaty introduced a mutual assistance clause. This is laid down in Article 42(7) TEU and refers to cases in which a Member State is the victim from armed aggression on its territory. In this case, the other Member States 'shall have towards it an obligation of aid and assistance by all means in their power, in accordance with Article 51 of the United Nations Charter'.

This clause imposes a duty on Member States, the scope of which appears to be very broad: 'by all the means in their power'. The caveats set out are broad too, as they relate to compliance with international law,⁷³ the neutrality of certain Member States, and the fundamental choices about security and defence made by Member States in relation to NATO. This formulation of the mutual assistance clause is entirely consistent with the tenor of the CSDP and the balance it seeks to strike between the security and defence choices made by the Member States and the common policy it envisages for the Union.

However, the questions Article 42(7) TEU raise are how far are Member States required to go in order to comply with their duty of solidarity and how rigorous can the enforcement of this duty be. The Treaty's wording suggests that military means constitute merely one option open to a Member State when it examines how best to comply with its duty. It also suggests that compliance with the mutual assistance clause cannot but be dependent on the subjective assessment of a Member State as to how best

72 For a discussion of these developments, see S Biscop and J Coelmont, 'CSDP and the "Ghent Framework": The Indirect Approach to Permanent Structured Cooperation', (2011) 16 *EFA Rev* 149.

73 According to Art. 51 UN Charter, '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security'.

it may assist another Member State which is a victim of armed aggression on its territory. This assessment is subject to multifarious considerations, not least of which are of a political and economic nature. Such inherently indeterminate criteria do not lend themselves to a rigorous mechanism of verification or control. There can be no agreed-on assessment mechanism as to whether, for instance, military means should be relied on by all Member States. After all, the EU is not a military alliance, and the mutual assistance clause does not render it one.⁷⁴

The preceding discussion does not mean to suggest that the provision of Article 42(7) TEU is not significant. On one hand, it is a specific illustration of political solidarity, one of the main pillars of the CFSP as laid down in Article 24(3) TEU. As such, it may appear to merely state the obvious. However, when it comes to the Union's foreign policy, the obvious often needs to be stated. Recall that when Greece claimed that its territorial integrity was undermined by Turkey in the Imia incident in December 1995 and when Spain made a similar claim regarding Morocco in the Leila incident in July 2002, their fellow Member States failed woefully to provide any substantial support in terms of political solidarity, let alone even assurances about military assistance.⁷⁵ It is against this background that the mutual assistance clause must be understood. On the other hand, the interpretation of the mutual assistance clause is subject to continuous redefinition: The development of the CSDP and of political solidarity in general, as well as of common structures of military capabilities in particular, is bound to have an impact on how close to the military end of the scale Member States would be prepared to go in order to assist a Member State under attack.

Another function of the mutual assistance clause is noteworthy: Against the various CSDP missions carried out in far-flung places and export EU values to third parties, it renders the CSDP relevant to the Union's citizens in a much more direct manner. In other words, it bolsters a sense of belonging by reaffirming the solidarity between Member States. However, its practical significance should a crisis occur is another matter altogether.

74 See also J.-C. Pirijs, *The Lisbon Treaty-A Legal and Political Analysis* (Cambridge: Cambridge University Press, 2010), 275. See also P. Koutrakos, 'The Law in Common Security and Defence Policy: Functions, Limitations, and Understandings', in P. Koutrakos (ed.), *The Foreign Policy of the European Union – Legal and Political Aspects* (London: Edward Elgar Publishing, 2011), 235.

75 See J. Monar, 'The CFSP and the Leila/Perejil Island Incident: The Nemesis of Solidarity and Leadership', (2002) 7 *EFA Rev* 251.

5. Conclusion

Compared to the raving statements of the various Union actors, this Chapter paints a more nuanced picture of the main innovations introduced by the Lisbon Treaty in the area of the CFSP. Rather than providing the answers to the Union's questions about a more effective and coherent foreign policy, the new Treaty shapes a new negotiating environment within which the political will of the Member States may decide how to use the new toolkit it provides. The inter-institutional skirmishes which have characterised the Union's international action will by no means become a thing of the past, and the practical problems which have hampered the development of a truly effective security policy will not simply evaporate. As all these form, part and parcel, the Union's deeply idiosyncratic constitutional set up, they will continue to affect the conduct of foreign affairs, albeit in the revamped framework set out by the Lisbon Treaty.

In effect, this analysis of the Lisbon Treaty illustrates the limits of primary legal rules. Another way of making this point is to notice what the Treaty fails to mention. In the area of external economic relations, for instance, there is no reference to the duty of cooperation. This has been developed by the Court of Justice over the years as binding both the EU institutions and the Member States in the process of negotiation, conclusion, and application of mixed agreements.⁷⁶ As it refers to areas where the EU shares competence with its Member States, this duty is central to the conduct of EU external action. It has become a central constitutional principle which governs the complex and multilayered system of EU external relations. And yet, the Lisbon Treaty which purports to streamline and organise this system fails to mention it in this specific context. However, this will by no means render the principle any less important, nor will it prevent the Court from developing further its interpretation.

⁷⁶ See *Opinion 1/91* (re: ILO) [1993] ECR I-1061, *Opinion 1/94* (re: WTO) [1994] ECR I-5267, *Case C-25/94 Commission v. Council (FAO)* [1996] ECR I-1469, *Case C-266/03 Commission v. Luxembourg* [2005] ECR I-4805m *Case C-459/03 Commission v. Ireland* (re: *Mox Plant*) [2006] ECR I-4635, *Case C-246/07 Commission v. Sweden*, judgment of 20 April 2010, not yet reported. See M. Cremona, 'Defending the Community Interest: The Duties of Cooperation and Compliance', in M. Cremona and B. de Witte (eds.), *EU Foreign Relations Law-Constitutional Fundamentals* (Oxford: Hart Publishing 2008) 125; and C. Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation"', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited – The EU and its Member States in the World* (Oxford: Hart Publishing 2010), 87.

Finally, in policy terms, it is the substantive initiatives undertaken by the EU institutions and the Member States which determine the effectiveness of the Union's international action, as well as other multifarious factors, such as political developments in the Member States, the international geopolitical context, and the economic environment. Furthermore, one should not forget that the international role of the EU is intrinsically linked to its internal policies. This link becomes more significant in the current economic and political climate in which Member States are prepared to flex their protectionist reflexes, the stability of the euro is seriously challenged, and the European leaders have failed to tackle the crisis with imagination and decisiveness. It is worth recalling that the starting point for the Union's international role is its success as a major economic player and a laboratory for innovative transnational economic governance. The existential crisis the Union has been suffering in the light of the fundamental problems of its eurozone is bound to affect the Union's international posture, hence creating policy problems which the legal rules of the Lisbon Treaty would be inherently unsuitable to address.