12

External Union policies

A substantive overview

Introduction

While it might have been possible for states to isolate themselves from international politics in the nineteenth century,[1] the economic and social globalisation in the twenty-first century has made this choice impossible.[2] Not only have (almost) all markets become 'internationalised',[3] the ability of states unilaterally to guarantee internal security or external peace have dramatically declined. The contemporary world is an *international* world – a world of *collective* trade agreements and *collective* security systems.[4] The European Union – as a union of states – embodies this collective spirit on a regional (international) scale. However, even the Union cannot isolate itself from globalisation and international politics. On the contrary, it was destined – in due course – to become a significant international actor in its own right.[5]

[1] On the United States following a policy of isolationism until the First World War, see G. C. Herring, *From Colony to Superpower: U.S. Foreign Relations since 1776* (Oxford University Press, 2011).

[2] On social and economic globalisation, see D. Held and A. McGrew (eds.), *The Global Transformations Reader: An Introduction to the Globalisation Debate* (Cambridge: Polity Press, 2003).

[3] For a historical overview, see R. Cameron and L. Neal, *A Concise Economic History of the World* (Oxford University Press, 2003); see also J. Viner, *Studies in the Theory of International Trade* (Clifton, NJ: Augustus M. Kelley, 1975).

[4] These international 'collective' systems may be regional or global in scope. For a regional trade or security system, see the North American Free Trade Association (NAFTA) and the North Atlantic Treaty Organization (NATO). For a global trade or security system, see the World Trade Organization (WTO) and the United Nations (UN).

[5] The 1957 Treaty of Rome had already acknowledged the legal personality of the European Community. However, in its first three decades of life, the Union naturally concentrated on its internal affairs. Since then, the Union has become an increasingly active – and highly analysed – international actor on the world scene. For a political science overview of the EU as an international actor, see C. Hill and M. Smith, *International Relations and the European Union* (Oxford University Press, 2011), as well as K. Smith, *European Union Foreign Policy in a changing World* (Cambridge: Polity, 2008).

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What type of international actor is the European Union? The Union is often characterised as a 'civilian' power on the international scene.[6] This international role was a reflection of its domestic constitution. For the European Treaties originally entitled the Union solely to pursue two external policies. The Common Commercial Policy empowered the Union to engage in international trade policies, while its competence to conclude association agreements entitled it to create trade 'leagues' with third countries. On the basis of these two competences, a third policy gradually emerged: the Union's development policy. With time, the Union would indeed become one of the most important international donors of Third World aid.[7] For a long time the Union thus exercised only economic powers, yet its classification as a civilian – as opposed to military – power must today be (partly) qualified.[8] For with the incorporation of the Common Foreign and Security Policy into the European Treaties,[9] the Union has been actively engaged in the fight against international terrorism and may even deploy its own military capabilities abroad.

Unable to explore all aspects of the Union's substantive relations with the outside world, this final chapter wishes to provide an overview of the four most important external policies of the Union. Section 1 starts with the Common Commercial Policy, which represents the 'oldest' and most centralised external policy. It is set out in Title II of the External Action Part of the TFEU, and provides the Union with an exclusive competence within this field. Section 2 looks at the complex constitutional foundations of the Union's development policy. The latter has drawn on various parts within the Treaties, of which Chapter 2 within Title III of the External Action Part of the TFEU represents only part of the picture. Section 3 moves to the Common Foreign and Security Policy. The latter touches upon the very

[6] On the Union as a 'civilian power', see F. Duchêne, 'The European Communities and the Uncertainties of Interdependency' in M. Kohnstamm and W. Hager (eds.), *A Nation Writ Large? Foreign Policy Problems Before the European Communities* (London: Macmillan, 1973). On the classification of 'civilian' and 'military' power more generally, see E. H. Carr, *The Twenty Years' Crisis 1919–1939: An Introduction to the Study of International Relations* (London: Macmillan, 2001).

[7] The notion of the 'Third World' was originally coined during the twentieth century's 'Cold War'. It described those countries that were neither part of the (capitalist) 'Western World' nor part of the (communist) 'Eastern World'.

[8] See K. Smith, 'The End of Civilian Power EU: A Welcome Demise or Cause for Concern?' (2000) 35 *The International Spectator* 11.

[9] This happened in 1992 through the (Maastricht) Treaty on European Union. For an analysis of this historical period, see R. Schütze, *European Constitutional Law* (Cambridge University Press, 2012), 27 *et seq.*

Table 12.1 *Union external policies (details)*

TFEU		TEU
Part IV: Association of Overseas Countries		Article 8
		European Neighbourhood Policy
Part V: External Action		**Title V: CFSP**
Title II		**Chapter 2** Specific Provisions on the CFSP
Common Commercial Policy		
Title III		**Section 1** Common Provisions
Cooperation Third Countries		**Section 2** Common Security and Defence Policy
Chapter 1 Development Cooperation		
Chapter 2 Technical Assistance		
Chapter 3 Humanitarian Aid		
Title IV Restrictive Measures		
Title V International Agreements		
Article 217 Association Agreements		Article 49 EU Membership
Protocol No. 10 'On Permanent Structured Cooperation'		
Protocol No. 11 'On Article 42 TEU'		
Protocol No. 22 'On the Position of Denmark'		
Annex II: 'Overseas Countries and Territories to which Part IV TFEU applies'		

heart of the Member States' external sovereignty; and it has therefore been subject to very rigid political safeguards of federalism. Last but not least, section 4 explores the 'politics' of association and enlargement. While not styled as external 'policies', the Union has nonetheless turned both into formidable strategic tools to 'export' its values.

1 Common Commercial Policy

The internationalisation of trade constitutes *the* political legacy of the second half of the twentieth century.[10] In our time, each and every state – while formally sovereign – will substantially depend on the 'world market'. The latter provides the trade 'theatre' in which goods, services and capital are exchanged. The idea of free trade between states originated

[10] See R. Findlay and K. H. O'Rourke, *Power and Plenty* (Princeton University Press, 2009), ch. 9. On the political rise and fall of the 'second' world within this part of that century, see A. Brown, *The Rise and Fall of Communism* (London: Vintage, 2010).

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in the eighteenth century, when Adam Smith prophesied the increased wealth of nations through an international division of labour.[11] However, states would only slowly agree to remove national trade barriers designed to protect their respective domestic market from foreign competition. Historically, the classic tool of trade protectionism is the territorial tariff. Tariffs are customs duties that are charged when foreign goods cross a domestic frontier. Their progressive abolition constitutes the heart of modern trade liberalisation, whose best legal expression are the 1947 General Agreement on Tariffs and Trade (GATT) and the 1995 World Trade Organization (WTO).

While many third states nonetheless continue to enjoy considerable trade powers under international law, the competence over external trade belongs – within Europe – exclusively to the European Union.[12] The Common Commercial Policy (CCP) constitutes the centre-piece of EU external relations.[13] Complementing its internal customs union,[14] the CCP allows the Union – among other things – to choose *which* tariffs for *which* goods from *which* countries. This choice entails a formidable political dimension in that the Union can grant preferences to certain goods or certain countries.

The constitutional locus of the CCP is Title II of the External Action Part of the TFEU. It consists of two provisions: Articles 206 and 207 TFEU. The former sets out the objectives of the policy. They are 'the *harmonious development* of world trade, the *progressive abolition* of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers'.[15] Article 207 then grants the Union a competence to achieve these objectives. It is the central provision within this Title and the outcome of a number of fierce judicial and constitutional battles in the past fifty years. In order to understand the complex case

[11] A. Smith, *Wealth of Nations* (Oxford University Press, 1998).
[12] Art. 3(1)(e) TFEU.
[13] P. Eeckhout, *EU External Relations Law* (Oxford University Press, 2012), 439.
[14] The provisions dealing with the 'customs union' can be found in Chapter 1 ('The Customs Union') of Title II ('Free Movement of Goods') within Part III ('Union Policies & Internal Actions'). According to Art. 28(1) TFEU: 'The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.' And according to Art. 31 TFEU, 'Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.' That provision – together with Art. 207 TFEU – empowers the Union to set its customs tariffs for imports from third states. The Union's – enormous – Customs Code shall however not be discussed here.
[15] Art. 206 TFEU (emphasis added).

law developed thereunder, section 1(a) offers a brief historical overview of the evolution of the competence, after which we shall quickly look at the decision-making processes to exercise it. Sections 1(c) and (d) then analyse how the Union has made use of its competence to liberalise or regulate international trade. The two instruments expressly mentioned in Article 207 here are 'tariff and trade agreements' and 'autonomous' trade measures – that is, measures that are adopted without the participation of third states.

(a) The Union's CCP competence: scope and nature

When the Union came into being, there were few signposts establishing a conceptual fence around its CCP competence. The original Rome formulation stated in ex-Article 133 EC that 'the common commercial policy shall be based on uniform principles, *particularly* in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade'.[16] This definition was vague and only contained a list of non-exhaustive illustrations.[17] However, in view of the close constitutional connection between the CCP and the customs union,[18] it appeared that the Treaties had limited the CCP to trade in goods – a limitation that reflected (then) contemporary international economic law. Would trade in services and capital therefore be beyond the scope of the CCP; or was the latter 'the external projection of the internal market'?[19] And, secondly, would the CCP competence allow the Union merely to *de*-regulated international trade; or could it equally *regulate* it? Thirdly, what was the nature of this Union competence?

[16] Ex-Art. 113 EEC.

[17] This was subsequently clarified in Opinion 1/78 (International Agreement on Rubber) [1979] ECR 2871, para. 45: '[T]he enumeration in [ex-Article 133 EC] of the subjects covered by commercial policy . . . is conceived as a non-exhaustive enumeration which must not, as such, close the door to the application in a [Union] context of any other process intended to regulate external trade.'

[18] Ex-Art. 3(b) EEC seemed to confirm that by treating the common customs tariff and the CCP as Siamese twins; Art. 110 EEC read: 'By establishing a customs union between themselves, Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.'

[19] Emphasis added. See P. Demaret, 'La Politique commerciale: perspectives d'évolution et faiblesses présente' in J Schwarze and H Schermers (eds.), *Structure and Dimensions of European Community Policy* (Baden-Baden: Nomos, 1988), 69, 75.

Let us look at each question in turn – albeit in reverse order.

Early on, the Court clarified that the CCP was an exclusive Union competence. From a systemic point of view, ex-Article 133 EC did not appear destined for exclusivity;[20] yet the Court chose a teleological perspective in Opinion 1/75.[21] According to the Court, the harmonious operation of the institutional framework of the Union and the solidarity among its members would be called into question if the states retained an autonomous competence in this field.[22] The Union interest would not allow that the states' 'own interests were separately satisfied in external relations'. Only strict uniformity in the commercial relations with third countries would eliminate restrictions and the distortions of competition in the internal market. This judicial classification as an exclusive competence was confirmed in *Donckerwolcke*,[23] where the Court clarified that 'full responsibility in the matter of commercial policy was transferred to the [Union] by means of [ex-Article 133(1) EC]' with the consequence that national measures falling within the CCP competence were only permissible 'by virtue of specific authorization by the [Union]'.[24]

We find an answer to the second question in Opinion 1/78.[25] The Court was here requested to rule on whether the Union was entitled to conclude an international agreement on natural rubber, whose aim was not the liberalisation of trade but rather the international *regulation* of commodity prices in raw materials so as to assist developing countries.[26] Could this be done under the CCP? In the view of the Court this was the case:

> Although it may be thought that at the time when the Treaty was drafted liberalization of trade was the dominant idea, the Treaty nevertheless does not form a barrier to the possibility of the [Union] developing a commercial policy aiming at a regulation of the world market for certain products rather than at mere liberalization of trade.[27]

The Court thus rejected a Treaty interpretation that froze the CCP in historic time: 'an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to

[20] On this point, see Ch. 6, section 1(a) above.
[21] Opinion 1/75 (Draft understanding on a local cost standard) [1975] ECR 1355.
[22] *Ibid.*, 1364.
[23] Case 41/76, *Suzanne Criel, née Donckerwolcke and Henri Schou* v. *Procureur de la République au tribunal de grande instance de Lille and Director General of Customs* [1976] ECR 1921.
[24] *Ibid.*, para. 32.
[25] Opinion 1/78 (International Agreement on Natural Rubber) (1979) ECR 2871.
[26] *Ibid.*, para. 38. [27] *Ibid.*, para. 44.

have effect only on the traditional aspects of external trade' would render the commercial policy 'nugatory in the course of time'.[28] Changes in the mode of international economic relations on the world market – such as the transition from the *liberalisation* of trade to the *regulation* of trade – would thus automatically be reflected in the expanding scope of the CCP.[29]

Would this choice in favour of an open and dynamic CCP equally answer our first question? For even if the CCP had originally been confined to goods, trade in services had become an important item on the international agenda at the end of the twentieth century. Would it then not follow that if *(inter)national* commercial priorities had changed, the *Union* commercial policy would have to follow suit?[30] Surprisingly, the European Court rejected this logic in Opinion 1/94.[31] The Opinion concerned the scope of Union powers for the conclusion of the WTO Agreement (and its Annexes).[32] The WTO Agreement represents an international liberalisation effort beyond goods, which includes trade in services and intellectual property rights. But the Court famously refused to expand the scope of the Union competence in parallel with this novel international practice. It insisted instead that the CCP competence was centred on trade in goods.[33] The reason behind this restrictive interpretation – and

[28] *Ibid.*

[29] This has been confirmed in Case C-150/94, *United Kingdom* v. *Council* [1998] ECR I-7235, where the Court held (para. 67) that '[a]ccording to settled case-law, [the CCP] cannot be interpreted as prohibiting the [Union] from enacting any measure liable to affect trade with non-member countries. As is clear from the actual wording of the provision, its objective of contributing to the progressive abolition of restrictions on international trade cannot compel the institutions to liberalise imports from non-member countries where to do so would be contrary to the interests of the [Union].'

[30] Opinion 1/75, n. 21 above, stated that the concept of 'commercial policy' would have 'the same content whether it is applied in the context of the international action of a State or to that of the [Union]': Opinion 1/75, 1362.

[31] Opinion 1/94 (WTO Agreement) [1994] ECR I-5267.

[32] For an overview of the structure and content of the WTO Agreement, see below.

[33] The Court thus confirmed that the CCP covered GATT but rejected that it naturally extended to services. Only those services that were 'not unlike trade in goods' could be covered, see para. 44–5: 'As regards cross-frontier supplies, the service is rendered by a supplier established in one country to a consumer residing in another. The supplier does not move to the consumer's country; nor, conversely, does the consumer move to the supplier's country. That situation is, therefore, not unlike trade in goods, which is unquestionably covered by the common commercial policy within the meaning of the Treaty. There is thus no particular reason why such a supply should not fall within the concept of the common commercial policy. The same cannot be said of the other three modes of supply of services covered by GATS, namely, consumption abroad, commercial presence and the presence of natural persons.'

the resulting 'deformation' of the CCP when measured against international trade – appears to have been the exclusive nature of the Union competence.[34]

The 'ontologically' deformed scope of the CCP was (partly) remedied by the Nice Treaty,[35] which broadened ex-Article 133(5) EC to the fields of trade in services and commercial aspects of intellectual property.[36] However, the price for this expansion was the introduction of *non*-exclusive enclaves within the CCP competence. For the Union's newly added powers for services and intellectual property were *shared* powers within which a particular part even required mixed action by the Union and its Member States.[37] The Lisbon Treaty has finally simplified these maddeningly complicated competence arrangements. It has removed all enclaves of shared power from the scope of the CCP, and clarified that the entire competence constitutes an exclusive power of the Union.[38] The reformed text of the CCP competence can today be found in Article 207 TFEU, which states:

[34] The sharpest critique of Opinion 1/94 has come from the pen of Pierre Pescatore, who viewed Opinion 1/94 as a 'vast sham construction, put up to make us believe that the major part of the Agreement on "*trade* in services" and almost the entire Agreement on "*trade aspects* of intellectual property rights" are not "*trade* agreements" in the sense of [ex-Article 133 EC] and, to that extent, remain outside the EC's competence': P. Pescatore, 'Opinion 1/94 on "Conclusion" of the WTO Agreement: Is there an Escape from a Programmed Disaster?' (1999) 36 *CML Rev* 387, 393.

[35] On the Nice reform of the CCP provisions generally, see M. Cremona, 'A Policy of Bits and Pieces? The Common Commercial Policy after Nice' (2002) 4 *Cambridge Yearbook of European Legal Studies* 61; and C. Hermann, 'Common Commercial Policy after Nice: Sisyphus Would Have Done a Better Job' (2002) 39 *CML Rev* 7.

[36] The competences under ex-Art. 133(5)–(7) were treaty-making powers. They did not grant competence to the Community to adopt internal legislation. Herein lay the difference to the older powers listed under Art. 133(1)–(4) EC. The Nice Treaty here broke with the original symmetry in scope and content of the competence in the internal and the external sphere (see Case 45/86, *Commission* v. *Council (Generalised tariff preferences)* [1987] ECR 1493).

[37] *Contra*, M Krajewski, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy' (2005) 42 *CML Rev* 91, 96, 99. Para. 5 stipulated that agreements in the fields of trade in services and the commercial aspects of intellectual property 'shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organizations in so far as such agreements comply with Community law and other relevant international agreements'. And to protect the commercial powers of the Member States even further, ex-Art. 133(6) EC even constitutionalised the need for mixed agreements 'relating to trade in cultural and audiovisual services, educational services, and social and human health services', for the provision expressly required that these agreements 'be concluded *jointly* by the [Union] and the Member States' (emphasis added).

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

> The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods *and services, and the commercial aspects of intellectual property, foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.[39]

The present scope of the CCP consequently covers goods, services[40] and the commercial aspects of intellectual property. It equally includes 'foreign direct investment' – an additional area of enormous significance.[41]

Are there external limits to this competence? Article 207 mentions two such limits. First, it expressly excludes transport *agreements* from the scope of the CCP[42] and, secondly, the provision delphically states that the

[39] Art. 207(1) TFEU (emphasis added).

[40] The notion of 'services' under Art. 207 TFEU might be wider than the notion of 'services' within the internal market part of the Treaties. See Cremona, 'A Policy of Bits and Pieces?', n. 35 above, 69: '[W]ithin E[U] internal market law services are distinguished from establishment, largely on the basis of the inherently temporary nature of the provision of services. Within world trade law, on the other hand, services is a broader concept, encompassing aspects of establishment and indeed capital movement.'

[41] Eeckhout, *EU External Relations Law*, n. 13 above, 62: 'one of the most important expansions of the EU's competence in the whole of the Lisbon Treaty'. The reference to 'foreign direct investment' thereby refers to both EU investments in a third state as well as third state investment in the European Union. In Case C-446/04, *Test Claimants in the FII Group Litigation* v. *Commissioners of Inland Revenue* [2002] ECR I-11753, the Court gave the following definition of 'direct investment' (para. 181): 'the concept of direct investments concerns investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity'. This (relatively) restrictive definition of 'direct investment' would contrasts with the concept of 'portfolio investment' – that is, 'the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking ("portfolio" investments)'; see Joined Cases C-282/04 and C-283/04, *Commission* v. *Netherlands* [2006] ECR I-9141, para. 19. However, it has been doubted whether the Court will eventually draw this EU law distinction in the light of international investment law practice. For an extensive analysis of these general questions, see M. Krajewski, 'The Reform of the Common Commercial Policy' in A. Biondi, P. Eeckhout and S. Ripley (eds.), *EU Law after Lisbon* (Oxford University Press, 2012), 292, 301; and A. Dimopoulos, *EU Foreign Investment Law* (Oxford University Press, 2011).

[42] Art. 207(5) TFEU: 'The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.' In Opinion 1/2008 [2009] ECR I-11129, the Court interpreted the predecessor to this provision (ex-Art. 133(6) EC – third indent), and gave this an extremely broad reading. Finding that the Treaties had traditionally intended that 'trade in services in transport matters remained

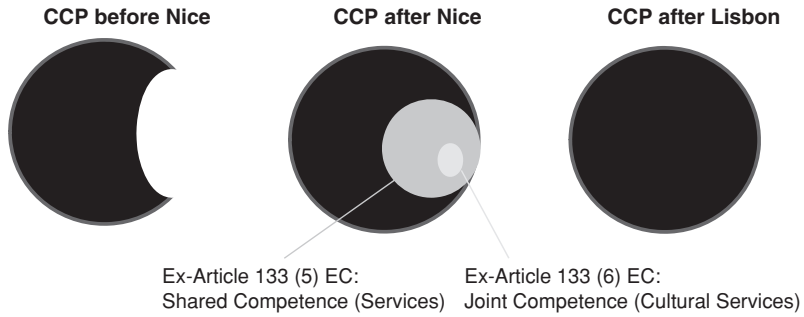

Figure 12.1 CCP competence – scope and nature

exercise of the Union's CCP competence 'shall not affect the delimitation of competences between the Union and the Member States';[43] nor shall it ever 'lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation'.[44] This second limitation appears to be designed to protect the Member States' 'reserved' powers under the Union's complementary competences. For it prohibits the exercise of Article 207, where the resultant international harmonisation would undermine the exclusion of Union harmonisation in the internal sphere.[45] If the Union wishes to act here, it can do so only in the form of a mixed agreement.[46]

wholly outside the common commercial policy' (*ibid.*, para. 162), the Court held that if Art. 207(5) TFEU would only be applicable in the case of agreements that are exclusively, or at the very least predominantly, concerned with transport that restrictive interpretation 'would to a large extent deprive that provision of its effectiveness' (*ibid.*, para. 163). In order to protect 'the distinctive features of transport' (see Art. 91 TFEU), the normal rules governing the choice of legal basis would therefore not apply. For an excellent discussion of the case, see M. Cremona, 'Balancing Union and Member State Interest: Opinion 1/2008, Choice of Legal Base and the Common Commercial Policy under the Treaty of Lisbon' (2010) 35 *EL Rev* 678.

[43] Art. 207 (6) TFEU – first alternative. This odd formulation may indicate an explicit rejection of the reasoning shown by the US Supreme Court in *Missouri* v. *Holland*, 252 US 416 (1920). The European Union's CCP competence would thus seem to find a systemic limit in the internal competences of the Union. However, that assumes that Art. 207 TFEU would go beyond the scope of Art. 352 TFEU – which is, in my opinion, very doubtful.

[44] Art. 207(6) TFEU.

[45] In this sense, Art. 207 TFEU is more restricted than Art. 114 TFEU. For in Case C-376/98, *Germany* v. *Council (Tobacco Advertising)* [2000] ECR I-8419, the Court allowed that competence to be used where the centre of gravity fell on Art. 114 TFEU.

[46] On mixed agreements in the Union legal order, see Ch. 5, section 2(c) above.

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(b) Decision-making and treaty-making procedure(s)

What are the procedural rules governing the exercise of Article 207? The provision distinguishes between autonomous acts and international agreements. In the adoption of *autonomous* acts, the Union will have to act 'by means of regulations in accordance with the ordinary legislative procedure'.[47] The latter involves the Commission, as well as the European Parliament and the Council – both acting under (qualified) majority rule. With regard to the negotiation of international agreements, the 'ordinary' treaty-making procedure applies,[48] but the latter is subject to the special provisions governing the role of the Commission set out in Article 207(3).[49] An agreement will thus generally be concluded by the Council acting by qualified majority,[50] and after having obtained the consent of the European Parliament.[51] Article 207(4) however contains a number of exceptions that require a unanimous decision within the Council. It states:

> For the negotiation and conclusion of agreements in the fields of trade in *services and the commercial aspects of intellectual property, as well as foreign direct investment*, the Council shall act unanimously *where such agreements include provisions for which unanimity is required for the adoption of internal rules.*

[47] Art. 207 (2) TFEU.

[48] On the procedure under Art. 218 TFEU, see Chs. 9 and 11 above.

[49] Art. 207(3) TFEU states: 'Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.' The special committee here mentioned is the Trade Policy Committee (formerly known as the Article 133 Committee).

[50] Art. 207(4) TFEU states: 'For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.'

[51] The role of the European Parliament within the CCP has been traditionally weak. The Lisbon Treaty has dramatically changed this, for Art. 218(6)(a)(v) TFEU now requires parliamentary consent to international agreements, where the legal basis internally envisages a legislative procedure – and this is the case for Article 207(2) TFEU. On the Parliament within the CCP, see M. Krajewski, 'Die neue handelspolitische Bedeutung des Europäischen Parlaments' in M. Bungenberg and C. Hermann (eds.), *Die gemeinsame Handelspolitik der europäischen Union nach Lissabon* (Baden-Baden: Nomos, 2011), 55.

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> The Council shall also act unanimously for the negotiation and conclusion of agreements:
> a. in the field of trade in *cultural and audiovisual services*, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
> b. in the field of trade in *social, education and health services*, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them. [Emphasis added.]

The provision distinguishes between a general exception to qualified majority voting in the first indent and two special exceptions in the second indent. Generally, all CCP agreements – apart from agreements on goods – will require unanimity in the Council, where they include '*provisions* for which unanimity is required for the adoption of internal rules'. This procedural parallelism between the internal and the external sphere is theoretically sound,[52] but matters little in practice. By contrast, the two special exceptions concern two special fields of trade in services, namely 'cultural and audiovisual services' and 'social, education and health services'. International agreements relating to these sensitive service industries will equally be subject to a national veto in the Council. This veto right is, however, not unconditional, for the objecting Member State will have to demonstrate that the international agreement is 'prejudicing' the interests mentioned in Article 207(4)(a) or (b) – a task that might prove difficult in the future.

(c) Tariff and trade agreements: multilateral and bilateral

(aa) The WTO Agreement: structure and content

How has the Union exercised its CCP competence? The Union has concluded an enormous range of international commercial agreements with third states. The most important agreement – by any standard – is here

[52] There have been critical voices of the procedural parallelism, see Cremona, 'A Policy of Bits and Pieces?', n. 35 above, 78: 'Nowhere else in the Treaties are express (attributed) *external* powers explicitly linked to attributed *internal* powers granted elsewhere in the Treaty'; and Eeckhout, *EU External Relations Law*, n. 13 above, 61: 'This provision appears to operate a dichotomy between internal and international action. The presumption is that the internal rules referred to are based on provisions in the Treaties, other than Article 207 TFEU, and require unanimity . . . This subparagraph appears to confuse trade policy powers with implied powers. The circumstances to which it refers are such that under the doctrine of implied powers the Treaty provision giving "internal" powers to the EU would have to be the legal basis for external action.'

Table 12.2 *WTO Annexes*

	WTO Agreement Annexes (selection)
Annex 1A	General Agreement on Tariffs and Trade (GATT)
	Agreement on Trade-related Investment Measures (TRIMS)
Annex 1B	General Agreement on Trade in Services (GATS)
Annex 1C	Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)
Annex 2	Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)
Annex 3	Trade Policy Review Mechanism
Annex 4	Agreement on Trade in Civil Aircraft
	International Dairy Agreement

the agreement establishing the WTO. This is a multilateral agreement that binds more than 150 states and, as such, epitomises – even if informally – the economic constitution of the world.[53] The Union is a party to the WTO Agreement, which thus binds the Union under international law.[54] The Agreement follows a complex structure. It was concluded to 'provide the common institutional framework for the conduct of trade relations among its Members',[55] and consequently sets out the constitutional provisions governing the WTO. Its substantive trade rules are only found in the various Annexes, which integrate a number of sector-specific trade agreements into the WTO Agreement (Table 12.2).[56]

[53] For an excellent analysis of the WTO Agreement, see A. F. Lowenfeld, *International Economic Law* (Oxford University Press, 2003).

[54] While international agreements of the Union will generally have internal effects within the Union legal order, the WTO Agreement(s) have consistently been denied such direct effect (see Case C-280/93, *Germany* v. *Council* [1994] ECR I-4973; and Case C-149/96, *Portugal* v. *Council* [1999] ECR I-8395). The Court has however accepted that the WTO Agreement(s) may have an indirect effect on the interpretation of Union legislation (see Case 70/87, *FEDIOL* v. *Commission* [1989] ECR 1781; Case C-69/89, *Nakajima All Precision* v. *Council* [1991] ECR I-2069; and Case C-61/94, *Commission* v. *Germany (International Dairy Agreement)* [1996] ECR I-3989). For an analysis of the effects of the WTO Agreement in the Union legal order, see Ch. 10 above.

[55] Art. II(1) WTO Agreement.

[56] *Ibid.*, Art. II(2) and (3): 'The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted

What are the fundamental economic principles governing world trade under the WTO Agreement? Its central objective is the liberalisation of international trade by reducing national protectionist barriers. The WTO Agreement thus outlaws quantitative restrictions (and measures having equivalent effect) on imports or exports,[57] and equally demands that imports 'be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws [and] regulations'.[58] Solely customs duties (and charges of equivalent effect) are recognised as legitimate barriers to international trade, yet only under the condition that they themselves are subjected to the Most-Favoured-Nation (MFN) principle. According to the MFN principle, any customs advantage granted by one state to another must automatically be accorded to *any third state* trading in a like product.[59] In this way, bilateral advantages originally reserved to a state's 'most-favoured' trading partner are multilateralised. However, WTO rules recognise two major exceptions to this rule. First, states may accord preferential treatment to developing countries[60] and, secondly, the MFN principle will not apply inside 'customs unions' or 'free trade areas'.[61]

them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.'

[57] Art. XI(1) GATT: 'No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.'

[58] Art. III(4) GATT.

[59] See Art. I(1) GATT: 'With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.'

[60] On this point, see section 2 below.

[61] Art. XXIV GATT, in particular paras. 4–5: 'The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement

(bb) Bilateral trade agreements of the Union

The European Union constitutes one of the most important economic blocs in the world. It has established a wide net of bilateral trade agreements with third states. Depending on whether or not they go beyond 'WTO treatment', one can distinguish between preferential and non-preferential trade agreements. An example of the latter could be seen in the 1994 Partnership and Cooperation Agreement between the Union and Russia, where the parties agreed to afford to each other MFN treatment.[62] Preferential trade agreements, by contrast, grant a specific advantage to a country that goes beyond WTO treatment. These agreements must – in order to conform with the WTO – either establish a customs union between the parties, or at least represent *reciprocal* free trade agreements.[63] A good illustration of such a free trade agreement is the EU–(South) Korea Agreement, whose principal objective is to 'establish a free trade area on goods, services, establishment' in conformity with Article XXIV GATT.[64] Similar agreements are currently negotiated with China, India and the United States of America.

(d) (Autonomous) liberalisation and protective measures

In addition to international agreements, the Union is entitled to adopt autonomous measures under its CCP competence. Article 207 describes these unilateral measures as 'measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies'.[65] Following this textual formulation, a classificatory dichotomy is usually adopted to distinguish between 'liberalisation measures' and 'protection measures'. The former category collects a range of tariff and non-tariff measures with regard to imports and export, while

necessary for the formation of a customs union or of a free trade area[.]' For the respective definitions of a 'customs union' and a 'free trade area', see *ibid.*, para. 8.

62 See 1994 Partnership and Cooperation Agreement between Russia and the European Communities (1997) OJ L 327/3, esp. Art. 10. Art. 13 continues: 'The following Articles of the GATT shall be applicable mutatis mutandis between the Parties: 1. Article VII, paragraphs 1, 2, 3, 4 (a), (b) and (d), 5; 2. Article VIII; 3. Article IX; 4. Article X.' On the direct effect of certain provisions of the agreement in the Union legal order, see Case C-265/03, *Simutenkov* v. *Ministerio de Educación y Cultura and Real Federación Española de Fútbol* [2005] ECR I-2579.

63 Non-reciprocal preferential agreements cannot be justified under Art. XXIV GATT.

64 See Free Trade Agreement between the European Union and its Member states, of the one part, and the Republic of Korea, of the other (2011) OJ L 127/6, Art. 1.

65 Art. 207(1) TFEU.

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Table 12.3 *Union autonomous measures*

Liberalisation measures		Protection measures
Union Imports	*Union Exports*	*Import/Exports*
Regulation 260/2009 on 'Common Rules for Imports'	Regulation 1061/2009 on 'Common Rules for Exports'	Regulation 1225/2009 on 'Protection against Dumped Imports'
Regulation 625/2009 on 'Common Rules for Imports from Certain Third Countries'	Regulation 428/2009 on 'Control of Exports . . . of Dual-use Items'	Regulation 597 on 'Protection against Subsidized Imports'
Regulations 3030/93 and 517/94 on 'Common Rules for Imports on Textile Products'	Regulation 116/2009 on 'Export of Cultural Goods'	Regulation 3286/94 on 'Exercise of the [Union's] Right under International Trade Rules'

the latter category groups a set of autonomous acts designed to protect the Union against illicit trade practices within third states. The most important measures for either category can be found in Table 12.3.

What are the Union's liberalisation measures? Following the trade regime established under the WTO, the Union's import regime outlaws any quantitative restrictions on imports.[66] The ability to import freely is however subject to so-called 'safeguard measures', '[w]here a product is imported into the [Union] in such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, serious injury to

[66] Art. 1(2) Regulation 260/2009 on the common rules for imports (Codified version) (2009) OJ L 84/1. The regulation expressly refers only to 'quantitative restrictions', and this was originally seen to exclude measures of equivalent effect to quantitative restrictions (see Case 51/75, *EMI Records Ltd* v. *CBS United Kingdom Ltd* (1976) ECR I-811, esp. para. 20). The Court has, however, subsequently interpreted the Union's export regime to extend to such measures. See Case C-83/94, *Leifer* [1995] ECR I-3231, para. 23: 'A regulation based on Article [207] of the Treaty, whose objective is to implement the principle of free exportation at the [Union] level, as stated in Article 1 of the Export Regulation, cannot exclude from its scope measures adopted by the Member States whose effect is equivalent to a quantitative restriction where their application may lead, as in the present case, to an export prohibition.' The same reasoning should apply, *mutatis mutandis*, to import restrictions.

[Union] producers'.[67] Moreover, the Union may exceptionally authorise the Member States to adopt import restriction, where they pursue a public interest justification.[68] This general Union regime is complemented by two special Union regimes – one in relation to particular countries, the second in relation to particular goods.[69] The former concerns countries that were formerly non-market economies for which a special surveillance regime is established.[70] The latter regime governs textile products,[71] where the Union is entitled to impose quantitative limits.[72]

The Union's export trade regime is similarly structured. The basic principle is again the principle of free trade: '[t]he exportation of products from the European [Union] to third countries shall be free, that is to say, they shall not be subject to any quantitative restriction'.[73] The general export regime however recognises two exceptions, namely where the Union wishes to prevent or remedy a 'shortage of essential products'[74] and where the Member States are authorised to impose export restrictions

[67] Art. 16 Regulation 260/2009. For a special transitional safeguard regime with regard to China, see Regulation 427/2003 on a transitional product-specific safeguard mechanism for imports originating in the People's Republic of China (2003) OJ L 65/1.

[68] Art. 24(2) Regulation 260/2009: 'Without prejudice to other [Union] provisions, this Regulation shall not preclude the adoption or application by Member States: (a) of prohibitions, quantitative restrictions or surveillance measures on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property[.]'

[69] *Ibid.*, Art. 1(1).

[70] See Regulation 625/2009 on common rules for imports from certain third countries (Codified version) (2009) OJ L 185/1, Annex 1 lists: Armenia, Azerbaijan, Belarus, Kazakhstan, North Korea, Russia, Tajikistan, Turkmenistan, Uzbekistan and Vietnam. For these countries, Art. 1(2) extends the freedom of importation and the abolition of quantitative restrictions, but subjects them to a special surveillance regime in Art. 9 of the Regulation.

[71] The Union here distinguishes whether the textile imports from third countries are covered by bilateral agreements between the country and the Union (see Regulation 3030/93 on common rules for imports of certain textile products from third countries (1993) OJ 275/1) or not (Regulation 517/94 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Community import rules (1994) OJ L 67/1).

[72] See Art. 2(1) Regulation 3030/93, n. 71 above: 'Importation into the [Union] of the textile products listed in Annex V originating in one of the supplier countries listed in that Annex shall be subject to the annual quantitative limits laid down in that Annex'; and Art. 3(1) Regulation 517/94, n. 71 above: 'Imports into the [Union] of textile products listed in Annex IV and originating in the countries indicated in that Annex shall be subject to the annual quantitative limits established in that Annex[.]'

[73] Art. 1 Regulation 1061/2009 establishing common rules for exports (2009) OJ L 291/1.

[74] *Ibid.*, Art. 6.

for energy-related products or on public policy grounds.[75] Two special export regimes complement this general Union regime. The first concerns so-called dual-use goods – that is, 'items, including software and technology, which can be used for both civil and military purposes'.[76] For these goods an export authorisation is required.[77] The same requirement governs the second special export regime for trade in cultural goods.[78]

What about the protective measures that the Union has adopted on the basis of Article 207 TFEU? The provision here expressly mentions measures taken in the event of dumping and subsidies. The Union has indeed adopted two regulations dealing with either situation – both of which entitle it to impose 'counter-customs'.[79] Regulation 1225/2009 allows the Union to impose an 'anti-dumping duty' on 'any dumped product whose release for free circulation in the [Union] causes injury'.[80] The Anti-Dumping Regulation considers a product being dumped 'if its export price to the [Union] is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country'.[81] Such a dumped product must cause a (negative) impact on the '[Union] industry'[82] – that is, the Union producers 'as a whole of the like products'

[75] *Ibid.*, Art. 9 – which allows for (transitional) restrictions for oil and gas products listed in Annex I of the Regulation; and Art. 10: 'Without prejudice to other [Union] provisions, this Regulation shall not preclude the adoption or application by a Member State of quantitative restrictions on exports on grounds of public morality, public policy or public security; the protection of health and life of humans, animals and plants; the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property.'

[76] Art. 2(1) Regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (2009) OJ L 134/1. For a list of these items, see Annex I.

[77] *Ibid.*, Art. 3(1). The authorisation form is attached in Annex II. For an analysis of the past and present dual-use regime, see P. Koutrakos, 'Export of Dual-use Goods under the Law of the European Union' (1998) 23 *EL Rev* 235; and A. G. Micara, 'Current Features of the European Union Regime for Export Control of Dual-use Goods' (2012) 50 *J of Common Market Stud* 578.

[78] Art. 2(1) Regulation 116/2009 on the export of cultural goods (Codified version) (2009) OJ L 39/1: 'The export of cultural goods outside the customs territory of the [Union] shall be subject to the presentation of an export licence.' The category of goods covered by the Regulation are listed in its Annex I, and includes, *inter alia*, archaeological objects more than 100 years old.

[79] In line with WTO law, only *tariff* restrictions are allowed.

[80] Art. 1(1) Regulation 1225/2009 on protection against dumped imports from countries not members of the European Community (2009) OJ 343/51.

[81] *Ibid.*, Art. 1(2). Art. 2 then sets out the rules for the 'determination of dumping' and in particular the procedure for the determination of the 'normal value' of a product.

[82] *Ibid.*, Art. 3(2).

or to a 'major proportion' of them.[83] Before the Union will adopt anti-dumping duties,[84] a third criterion must finally be satisfied: the adoption of such measures must be in the general Union interest.[85]

Complementing the Anti-Dumping Regulation,[86] Regulation 597/2009 allows the Union to impose a 'countervailing duty' to offset 'any *subsidy* granted, directly or indirectly' by a third state.[87] The Anti-Subsidy Regulation thus deals specifically with state aid granted 'for the manufacture, production, export or transport of any product whose release for the free circulation in the [Union] causes injury'.[88] It follows, *mutatis mutandis*, the legislative regime adopted for dumped products.[89]

In addition to these two 'defensive' instruments for trade protection, the Union has also adopted one 'offensive' instrument: the Trade Barrier

[83] *Ibid.*, Art. 4 (1).

[84] The Regulation here distinguishes between provisional duties (*ibid.*, Art. 7), which can be imposed for a maximum of 9 months (*ibid.*, Art. 7(7)), and definite duties (*ibid.*, Art. 9), which must expire after five years. Importantly, the anti-dumping duty must not exceed the dumping margin – that is, 'the amount by which the normal value exceeds the export price' (*ibid.*, Arts. 7(2) and 9(4), in combination with Art. 2(12)).

[85] *Ibid.*, Art. 21(1): 'A determination as to whether the [Union] interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers, and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the [Union] interest to apply such measures.' The provision thus allows for the inclusion of all affected branches of the Union industry as well as users and consumers; in other words, those interests that might benefit from the 'dumped' products.

[86] According to Art. 14 of Regulation 1225/2009 and Art. 24 of Regulation 597/2009 on protection against subsidised imports from countries not members of the European Community (Codified version) (2009) OJ L 188/93, both Regulations shall be mutually exclusive.

[87] Art. 1(1) Regulation 597/2009 (emphasis added). On the notion of subsidy, see *ibid.*, Art. 3. The provision defines the concept of 'subsidy' as a 'financial contribution by a government' (para. 1), whereby 'a benefit is thereby conferred' (para. 2). For a comparison between the notion of subsidy in this context and the Union concept of state aid, see L. Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford University Press, 2009).

[88] Art. 1(1) of Regulation 597/2009.

[89] The determination of injury is regulated in Art. 8 of the Regulation and hinges on a 'consequent impact' of the subsidised imports 'on the [Union] industry' – a concept that is defined in Art. 9 of the Regulation. In addition to a finding of a 'subsidy' and an 'injury', the Regulation also requires the existence of a Union interest in Art. 31.

Regulation.[90] It allows interested parties to attack trade barriers within third countries.

2 Development cooperation*

Title III within the External Action Part of the TFEU concerns 'Cooperation with Third Countries and Humanitarian Aid'. It is divided into three chapters. Chapter 1 deals with 'Development Cooperation' and consequently concerns '*developing* countries'.[91] Chapter 2 regulates the 'Economic, Financial and Technical Cooperation' with 'third countries *other than developing countries*'.[92] Chapter 3 provides the Union with a competence for 'Humanitarian Aid' for *any third* country that is the 'victim of natural or man-made disaster'.[93] The Union's development policy is undoubtedly the most politically significant competence within this Treaty Title. Indeed, the Union has become one of the largest donors of Third World aid and constitutes an international leader in development cooperation.[94]

* An extended version of this section has been published as 'EU Development Policy: Constitutional and Legislative Foundation(s)' in (2013) 15 *Cambridge Yearbook of European Legal Studies*.

90 Regulation 3286/94 laying down Community procedures in the field of the Common Commercial Policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (1994) OJ L 349/71 ('Trade Barrier Regulation'). Its Art. 1 states: 'This Regulation establishes [Union] procedures in the field of the common commercial policy in order to ensure the exercise of the [Union]'s rights under international trade rules, in particular those established under the auspices of the World Trade Organization which, subject to compliance with existing international obligations and procedures, are aimed at: (a) responding to obstacles to trade that have an effect on the market of the [Union], with a view to removing the injury resulting therefrom; (b) responding to obstacles to trade that have an effect on the market of a third country, with a view to removing the adverse trade effects resulting therefrom. These procedures shall be applied in particular to the initiation and subsequent conduct and termination of international dispute settlement procedures in the area of common commercial policy.'

91 Art. 208(1) TFEU – second indent (emphasis added).

92 Art. 212(1) TFEU (emphasis added).

93 Art. 214(1) TFEU. For an analysis of this competence, see M. Broberg, 'Undue Assistance? An Analysis of the Legal Basis of Regulation 1257/96 Concerning Humanitarian Aid' (2009) 34 *EL Rev* 769. The Union also enjoys a competence to act, where 'a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster' (Art. 222 TFEU). For an analysis of this 'solidarity clause', see T. Konstadinides, 'Civil Protection Cooperation in EU Law: Is there Room for Solidarity to Wriggle Past?' (2013) 19 *ELJ* 267.

94 M. Holland and M. Doidge, *Developing Policy of the European Union* (London: Palgrave Macmillan, 2012), 1.

The Union's competence over development aid has had a remarkably complex constitutional history in the past sixty years. With no express general competence in the original Treaties, it started as a regionally specific policy for French colonial Africa. In the aftermath of decolonisation, it was put on a new constitutional footing and broadened to cover the former dependencies of the United Kingdom. This special development policy for former colonies would gradually be complemented by a 'general' cooperation policy for all developing countries. This general policy was originally born within the context of the Common Commercial Policy.[95] Since the 1992 Maastricht Treaty, the Union also enjoys an express competence over development cooperation, which can today be found in Title III of the External Action Part of the TFEU.

This second section explores the multifarious constitutional foundations of the EU's development policy. Section 2(a) starts by analysing the general Union competence over development policy, while Section 2(b) subsequently explores the 'special' development policy that the Union has traditionally pursued towards the Member States' former dependencies. We shall see there that the Union continues to follow a two-track approach by maintaining a 'special' relationship with ex-colonies.

(a) Development policy: general relations

(aa) (Indirect) development cooperation under the Common Commercial Policy

In the absence of an express competence prior to the Maastricht Treaty, the Union's general policy choices towards the developing world were made under its CCP competence. From the start, the latter aimed at the '*harmonious development* of world trade'.[96] Would this curious reference entitle the Union to indirectly pursue development policy aims?

This European question was posed in an international context. For the imbalance in the structure of world trade became the subject of serious debate in the 1960s, when developing countries began to criticise the MFN principle within the GATT.[97] As the principle is based on the idea of formal equality, it seemed unable to accommodate the substantial inequality between the developing and developed world. The first United Nations Conference on Trade and Development (UNCTAD) consequently commended the establishment of a 'New International Economic Order' in

[95] Title II of Part V of the TFEU. [96] Ex-Art. 110 EEC – first indent (emphasis added).
[97] On the MFN clause within the GATT/WTO, see section 1 above.

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1968,[98] and in particular the creation of a system of tariff preferences for developing countries. This recommendation was heeded in 1971, when the GATT recognised an exception to the rule of tariff equality in favour of developing countries.[99] This reformed GATT system henceforth positively permitted states to discriminate between developed and developing countries by allowing lower tariffs for the latter. Yet in the spirit of formal equality, the GATT insisted that all such tariff preferences be 'generalised' – that is, they must apply to *all* developing countries. The single exception to this rule concerned the category of least-developed countries, for these poorest amongst the poor were allowed to benefit from an especially preferential treatment.[100]

The international idea of tariff preferences for developing countries was swiftly taken up by the European Union. As the very first international actor, it established a Generalised System of Preferences (GSP) for developing countries.[101] This generalised system was 'based on the principle of the *unilateral* grant by the [Union] of tariff advantages in favour of products originating in certain developing countries with the aim of facilitating the flow of trade with those countries'.[102] But could such a preferential tariff system be based on the Union's commercial

[98] For an overview of the ideas behind the 'New International Economic Order', see J. A. Hart, *The New International Economic Order* (London: Palgrave Macmillan, 1983); and M. Hudson, *Global Fracture: The New International Economic Order* (London: Pluto, 2005).

[99] In 1971, the GATT first granted a temporary waiver from the MFN Principle – allowing for tariff preferences for developing countries (see Decision of the Contracting Parties of 25 June 1971, relating to the establishment of 'generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries' (BISD 18S/24)). This temporary solution became permanent in 1979 when the GATT integrated an 'Enabling Clause' (see Decision of 28 November 1979 (L/4903)), which states: 'Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES decide as follows: 1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties. 2. The provisions of paragraph 1 apply to the following: *a)* Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences[.]'

[100] See 'Enabling Clause' (*ibid.*), para. 2(d): 'Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.'

[101] See Regulations 1308–1314/71. For an English translation, see www.wto.org/gatt_docs/English/SULPDF/90840264.pdf.

[102] Case 827/79, *Amministrazione delle finanze dello Stato* v. *Entreprise Ciro Acampora* [1980] ECR 3731, para. 5 (emphasis added).

policy competence? The European Court of Justice gave a clear and positive answer in *Commission* v. *Council (Generalized Tariff Preferences)*.[103] The Commission had challenged two Council regulations establishing tariff preferences for developing countries that had been (partly) based on Article 352 TFEU – the Union's residual power clause. The Council had adopted the acts on this legal basis 'because it was convinced that the contested regulations had not only commercial-policy aims, but also major development-policy aims'; and in the absence of a Union development policy competence, recourse to the residual power had been thought necessary.[104] The Court disagreed. Drawing on the novel conception of international trade within the United Nations, it held:

> The link between trade and development has become progressively stronger in modern international relations. It has been recognized in the context of the United Nations, notably by the United Nations Conference on Trade and Development (UNCTAD), and in the context of the GATT, in particular through the incorporation in the GATT of Part IV, entitled 'Trade and Development'. It was against that background that the model was evolved on which the [Union] system of generalized preferences, partially implemented by the Regulations at issue, was based. That system reflects a new concept of international trade relations in which development aims play a major role. In defining the characteristics and the instruments of the Common Commercial Policy in Article [206 *et seq.*], the Treaty took possible changes into account.[105]

The Union was consequently entitled to adopt its generalised system of tariff preferences exclusively under its CCP competence – even if that system had not been designed from a trade liberalisation perspective but '*from the point of view of a development policy*'.[106]

What kind of tariff preferences does the Union offer to developing countries? The Union's most recent GSP has been adopted in the form of Regulation 978/2012.[107] This 'GSP Regulation' applies for the period 2014–23. It distinguishes between three categories of tariff preferences: a

[103] Case 45/86, *Commission* v. *Council (Generalised Tariff Preferences)* [1987] ECR 1493. But see also *Hauptzollamt Würzburg* v. *H. Weidenmann GmbH & Co.* [1982] ECR 2259.
[104] Case 45/86, *Commission* v. *Council*, n. 103 above, para. 10. [105] *Ibid.*, paras. 17–19.
[106] *Ibid.*, para. 19 (emphasis added). See also Opinion 1/78 (International Agreement on Natural Rubber) [1979] ECR 2871.
[107] Regulation 978/2012 applying a scheme of generalised tariff preferences, (2012) OJ L 303/1. According to Art. 43 of the Regulation, this new tariff regime will apply from 1 January 2014.

'general arrangement' applicable to *all* developing countries is complemented by two special arrangements for *some* developing countries.[108] The general arrangement is set out in Chapter 2 of the Regulation. It suspends all customs duties on non-sensitive products that originate in developing countries;[109] whereas for all sensitive products, on the other hand, the Common Customs Tariff for *ad valorem* duties is reduced by 3.5 per cent.[110]

What about the two special tariff preference arrangement within Regulation 978/2012? Chapter 3 deals with the so-called GSP+ arrangement and provides a 'special incentive arrangement for sustainable development and good governance'. The GSP+ system thereby ties additional tariff reductions to the ratification by developing countries of international conventions that are considered to further the aims of sustainability and democracy.[111] Importantly, not all GSP products are also GSP+ products.[112] But for those GSP+ products, *ad valorem* duties will principally be suspended altogether.[113] This form of 'positive conditionality' has been very controversial in the light of the GATT rules.[114] For it appears to

[108] Art. 1(2) of Regulation 978/2012. Any preferential treatment may be withdrawn in certain circumstances. The Regulation thereby distinguishes between the temporary withdrawal due to certain unacceptable circumstances in the beneficiary country, such as systematic violations of international law (*ibid.*, Arts. 19–21), and the situation '[w]here a product originating in a beneficiary country of any of the preferential arrangements referred to in Article 1(2), is imported in volumes and/or at prices which cause, or threaten to cause, serious difficulties to Union producers of like or directly competing products, normal Common Customs Tariff duties on that product may be reintroduced' (*ibid.*, Art. 22(1)).

[109] Art. 7(1) of Regulation 978/2012. These non-sensitive products are listed in Annex V. The list of eligible countries is established in Annex II of the Regulation.

[110] Art. 7(2) of Regulation 978/2012. There are a number of special rules for certain categories of sensitive products in Art. 7(2)–(6). Moreover, there is also an absolute limit to these tariff preferences: they will be suspended 'in respect of products of a GSP section originating in a GSP beneficiary country, when the average value of Union imports of such products over three consecutive years from that GSP beneficiary country exceeds [17, 5%]': *ibid.*, Art. 8(1) and Annex VI (1).

[111] Art. 9 of Regulation 978/2012. The Conventions are listed in Annex VIII.

[112] See Art. 11 of Regulation 978/2012, which states: '1. The products included in the special incentive arrangement for sustainable development and good governance are listed in Annex IX. 2. The Commission shall be empowered to adopt delegated acts, in accordance with Article 36, to amend Annex IX to take into account amendments to the Combined Nomenclature affecting the products listed in that Annex.'

[113] Art. 12(1) of Regulation 978/2012. For a number of exceptions to this rule, see *ibid.*, para. 2.

[114] On the notion of 'positive conditionality' and the conformity of the GSP+ with the WTO, see L. Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' (2003) 6 *Journal of International Economic Law* 507; and

be a *non*-generalised preference for *some* developing countries.[115] Finally, Chapter 4 sets out the second special arrangement vis-à-vis Least Developed Countries (LDCs).[116] For these countries, the Union suspends all duties and quotas on all products – except arms. This non-reciprocal trade arrangement is also called the 'Everything but Arms' (EBA) treatment,[117] and has been celebrated as 'the showcase of the development-friendly nature of EU trade policy'.[118]

(bb) From trade to aid: direct development policy

Trade preferences are only an *indirect* form of development policy. They will assist developing countries to gain market access *if they trade* with the developed world; but in the absence of trade no commercial assistance can be given. Development trade is indeed not direct development aid. A Union competence to grant development aid was however conferred in 1992,[119] and can today be found in Article 209 TFEU. The provision entitles the Union to adopt legislative measures or conclude international agreements 'necessary for the implementation of development cooperation policy, which may relate to multi-annual cooperation programmes with developing countries or programmes with a thematic approach'.[120] What is the scope and character of this competence? And in what ways has it been used to aid developing countries?

(i) Constitutional foundations: the development cooperation competence What is the scope of the Union's development cooperation competence? Its scope is defined and dependent on the Union's development objectives. Prior to the Lisbon Treaty, the Union's broad development

L. Bartels, 'The WTO Legality of the EU's GSP+ Arrangement' (2007) 10 *Journal of International Economic Law* 869.

115 These countries are listed in Annex III of Regulation 978/2012.

116 These countries are listed in Annex IV of Regulation 978/2012.

117 This rule originated in the 'Everything but Arms' Regulation, see Regulation 416/2001 amending Regulation (EC) No. 2820/98 applying a multi-annual scheme of generalised tariff preferences for the period 1 July 1999 to 31 December 2001 so as to extend duty-free access without any quantitative restrictions to products originating in the least developed countries ((2001) OJ L 60/43).

118 G. Faber and I. Orbie, 'Everything but Arms: Much More than Appears at First Sight' (2009) 47 *J of Common Market Stud* 767, 768.

119 The EC Treaty contained two legal bases within its original Title on 'Development Cooperation': Art. 179 EC allowed for the adoption of unilateral measures in the form of multi-annual programmes, while Art. 181 EC entitled the Union to conclude international agreements.

120 Art. 209(1) and (2) TFEU.

objectives were set out in ex-Article 177 EC. The provision originally provided as follows:

> 1. [Union] policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster:
>   – the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them,
>   – the smooth and gradual integration of the developing countries into the world economy,
>   – the campaign against poverty in the developing countries.
> 2. [Union] policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.

These were very broad development objectives, which provided the Union with a very broad development competence. The broad scope of the competence was clarified in *Portugal* v. *Council*.[121] Portugal had challenged an international agreement that contained a number of clauses that it argued were beyond development cooperation – a charge that the Court dismissed: 'the fact that a development cooperation agreement contains clauses concerning various specific matters cannot alter the characterization of the agreement, which must be determined having regard to its essential object and not in terms of individual clauses'.[122] The Court consequently found that the challenged provisions on energy, tourism, culture, drug abuse and intellectual property rights could legitimately be part of a Union agreement concluded under its development competence.[123] Even a clause making the respect for human rights and democratic principles an *essential* element of the agreement could validly be included.[124]

This broad reading of development cooperation was subsequently confirmed in *ECOWAS*.[125] Here the Court had to deal with the question of whether a clause combating the spread of small arms and light weapons

[121] Case C-268/94, *Portugal* v. *Council* [1996] ECR I-6177. For an extensive analysis of this case, see S. Peers, 'Fragmentation or Evasion in the Community's Development Policy? The Impact of Portugal v. Council' in A. Dashwood and C. Hillion, *The General Law of E.C. External Relations* (London: Sweet & Maxwell, 2000), 100.

[122] Case C-268/94, *Portugal* v. *Council*, para. 39.

[123] *Ibid.*, paras. 55, 60, 76.

[124] *Ibid.*, paras. 24–9.

[125] Case C-91/05, *Commission* v. *Council (ECOWAS)* [2008] ECR I-3651. For an extensive discussion of this case, see C. Hillion and R. Wessel, 'Competence Distribution in EU External Relations after ECOWAS: Clarification or continued Fuzziness?' (2009) 46 *CML Rev* 551.

could potentially be based on the Union's development competence. This was particularly doubtful as the fight against these weapons appeared to be closely related to the Common Foreign and Security Policy of the Union.[126] Recalling the three broad objectives mentioned in ex-Article 177 EC, the Court nonetheless confirmed the constitutional availability of the Union's development competence even in this context. The Court summed up its view as follows:

> While the objectives of current [Union] development cooperation policy *should therefore not be limited to measures directly related to the campaign against poverty*, it is none the less necessary, if a measure is to fall within that policy, that it contributes to the pursuit of that policy's economic and social development objectives. In that regard, it is apparent from a number of documents emanating from the Union institutions and from the European Council that certain measures aiming to prevent fragility in developing countries, including those adopted in order to combat the proliferation of small arms and light weapons, *can contribute to the elimination or reduction of obstacles to the economic and social development of those countries.*[127]

The judgment suggested two things. First, the aims of development cooperation as set out in ex-Article 177 EC went beyond poverty reduction and thus covered broader economic and social development objectives. Secondly, these broad development objectives could potentially overlap with the even broader objectives underlying the Common Foreign and Security Policy;[128] and where this appeared to be the case, the Court would closely scrutinise whether such a security or stability measure actively contributed to the economic or social development of the third country.[129]

Has the Lisbon Treaty limited this wide ambit of the Union's development competence? The argument could indeed be made. For unlike the

[126] On the scope and nature of the CFSP, see section 3 below.

[127] Case C-91/05, *Commission* v. *Council (ECOWAS)*, paras. 65–8 (emphasis added).

[128] On the demarcation between the CFSP and other external policies of the Union in the light of Art. 40 TEU, see Ch. 9, section 1(d) above.

[129] On this point, see also Case C-403/05, *Parliament* v. *Commission (Philippine Borders)* [2007] ECR I-9045. In this case Parliament had sought annulment of a Commission decision approving a project relating to the security of the borders of the Republic of the Philippines. Parliament argued that the project pursued the aim of international security and the fight against terrorism and as such would not form part of development cooperation (*ibid.*, para. 41). The Court partly accepted this argument by insisting that 'there is nothing in the contested decision to indicate how the objective pursued by the project could contribute effectively to making the environment more conducive to investment and economic development': *ibid.*, para. 67.

various objectives mentioned in ex-Article 177 EC, the new Article 208 TFEU focuses on the – sole – primary objective of poverty reduction. The new provision states:

> Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action . . . Union development cooperation policy shall have as its *primary objective the reduction and, in the long term, the eradication of poverty.*[130]

This new formulation of the Union's development objective(s) would seem to drastically confine the scope of Article 209 TFEU to poverty reduction. This has been contested.[131] However, while it is true that the objectives of 'the sustainable economic and social development', 'the smooth and gradual integration of the developing countries into the world economy' and that of 'respecting human rights' remain *general* external objectives of the Union;[132] they are no longer *specific* development policy objectives. Article 209 TFEU therefore appears to have a much sharper focus than its predecessor, for, since the general external relations objectives have become 'secondary' or 'incidental' to poverty reduction,[133] Union measures that principally pursue these general objectives would – in theory – have to be adopted on a different legal base.

[130] Art. 208(1) TFEU (emphasis added).

[131] See M. Broberg, 'What Is the Direction of the EU's Development Cooperation after Lisbon' (2011) 16 *EFAR* 539, 546: '[T]he Lisbon Treaty has not led to a limitation of the objectives that will guide the EU's development cooperation policy'; and B. Martenczuk, 'Die Kooperation der Europäischen Union mit Entwicklungsländern und Drittstaaten und der Vertrag von Lissabon' [2008] *Europarecht – Beiheft* 2, 36, 41: 'keine Veränderung der Reichweite der Entwicklungspolitik der Union'.

[132] See Art. 21(2) TEU: '(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty'; '(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade'; and '(b) consolidate and support democracy, the rule of law, human rights and the principles of international law'.

[133] In this sense also, see P. Koutrakos, *The EU Common Security and Defence Policy* (Oxford University Press, 2013), 211. Of course, it all depends how broadly the Court will interpret 'poverty reduction'. For a broad definition of the concept, see Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', [2006] OJ C46/01, para. 11 – defining poverty as relating 'to human capabilities such as consumption and food security, health, education, rights, the ability to be heard, human security especially for the poor, dignity and decent work'.

What is the nature of the Union's development competence? The Court clarified early on that this competence was non-exclusive in nature.[134] Article 209 TFEU represents indeed a shared competence – but a shared competence of a special kind. Qualifying the general definition of shared competences in Article 2(2) TFEU, Article 4(4) TFEU adds: 'In the [area] of development cooperation . . . the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.' And within the development cooperation competence the Treaties additionally specify that the conclusion of international agreements by the Union is 'without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements'.[135] All these formulations suggest that the Union and its Member States can act in parallel within this area. However, there exists a particularly strong constitutional obligation for the Union and the Member States to coordinate their respective policies so that they 'complement and reinforce each other'.[136]

(ii) Legislative foundations: the development cooperation instrument

The Union has used its development competence to adopt or conclude a wide range of autonomous measures and international agreements.[137] The former will be adopted under the ordinary legislative procedure,[138] while the latter will be concluded under the ordinary treaty-making procedure set out in Article 218 TFEU.[139]

[134] The non-exclusive nature of the development cooperation competence was confirmed in Case C-316/91, *Parliament* v. *Council (Lomé Convention)* [1994] ECR I-625, esp. para. 34: '[T]he competence of the [Union] in the field of development aid is not exclusive[.]'

[135] See Art. 209(2) TFEU – second indent.

[136] Art. 208(1) TFEU. See also Art. 210(1) TFEU: 'In order to promote the complementarity and efficiency of their action, the Union and the Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in international organisations and during international conferences. They may undertake joint action. Member States shall contribute if necessary to the implementation of Union aid programmes.'

[137] On the various legislative instruments, see S. Bartelt, 'The Institutional Interplay Regarding the New Architecture for the EC's External Assistance' (2008) 14 *ELJ* 655. For illustrations of Union agreements in the field of developing cooperation, see Cooperation Agreement between the European Community and the Islamic Republic of Pakistan on Partnership and Development Fields (2004) OJ L 378/23, and Convention between the European Community and the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) concerning aid to refugees in the countries of the Near East (2002 to 2005), [2002], OJ L 281/12.

[138] Art. 209(1) TFEU.

[139] Art. 209(2) TFEU.

The most important category among the legislative measures are 'financial instruments' in the form of 'multi-annual cooperation programmes'.[140] And the most important instrument in this respect is the 'development cooperation instrument' (DCI) established by Regulation 1905/2006.[141] The DCI applies to forty-seven developing countries in Latin America, (Central) Asia, the Middle East and South Africa.[142] Its primary objective is 'the eradication of poverty in partner countries and regions in the context of sustainable development'.[143] To achieve this aim, the DCI provides the legislative foundation for a number of geographic and thematic programmes through which Union assistance must be channelled.[144] The geographic programmes thereby concentrate on five different regions – all of which are subject to the same general development aims,[145] while having their own regional specificity.[146] Thematic programmes, on the other hand, relate to a specific interest.[147] The DCI mentions five such programmes, namely: 'Investing in People',[148] 'Environment and Sustainable Management of natural resources including Energy',[149] 'Non-state Actors and Local Authorities in Development',[150] 'Food Security'[151] and 'Migration and Asylum.[152]

For the period 2007–13,[153] the indicative amounts allocated to each aid programme are listed in Table 12.4.

How are these aid programmes 'programmed'? The central player in this administrative context is undoubtedly the Commission. For all geographic programmes, the Commission will have to draw up a 'strategy paper', which is followed by a multi-annual 'indicative programme'.[154] The Commission will subsequently adopt 'annual action programmes'. These annual programmes will offer assistance for concrete projects within the developing country. The financial framework for each of these concrete

[140] Art. 209(1) TFEU.

[141] Regulation 1905/2006 establishing a financing instrument for development cooperation (2006) OJ L 378/41.

[142] *Ibid.*, Art. 1 in combination with Annex I.

[143] *Ibid.*, Art. 2(1). [144] *Ibid.*, Art. 4. [145] *Ibid.*, Art. 5.

[146] *Ibid.*, Arts. 6–10, which deal – respectively – with the development aid priorities of Latin America, Asia, Central Asia, Middle East and South Africa.

[147] *Ibid.*, Art. 11. [148] *Ibid.*, Art. 12. [149] *Ibid.*, Art. 13. [150] *Ibid.*, Art. 14.

[151] *Ibid.*, Art. 15. [152] *Ibid.*, Art. 16.

[153] The Regulation will need to be amended soon. For a recent proposal see Proposal for a Regulation (EU) of the European Parliament and of the Council of 17 March 2010 amending Regulation (EC) No. 1905/2006 establishing a financing instrument for development cooperation (COM (2010) 102 final).

[154] See Arts. 18(1) and 19 of Regulation 1905/2006. This policy cycle is slightly easier for thematic programmes, for which there is no need for a multi-annual indicative programme.

Table 12.4 *DCI – budget allocation*

Programme	€ (millions)
Geographic programmes	10,057
Latin America	2,690
Asia	5,187
Central Asia	719
Middle East	481
South Africa	980
Thematic programmes	5,596
Investing in people	1,060
Environment and sustainable management of natural resources	804
Non-state actors and local authorities in development	1,639
Food security	1,709
Migration and asylum	384

programmes is thereby subject to financial ceilings established for each year. A good illustration of the administrative mechanics of the policy cycle is the implementation of the Latin American priority of supporting the creation of a common EU–Latin American higher education area.[155] The relevant strategy paper for Latin America (2007–13)[156] and the multi-annual indicative programme (2011–13) here pledged to 'support . . . higher education scholarships in EU countries under the current format of the Erasmus Mundus programme', and earmarked €92.6 million for the period 2011–13.[157] The Annual Action Plan subsequently specified the types of action and the annual budget, while charging an executive agency to administer the specific programme(s).[158]

(b) Development policy: special relations

The origins of the Union's 'special' development policy lie in Europe's dark colonial past; for when the Union was founded, a number of its Member

[155] *Ibid.*, Art. 6(d).
[156] For the Union's regional strategy vis-à-vis Latin America, see http://eeas.europa.eu/la/rsp/07_13_en.pdf.
[157] For the 'Regional Indicative Programme 2011–2013 for Latin America', see http://eeas.europa.eu/la/csp/11_13_mtr_en.pdf.
[158] For the 2011 Action Plan, see http://ec.europa.eu/europeaid/documents/aap/2011/aap_2011_amlat_en.pdf.

States (in particular, France) wished to 'associate' its African colonies to the European Union.[159] This was achieved by means of a special part within the European Treaties expressly dedicated to the 'Association of the Overseas Countries and Territories'.[160] One of the purposes behind this *constitutional* association was 'to promote the economic and social *development*' of the associated countries.[161] And in order to achieve this objective, the Union not only promised to open its internal market to colonial imports,[162] but it complemented its colonial trade policy by a development aid policy in the form of the European Development Fund (EDF).

This 'colonial' foundation of the Union's special development policy was overtaken by events. For only a few years after the entry into force of the 1957 Rome Treaty, many of the dependent territories declared their independence from the Member States of the Union. Willing to continue its development policy, the Union had nonetheless to search for a new constitutional base. This new base was found in a second form of 'association' envisaged by the Rome Treaty. This *contractual* association regime is today set out in Article 217 TFEU. It allows the Union to conclude 'agreements establishing an *association involving reciprocal rights and obligations*'.[163] On the basis of Article 217 TFEU, the Union has indeed concluded two major development agreements 'associating' former colonies: the Lomé Convention(s) and the Cotonou Agreement.[164] With the accession of the United Kingdom, the regional scope of these conventions covers a number of African, Caribbean and Pacific countries (ACP countries).

(aa) Associating ACP countries: from Lomé to Cotonou

Textually insisting on the *reciprocity* of rights and obligations governing the association, Article 217 TFEU seemed less than ideal as a constitutional

[159] For an analysis of this 'French' negotiating objective in the Rome Treaty, see E. Grilli, *The European Community and the Developing Countries* (Cambridge University Press, 1994), ch. 1.

[160] The 1957 EEC Treaty established a special regime for these 'Overseas Countries and Territories' (OCTs) that can today be found in the – strange – Part IV of the TFEU. On the Union's (constitutional) association regime, see section 4(a) below.

[161] Art. 198 TFEU – second indent (emphasis added).

[162] Art. 199(1) and (3) TFEU.

[163] Art. 217 TFEU (emphasis added). On the Union's (contractual) association regime, see section 4(b) below.

[164] Prior to the Lomé Convention, the Union had already concluded the Yaounde Convention(s) on the basis of Art. 217 TFEU. These Conventions will not be discussed here, but for a brief overview of these Lomé predecessors, see Holland and Doidge, *Developing Policy of the EU*, n. 94 above, 49 *et seq.*

base for a development policy based on *non*-reciprocity. Yet the Treaty text would – once again – be no legal match to the political will of the Member States. Inspired by the philosophy of the 'New International Economic Order', the Union soon concluded an international convention that recognised the economic asymmetry between the developing and the developed world. Signed in Lomé (Togo) and revised several times,[165] the Lomé Convention(s) became the classic pillar of the Union's 'special' development policy.

What economic and financial benefits did the Lomé Convention(s) offer to developing countries? With regard to international trade, the Convention granted non-reciprocal market access to the signatory ACP countries: ACP goods could generally enter the European market without any customs duties, while Union products were only offered MFN treatment.[166] Moreover, in order to guarantee relatively stable export earnings, the Convention set up a mechanism for the 'Stabilisation of Expert Earnings' (Stabex) that was designed to prevent fluctuations in the price of primary products.[167] Finally, the Convention earmarked a substantial amount of development aid for ACP countries to be administered by the EDF.

This sophisticated mix of trade and aid policy encountered severe criticism at the end of the twentieth century. Legally, the special and preferential regime for ACP countries was found to violate the WTO regime and its insistence on *generalised* tariff preferences.[168] But worse, from an economic perspective, the non-reciprocal trade arrangements had showed themselves to be – relatively – ineffective in the fight against underdevelopment.[169] By the end of the twentieth century, a reform of

[165] There were four Lomé Conventions. For an overview of each see K. R. Simmonds, 'The Lomé Convention and the New International Economic Order' [1976] 13 *CML Rev* 315; 'The Second Lomé Convention: The Innovative Features' [1980] 17 *CML Rev* 415; 'The Third Lomé Convention' (1985) 22 *CML Rev* 389; and 'The Fourth Lomé Convention' (1991) 28 *CML Rev* 521.

[166] K. R. Simmonds, 'The Lomé Convention and the New International Economic Order' (1976) 13 *CML Rev* 315, 324.

[167] See Grilli, *The EC and the Developing Countries*, n. 159 above, 27: 'STABEX was the most important innovation of Lomé I. It met one of the long-standing demands of developing countries to have a measure of insurance against commodity revenue instability[.]'

[168] On this point, see O. Babarinde and G. Faber, 'From Lomé to Cotonou: Business as Usual?' (2004) 9 *EFAR* 27.

[169] On this point, see K. Arts, 'ACP–EU Relations in a New Era : The Cotonou Agreement' (2003) 40 *CML Rev* 95; and Holland and Doidge, *Developing Policy of the EU*, n. 94 above, 16: '[A]lmost every state in Asia had substantially out-performed those of the ACP, despite not receiving any such concessionary privileges.'

the Union's special development policy towards ACP countries was thus considered necessary, and the Lomé Convention was replaced by a second development convention: the 2000 Cotonou Agreement.[170]

What is the development philosophy behind the Cotonou Agreement? Like Article 208 TFEU, the objective behind the Agreement is the reduction and eventual eradication of poverty;[171] yet this objective is premised on the neo-classical idea of free *reciprocal* trade. Unlike the Lomé Convention(s), the Cotonou Agreement is a framework agreement that envisages the conclusion of 'Economic Partnership Agreements' (EPAs) between the Union and ACP countries. These EPAs would grant *reciprocal* rights and obligations to the contracting parties and would thus replace the *non*-reciprocal relations under the Lomé Convention(s).[172] (Those ACP countries refusing to conclude an EPA would only benefit from the Union's Generalised System of Preferences – unless they belonged to the group of Least Developed Countries (LDC).[173]) The new trading arrangements under the Cotonou Agreement thus considerably align ACP countries with the rest of the developing world.

This process of *external assimilation* is complemented by a push towards *internal differentiation*. For unlike the Lomé regime, the Cotonou Agreement no longer envisages a homogenous solution for all ACP countries. Instead it prefers a differential approach that splits the ACP countries

[170] For the text of the consolidated version of the Cotonou Agreement, see http://ec.europa.eu/europeaid/where/acp/overview/documents/cotonou-consolidated-fin-ap-2012_en.pdf. For an analysis of the Agreement, see S. Bartelt, 'ACP–EU Development Cooperation at a Crossroad? One Year after the Second Revision of the Cotonou Agreement' (2012) 17 *EFAR* 1.

[171] Cotonou Agreement, Art. 1 – second indent.

[172] For an overview of the (economic) rationale behind EPAs, see L. Curran, L. Nilsson and D. Brew, 'The Economic Partnership Agreements: Rationale, Misperceptions and Non-trade Aspects' (2008) 26 *Development Policy Rev* 529. The reciprocity underlying the EPAs would make them, in principle, conform with the GATT, which allows non-generalised preferential arrangements with non-LDC only when covered by Art. XXIV GATT – that is, the creation of a (reciprocal) Preferential Trade Agreement. On the objective of WTO compatibility, see Art. 34(4) Cotonou: 'Economic and trade cooperation shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking account of the Parties' mutual interests and their respective levels of development. It shall also address the effects of preference erosion in full conformity with multilateral commitments.'

[173] Art. 85(1) Cotonou: 'The least developed ACP States shall be accorded a special treatment in order to enable them to overcome the serious economic and social difficulties hindering their development so as to step up their respective rates of development.' The list of least-developed countries is given in Annex VI.

into various regional blocs.[174] The idea behind this regional approach is to allow the Union to better differentiate in its trade relations with these countries,[175] while encouraging them to form regional trade areas like the East African Community (EAC). The Union has currently divided the ACP countries into seven regions – five of which are in Africa,[176] and one region within the Caribbean and the Pacific respectively.

This idea of regionalisation and reciprocity behind the Cotonou Agreement is not yet matched by legal practice. The only EPA formally concluded so far is the agreement with the Caribbean Forum (CARIFORUM).[177]

(bb) The European Development Fund

Originally created on the basis of an international agreement in 1957,[178] the EDF has been the central aid institution under the Union's special development policy. It is the financial instrument for all ACP countries. It typically runs in five-year cycles, and thus needs to be regularly renewed

[174] Art. 35(2) Cotonou: 'Economic and trade cooperation shall build on regional integration initiatives of ACP States. Cooperation in support of regional cooperation and integration as defined in Title I and economic and trade cooperation shall be mutually reinforcing.' For the provisions of the Cotonou agreement dealing specifically with regional cooperation and integration, see *ibid.*, Arts. 28–30.

[175] The principle of differentiation and regionalisation is a core principle of the Convention (*ibid.*, Art. 2 – third indent).

[176] These African regions are West Africa, Central Africa, Eastern and Southern Africa, the East African Community and the Southern African Development Community.

[177] For a brief look into the EPA with CARIFORUM, see M. Cremona, 'The European Union and Regional Trade Agreements' (2010) *European Yearbook of International Economic Law* 245, 263 *et seq*. With the remaining six ACP regions, the Union has concluded interim-EPAs, see Interim Agreement with the Southern African Development Community, see http://trade.ec.europa.eu/doclib/docs/2009/july/tradoc_143981.pdf. All these interim EPAs were supposed to come into force on 1 January 2008 (after the end of an WTO Waiver), and the Cotonou record has thus not been great. See Holland and Doidge, *Developing Policy of the EU*, n. 94 above, 93: 'The record for implementing EPA's has been a disappointment for the Cotonou architects. What was presumed would be an appealing new trade and development paradigm has come to be viewed with increasing scepticism – except in the Caribbean – by the ACP States.'

[178] The EDF was created in the 1957 Implementing Convention on the Association of the Overseas Countries and Territories with the Community (Rome, 25 March 1957), whose Art. 1 stated: 'The Member States shall, under the conditions laid down below, participate in measures which will promote the social and economic development of the countries and territories listed in Annex IV to this Treaty, by supplementing the efforts made by the authorities responsible for those countries and territories. For this purpose, a Development Fund for the Overseas Countries and Territories is hereby established, into which the Member States shall, over a period of five years, pay the annual contributions set out in Annex A to this Convention. The Fund shall be administered by the Commission.'

Table 12.5 *EDF – budget allocation*

EDF (duration, legal base)	€ (millions)*
1 EDF: 1959–64 (EEC Implementing Convention)	581
2 EDF: 1964–70 (Yaoundé I Convention)	666
3 EDF: 1970–5 (Yaoundé II Convention)	843
4 EDF: 1975–80 (Lomé I Convention)	3,124
5 EDF: 1980–5 (Lomé II Convention)	4,754
6 EDF: 1985–90 (Lomé III Convention)	7,754
7 EDF: 1990–5 (Lomé IV Convention)	10,800
8 EDF: 1995–2000 (Revised Lomé IV Convention)	12,967
9 EDF: 2000–7 (Cotonou Agreement)	13,500
10 EDF: 2008–13 (Revised Cotonou Agreement)	22,682

* The figures are taken from M. Holland and M. Doidge, *Developing Policy of the European Union* (London: Palgrave Macmillan, 2012), 48.

or revised by an international agreement. Under the Cotonou Agreement this has already happened twice.[179] The Fund is financed through direct Member State contributions and therefore exists outside the ordinary Union budget. The Fund's extra-budgetary nature has not been uncontroversial, and the Parliament and the Commission have long argued in favour of the 'budgetisation' of the EDF. With the expiry of the Cotonou Agreement in 2020, this might indeed happen.[180] But for the time being, the special status of ACP countries continues to be reflected in their specific means of financing.[181] Table 12.5 lists the various EDF budgets granted since the beginning of the Union.

How does the Union allocate aid under the EDF to specific ACP countries? The special implementation procedures for the tenth EDF are set out in a number of special Council Regulations[182] which draw on the general management procedures set out in Annex IV of the Cotonou

[179] See Cotonou Agreement, Annexes I (a/b).

[180] See Commission, Communication: Preparation of the multi-annual financial framework regarding the financing of EU cooperation for African, Caribbean and Pacific States and Overseas Countries and Territories for the 2014–2020 period (11th European Development Fund), COM (2011) 837 final, 2: 'The integration of EU development cooperation with ACP States into the EU budget is foreseen for 2020, at the end of the 2014–2020 multiannual financial framework, coinciding with the year of expiry of the Cotonou Agreement.'

[181] Bartelt, 'ACP-EU Development Cooperation', n. 170 above, 21.

[182] See Regulation 617/2007 on the implementation of the 10th European Development Fund under the ACP–EC Partnership Agreement (2007) OJ L 152/1; and Regulation

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Agreement. Union aid will here be 'programmed' by means of 'Strategy Papers', (multi-annual) 'Indicative Programmes' and 'Annual Action Programmes' – both in relation to specific ACP countries or regions. The actual granting of aid will subsequently be given in the form of 'procurement contracts', 'grants', 'direct labour' or 'direct payments'.[183]

This EDF policy cycle shares many commonalities with the DCI discussed above. The Commission – again – plays a central role;[184] yet, thanks to the contractual nature of the association agreement underlying the Union's special development policy, the role of the beneficiary country appears to be much stronger.[185] Country Strategy Papers (CSP) shall thus be prepared by the ACP state concerned and the EU,[186] and will, *inter alia*, include 'a detailed outline of the country's medium-term development strategy, clearly defined priorities and expected financing requirements'.[187] On the basis of a CSP, each ACP state will then be required to draw up a draft (multi-annual) indicative programme, which must contain a general budget support and may contain a limited number of focal sectors or areas on which support shall be concentrated.[188] The draft multi-annual programme is subsequently submitted to the Union and 'shall be adopted by common agreement between the Commission on behalf of the [Union] and the ACP State concerned'.[189] Once this multi-annual financial framework has been agreed, the Commission will – again in coordination with the partner country – draw up annual action programmes.[190]

3 Common Foreign and Security Policy

Security and defence constitute the (cold) heart of all foreign policy. Foreign affairs were indeed traditionally defined as 'the power of war and peace, leagues and alliances'.[191]

215/2008 on the Financial Regulation applicable to the 10th European Development Fund (2008) OJ L 78/1.

183 Cotonou Agreement – Annex IV, Art. 19A(1).

184 Cotonou Agreement – Annex IV, Art. 34 states: 'The Commission shall undertake the financial execution of operations carried out with resources from the multi-annual financial framework of cooperation under this Agreement, with the exception of the Investment Facility and interest-rate subsidies[.]'

185 See Regulation 617/2007, n. 182 above, Art. 2(3)(a): 'the partner country or region concerned shall to the extent possible be the leading force in the programming of [Union] assistance'.

186 Cotonou Agreement – Annex IV, Art. 2.

187 *Ibid.*

188 *Ibid.*, Art. 4(1).

189 *Ibid.*, Art. 4(3).

190 Regulation 617/2007, Art. 7.

191 J. Locke, *Two Treaties of Government*, ed. P. Laslett (Cambridge University Press, 1988), 365, §146.

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Within a union of states, should the power over war and peace belong to the union or the states? From a philosophical perspective, it seems advantageous to combine the military resources of the small(er) states and concentrate them within the union.[192] Historically, this centralised solution has been adopted by the United States.[193] The European Union, by contrast, originally followed the decentralised solution. With the failure of the 1952 European Defence Community,[194] foreign and security policy remained firmly anchored in the Member States. This (partly) changed with the 1992 Maastricht Treaty, which formally conceived the Common Foreign and Security Policy (CFSP) of the European Union.[195] For more than a decade, the CFSP constituted a separate 'pillar' of the Union. This 'second pillar' was demolished by the 2007 Lisbon Treaty. However, placed within the Treaty on European Union, the CFSP continues to be isolated from the rest of the (supranational) Union policies set out in the Treaty on the Functioning of the European Union.

What is the reason behind this constitutional isolation? The Treaties justify this special treatment by reference to the 'specific rules and

[192] This solution has been proposed by de Montesquieu's *The Spirit of the Laws*, ed. A. M. Cohler, B. C. Miller and H. Stone (Cambridge University Press, 1989), which advanced a concrete reason for republics to federate: 'If a republic is small, it is destroyed by a foreign force; if it is large, it is destroyed by an internal vice.' To overcome this 'dual drawback', democracies would need to combine 'all the internal advantages of republican government and the external force of monarchy'. The solution was the creation of a 'federal republic'. 'This form of government is an agreement by which many political bodies consent to become citizens of the larger State that they want to form. It is a society of societies that make a new one, which can be enlarged by new associates that unite with it. Composed of small republics, the 'federal republic' thus 'enjoys the goodness of internal government of each one; and, with regard to the exterior, it has, by the force of the association, all the advantages of large monarchies' (*ibid.*, 131).

[193] Only a united stance had allowed the colonies to win independence from Great Britain. The 1777 Articles of Confederation consequently subjected the power to wage war to central control (*ibid.*, Art. IX: 'The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article – of sending and receiving ambassadors – entering into treaties and alliances[.]'). This solution has informed the 1787 US Constitution, in which foreign affairs are (almost) completely centralised, see L. Henkin, *Foreign Affairs and the United States Constitution* (Oxford: Clarendon Press, 1996).

[194] For an analysis of the history and structure of the European Defence Community, see Schütze, *European Constitutional Law*, n. 9 above, 16 *et seq.* For a more extensive discussion, see M. Trybus, 'The Vision of the European Defence Community and the Common Defence for the European Union' in M. Trybus and R. White, *European Security Law* (Oxford University Press, 2007), 15.

[195] For a remarkable overview of the historical background to the CFSP, see S. Nuttall, *European Foreign Policy* (Oxford University Press, 2000).

procedures' that apply within the CFSP.[196] The CFSP indeed constitutes the most 'sensitive' Union policy, which touches upon the very heart of the Member States' external sovereignty. The CFSP has consequently been subject to particularly strong safeguards of federalism. This section discusses the special constitutional foundations of the CFSP first. Institutional rules indeed make up the lion's share of the 'Specific Provisions on the Common Foreign and Security Policy' in Chapter 2 of Title V of the TEU. Section 3(b) explores the strategic policy choices made by the Union, while sections 3(c) and (d) then analyse Union actions on the ground.

(a) CFSP: constitutional foundations

(aa) Competence(s), instruments, procedures

The Union competence to conduct its foreign and security policy is provided in very generous terms in Article 24 TEU:

> The Union's competence in matters of common foreign and security policy shall cover *all areas of foreign policy and all questions* relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.[197]

This competence will be implemented through 'general guidelines' that identify the Union's strategic interest adopted by the European Council.[198] These strategic guidelines are subsequently implemented by means of decisions adopted by the Council.[199] Council decisions may thereby relate to 'actions' or 'positions' of the Union.[200] The former capture 'operational action by the Union',[201] whereas the latter 'define the approach of the

[196] Art. 24(1) TEU – second indent.
[197] *Ibid.*, first indent (emphasis added).
[198] Arts. 25(a) and 26(1) TEU.
[199] Arts. 25(b) and 26(2) TEU, as well as Art. 37 TEU. According to the latter, '[t]he Union may conclude agreements with one ore more States or international organisations in areas covered by this Chapter'.
[200] Art. 25(b) TEU distinguishes between '(i) actions to be undertaken by the Union', and '(ii) positions to be taken by the Union'. Prior to the Lisbon Treaty, the Union legal order expressly distinguished between 'joint actions' and 'common positions' as two separate CFSP instruments. The Lisbon Treaty has however absorbed them into the generic instrument of a 'decision' defined in Art. 288(4) TFEU.
[201] Art. 28(1) TEU: 'Where the international situation requires operational action by the Union, the Council shall adopt the necessary decisions. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.'

Union to a particular matter of geographical or thematic nature'.[202] The Council is also entitled to conclude international agreements across the CFSP.[203] With regard to both unilateral decisions and international agreements, the Council will (principally) act only after a unanimous decision of all Member States.[204]

A special manifestation of the general CFSP competence in Article 24 TEU can be found for the Common Security and Defence Policy (CSDP).[205] The latter is dealt with in a separate section within the CFSP Chapter; yet expressly constitutes 'an integral part of the common foreign and security policy'.[206] The special purpose of the CSDP is twofold. *Internally*, it is to 'provide the Union with an operational capacity drawing on civilian and military assets'.[207] This inward-looking task is complemented

[202] Art. 29 TEU: 'The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions.'

[203] Art. 37 TEU. For an overview of these agreements, see D. Thym, 'Die völkerrechtlichen Verträge der Europäischen Union' (2006) 66 *ZaöRV* 863; and for an overview within the special context of the CSDP, see Koutrakos, *The EU Common Security and Defence Policy*, n. 133 above, ch. 7.

[204] The complex decision-making rules are discussed in Ch. 9, section 3(a)(bb).

[205] On the position of Denmark within this area, see Protocol (No. 22) 'On the Position of Denmark', esp. Art. 5: 'With regard to measures adopted by the Council pursuant to Article 26(1), Article 42 and Articles 43 to 46 of the Treaty on European Union, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications. Therefore Denmark shall not participate in their adoption. Denmark will not prevent the other Member States from further developing their cooperation in this area. Denmark shall not be obliged to contribute to the financing of operational expenditure arising from such measures, nor to make military capabilities available to the Union.'

[206] Art. 42(1) TEU.

[207] *Ibid.* For the political impulse to develop the CSDP, see the 1999 Cologne EU Council Conclusions (Annex III, para. 1): 'In pursuit of our Common Foreign and Security Policy objectives and the progressive framing of a common defence policy, we are convinced that the Council should have the ability to take decisions on the full range of conflict prevention and crisis management tasks defined in the Treaty on European Union, the "Petersberg tasks". To this end, the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crises without prejudice to actions by NATO. The EU will thereby increase its ability to contribute to international peace and security in accordance with the principles of the UN Charter.' This was repeated in the 1999 Helsinki European Council Conclusions (esp. paras. 27–8): 'The European Council underlines its determination to develop an autonomous capacity to take decisions and, where NATO as a whole is not engaged, to launch and conduct EU-led military operations in response to international crises. This process will avoid unnecessary duplication and does not imply the creation of a European army. Building on the guidelines established at the Cologne European Council and on the basis of the Presidency's reports, the European Council

by an *external* task, for the Union is entitled to use its operational capacities 'on missions outside the Union for peace-keeping, conflict prevention and strengthening international security'.[208] A special competence for both tasks can thereby be found in Article 42(4) TEU:

> Decisions relating to the common security and defence policy, including those initiating a mission as referred to in this Article, shall be adopted by the Council acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or an initiative from a Member State.

In order to soften the edges of the unanimity requirement, Article 42(6) TEU however recognises the possibility of a special form of 'enhanced cooperation' – that is, the ability of some Member States to cooperate closer together. This special form of enhanced cooperation is called 'permanent structured cooperation'.[209]

(bb) Institutional infrastructure

Who operates below the Council to inform or implement its decisions? The infrastructure governing the CFSP (including the CSDP) betrays a peculiar architecture. The tasks that would normally be reserved to the Commission are here exercised by the High Representative of the Union (HRFASP), who also chairs the Foreign Affairs Council.[210] The High Representative is generally supported by a special service that is functionally

has agreed in particular the following: cooperating voluntarily in EU-led operations, Member States must be able, by 2003, to deploy within 60 days and sustain for at least 1 year military forces of up to 50,000–60,000 persons capable of the full range of Petersberg tasks[.]' This capacity-building commitment became known as the Helsinki Headline Goal.

208 Art. 42(1) TEU.

209 Art. 42(6) TEU states: 'Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. Such cooperation shall be governed by Article 46.' The procedure and substantive conditions governing permanent structured cooperation are set out in Art. 46 TEU as well as Protocol (No. 10) 'On Permanent Structured Cooperation Established by Article 42 of the Treaty on European Union'. For an academic analysis of the provisions, see S. Biscop, 'Permanent Structured Cooperation and the Future of the ESDP: Transformation and Integration' (2008) 13 *EFAR* 431.

210 Art. 27(1) and (2) TEU: 'The High Representative of the Union for Foreign Affairs and Security Policy, who shall chair the Foreign Affairs Council, shall contribute through his proposals to the development of the common foreign and security policy and shall ensure implementation of the decisions adopted by the European Council and the Council. The High Representative shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on

autonomous: the European External Action Service (EEAS).[211] Much of the information and implementation work is however done by a special CFSP committee: the Political and Security Committee (PSC).[212] The latter works below COREPER, but – in reality – it constitutes the eyes, brains and mouth of the Council. For Article 38 TEU charges it with three essential tasks: to 'monitor the international situation', to 'contribute to the definition of policies by delivering options to the Council' and to exercise 'the political control and strategic direction' of crisis situations.[213]

Within the CDSP, the PSC is assisted to discharge its control function by two military bodies: the Military Committee and the Military Staff (MiSt) of the Union. The former is composed of the Member States' Chief of Defence (or their military representatives).[214] Constituting 'the highest military body established within the Council', it is designed to provide 'military advice and recommendations to the Political and Security Committee (PSC)', as well as 'military direction to the European Union Military Staff (EUMS)'.[215] The Military Staff of the Union is composed of

the Union's behalf and shall express the Union's position in international organisations and at international conferences.' The High Representative might also be supported by a 'special representative with a mandate in relation to particular policy issues'. See Art. 33 TEU.

[211] Art. 27(3) TEU. See also Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service (2010) OJ L 201/30, esp. Art. 1: '1. This Decision establishes the organisation and functioning of the European External Action Service ("EEAS"). 2. The EEAS, which has its headquarters in Brussels, shall be a functionally autonomous body of the European Union, separate from the General Secretariat of the Council and from the Commission with the legal capacity necessary to perform its tasks and attain its objectives. 3. The EEAS shall be placed under the authority of the High Representative of the Union for Foreign Affairs and Security Policy ("High Representative"). 4. The EEAS shall be made up of a central administration and of the Union Delegations to third countries and to international organisations.' For an academic analysis of the EEAS, see B. van Vooren, 'A Legal-institutional Perspective on the European External Action Service' (2011) 48 *CML Rev* 475.

[212] For an excellent analysis of the PSC, see D. Thym, 'The Intergovernmental Branch of the EU's Foreign Affairs Executive: Reflections on the Political and Security Committee' in H. J. Blanke and S. Mangiameli (eds.), *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* (Berlin: Springer, 2012), 517.

[213] With regard to the third function, Art. 38 TEU contains a power to delegate decision-making power to the Committee: 'The Council may authorise the Committee, for the purpose and for the duration of a crisis management operation, as determined by the Council, to take the relevant decisions concerning the political control and strategic direction of the operation.' These tasks are further specified in Council Decision 2001/78 setting up the Political and Security Committee (2001) OJ L 27/1 – Annex.

[214] Council Decision 2001/79 setting up the Military Committee of the European Union (2001) OJ L 27/4, Art. 1.

[215] *Ibid.*, Annex, para. 1.

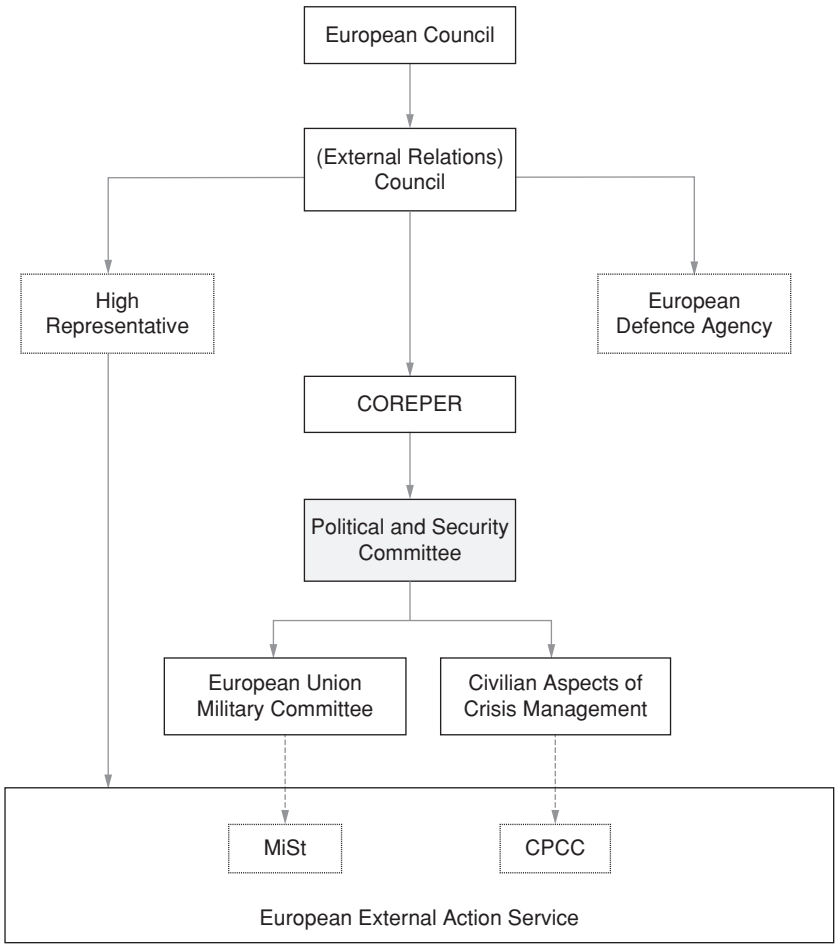

Figure 12.2 CFSP – institutional (sub)structure

military personnel seconded from Member States,[216] and it (now) forms a part of the EEAS.[217] Its task is 'to perform early warning, situation assessment and strategic planning for missions and tasks referred to in Article [42] of the TEU'.[218] Finally, the Council is supported by an Agency that is especially charged to develop the military capacity of the Union:

[216] Council Decision 2001/80 on the establishment of the Military Staff of the European Union (2001) OJ L 27/7, Art. 1(1).
[217] EEAS Council Decision, n. 211 above, Annex.
[218] Military Staff Council Decision, Annex 'Terms of Reference and Organisation', para. 2.

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the European Defence Agency. The tasks of the latter are generically set out in Article 45 TEU, and include in particular: 'to improve the EU's defence capabilities in the field of crisis management and to sustain the CSDP as it stands now and develops in the future'.[219]

Parallel structures have developed for the non-military side of the CSDP. The two bodies below the PSC are here called the Committee for Civilian Aspects of Crisis Management (CIVCOM),[220] which itself is assisted by the Civilian Planning and Conduct Capability (CPCC) within the EEAS.[221]

(b) Union 'strategies': words for the world

Words! Much of foreign affairs consist of words that 'declare' a position or express 'concerns'. These words may be spoken to a foreign diplomat or they may formulate an internal strategy. In either situation, they are fundamental in shaping a personal or political relationship. Many words have indeed been uttered to define the strategic foreign policy interests of the Union. This is hardly surprising. But in the light of the sheer number of external policy objectives mentioned in Article 21 TEU and the broad CFSP competence(s) to implement them,[222] where was the Union to start? The CFSP here needs and requires strategic impulses and directions. The task to provide such strategic shape and substance is given to the European Council:

> On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union. Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union. *Such decisions may concern the relations of the Union with a specific country or region or may be thematic in approach.*[223]

[219] Council Decision 2011/411/CFSP defining the statute, seat and operational rules of the European Defence Agency (2011) OJ L 183/16, Art. 2.

[220] Council Decision 2000/354 setting up a Committee for civilian aspects of crisis management (2000) OJ L 127/1, Art. 2 states: 'The Committee shall operate as a Council working party and report to the Permanent Representatives Committee. It will provide information, formulate recommendations and give advice on civilian aspects of crisis management to the interim Political and Security Committee and to the other appropriate Council bodies in accordance with their respective competencies.'

[221] See www.consilium.europa.eu/eeas/security-defence/csdp-structures-and-instruments/cpcc?lang=en.

[222] For a list of the Union's external relations objectives, see Ch. 9, section 1 above.

[223] Art. 22(1) TEU (emphasis added).

How has the European Council identified the Union's strategic interests? According to the provision, it can express its strategies by following a regional or a thematic approach. This should normally be done by means of formal decisions,[224] but the European Council has in the past preferred to express itself in informal ways. Indeed, apart from some formal decisions,[225] the Union has extensively indulged in a culture of strategic informality.[226] The strategic interests identified by the (European) Council are thus often placed in 'political' documents whose legal value is highly ambivalent.[227] The most important of these Union strategies is the European Security Strategy.[228] The Strategy was adopted in 2003 and represents the EU equivalent of the US National Security Strategy.[229]

What are the strategic interests defined in the European Security Strategy? Recognising that the end of the Cold War has left the United States in a dominant military position, the European Union here nonetheless claims its autonomous role on the international scene. Three strategic objectives are thereby identified. First, the Union pledges to address the 'key threats' within the contemporary international order – that is,

[224] Art. 26(1) TEU: 'The European Council shall identify the Union's strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions.'

[225] E.g. the Union's 'Common Strategy on Russia' (1999/414/CFSP) (1999) OJ L 157/1, defined the strategic vision of the Union as follows (*ibid.*, 1): 'The European Union has clear strategic goals: – a stable, open and pluralistic democracy in Russia, governed by the rule of law and underpinning a prosperous market economy benefiting alike all the people of Russia and of the European Union, – maintaining European stability, promoting global security and responding to the common challenges of the continent through intensified cooperation with Russia.'

[226] The culprit behind this drive to informality may be Art. 31(2) TEU, which permits an exception to the unanimity rule in the Council 'when adopting a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union's strategic interests and objectives, as referred to in Article 22(1)'.

[227] See 'EU Strategy against Proliferations of Weapons of Mass Destruction' (10 December 2003, Council Document 15708/03), 'European Security Strategy' (Brussels, 12 December, Council Document 78367); 'Strategy on Small Arms and Light Weapons' (17 October 2005, Council Document 13066/05), 'EU Counter-Terrorism Strategy' (30 November 2005, Council Document 14469/4/05 REV 4) and 'The EU and Africa: Towards a Strategic Partnership' (19 December 2005, Council Document, 15961/05, Presse 367).

[228] European Council, 'A Secure Europe in a Better World: European Security Strategy' (Brussels, 12 December, Council Document 78367). For an analysis of the strategy, see S. Duke, 'The European Security Strategy in a Comparative Framework: Does it Make for Secure Alliances in a Better World?' (2004) 9 *EFAR* 459; and A. Toje, 'The EU Security Strategy Revisited: Europe Hedging its Bets' (2010) 15 *EFAR* 171.

[229] The American NSS is a strategy document on foreign affairs that is periodically issued by the President. For the 2010 NSS, see www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

terrorism, the proliferation of weapons of mass destruction, regional conflicts, state failures and organised crime.[230] Secondly, it pledges to pay particular attention to the building of security in the European neighbourhood. And finally, it aims at the creation of an international order based on effective multilateralism.[231] Especially the third strategic objective has been celebrated as the 'European' approach to the international legal order,[232] for it strongly contrasts with the (past) unilateralism adopted by the United States.

The grand rhetoric of the European Security Strategy has, however, not completely matched up with reality. This cleavage between words and actions is particularly striking when placed into the context of CSDP missions on the ground.[233]

(c) From words to actions I: CSDP 'missions'

A famous aphorism holds war to be 'a mere continuation of policy by other means'.[234] This nineteenth-century belief considered war 'as an accepted and routine means of conducting everyday international business'.[235] But after two devastating World Wars in the twentieth century, this philosophical view has given way to another one: states 'shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state'.[236] With the rise of the United Nations as an – almost – universal international security organisation, unilateral warfare has been outlawed.[237] Under the United Nations

[230] European Security Strategy, n. 228 above, 3–4. [231] *Ibid.*, 6–10.

[232] *Ibid.*, 9–10: 'We are committed to upholding and developing International Law. The fundamental framework for international relations is the United Nations Charter. The United Nations Security Council has the primary responsibility for the maintenance of international peace and security . . . It is a condition of a rule-based international order that law evolves in response to developments such as proliferation, terrorism and global warming. We have an interest in further developing existing institutions such as the World Trade Organisation and in supporting new ones such as the International Criminal Court.'

[233] J. Wouters, S. de Jong and P. de Man, 'The EU's Commitment to Effective Multilateralism in the Field of Security: Theory and Practice' (2010) 20 *YEL* 164, 175.

[234] C. von Clausewitz, *On War* (Ware: Wordsworth, 1997), 22.

[235] S. C. Neff, *War and the Law of Nations* (Cambridge University Press), 161.

[236] Art. 2(4) UN Charter.

[237] This will, however, not affect the (temporary) right to self-defence, see Art. 51 UN Charter. For a collective defence clause within the European Union, see Art. 42 (7) TEU: 'If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power,

system, breaches of world peace or acts of aggression can be punished by economic sanctions or military means as determined by the UN Security Council.[238]

The collective security system established under the United Nations obligates all the Member States of the European Union *qua* members of the United Nations. And while the Union is not a formal member of the United Nations itself,[239] the European Treaties pledge strong allegiance to 'the strict observance and the development of international law, *including respect for the principles of the United Nations Charter*'.[240] This international loyalty finds a particular expression in Article 42 TEU, which entitles the Union to use civilian or military assets 'on missions outside the Union for peace-keeping, conflict prevention and strengthening international security *in accordance with the principles of the United Nations Charter*'.[241] The Union is here empowered to send 'missions' in pursuit of the so-called 'Petersberg task'. These are subsequently elaborated in Article 43 TEU:

> The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.[242]

The central 'action' under the CSDP is the 'mission';[243] and depending whether or not this involves the deployment of military, the Union

in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.'

238 Chapter VII of the UN Charter deals with 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Agression'.

239 According to Art. 4(1) UN Charter, only *states* can become full members of the United Nations. For the relations between the European Union with the United Nations, see Art. 220(1) TFEU: 'The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development.'

240 Art. 3(5) TEU (emphasis added), and see also Art. 21(1) and (2) TEU. For a reference in the TFEU, see Art. 208(2): 'The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.'

241 Art. 42(1) TEU (emphasis added).

242 Art. 43(1) TEU.

243 For an overview of the various missions, see G. Grevi, D. Helly and D. Keohane (eds.), *European Security and Defence Policy: The First Ten Years* (Paris: EU Institute for Security Studies, 2009); and F. Naert, 'ESDP in Practice: Increasingly Varied and Ambitious EU

distinguishes between civilian and military missions. (Importantly, not all Member States must always take part in all missions. The Council may delegate the implementation of a mission 'to a group of Member States which are willing and have the necessary capability for such a task'.[244]) In the past, the Union has deployed more than two dozen missions. Within the civilian missions, the two most prominent types are 'police missions' and 'rule of law missions'. The former are designed to assist and reform the local police,[245] while the latter aim to strengthen the legal institutions within the mission country.[246] Among the military missions, the Union distinguishes between missions that are *autonomous* Union missions and *Berlin-Plus* missions. The latter refer to an arrangement concluded with the North Atlantic Treaty Organization (NATO) – the traditional military alliance in Europe.[247] According to the Berlin-Plus arrangement, the European Union is permitted to use NATO assets and capabilities for its military missions. Autonomous EU missions, by contrast, will be completely resourced by the Member States,[248] with one of five Member States operating as the 'Framework State'.[249] The most important Union mission can be found in Table 12.6.

What administrative principles govern CSDP missions? Let us look at these principles by concentrating on Artemis – the first autonomous European military operation.[250] The mission took place in the

Security and Defence Operations' in M. Trybus and R. White, *European Security Law* (Oxford University Press, 2007), 61.

244 Arts. 42(5) and 44 TEU. However, there appears to exist a general obligation on the Member States to 'make civilian and military capabilities available to the Union for the implementation of the common security and defence policy': Art. 42(3) TEU.

245 See Joint Action 2002/210 on the European Union Police Mission (2002) OJ L 70/1, Annex.

246 See Joint Action 2008/124 on the European Union Rule of Law Mission in Kosovo (2008) OJ L 42/92, esp. Art. 2 ('Mission Statement').

247 On the complex legal relations between the EU and NATO in general, and the Berlin Plus arrangement in particular, see S. Blockmans, 'The Influence of NATO on the Development of the EU's Common Security and Defence Policy' in R. Wessels and S. Blockmans (eds.), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (The Hague: TMC Asser Press, 2012), 243.

248 A special financial mechanism, called 'Athena', was set up by (Council) Decision 2011/871 to administer the financing of the common costs of European Union operations having military or defence implication (Athena) (2011) OJ L 343/35, esp. Art. 24.

249 The five states are France, Greece, Germany, Italy and the United Kingdom. The Union is presently developing a 'Union' Operations Centre, see Council Decision 2012/173 on the activation of the EU Operations Centre for the Common Security and Defence Policy missions and operation in the Horn of Africa (2012) OJ L 89/66.

250 *Ibid.*, 73

Table 12.6 *EU missions (selection)*

	Year(s)	Operation	Country	Type
Civilian	2003–12	Eupm	Bosnia and Herzegovina	Police
	2005–today	Eupol Copps	Palestinian territories	Police
	2005–today	Eujust Lex	Iraq	Rule of law
	2007–today	Eupol	Afghanistan	Police
	2008–today	Eulex	Kosovo	Rule of law
Military	2003–03	Concordia	FYR Macedonia	Berlin Plus
	2003–03	Artemis	Democratic Republic of Congo	EU (France)
	2006–06	Eufor	Democratic Republic of Congo	EU (Germany)
	2004–today	Althea	Bosnia and Herzegovina	Berlin Plus
	2008–today	Atalanta	Somalia (Horn of Africa)	EU (Britain)

Democratic Republic of Congo, where a civil war had caused a major humanitarian crisis. Following a request from the United Nations,[251] the European Union adopted a 'joint action' among its Member States.[252] France was identified as the Framework Nation,[253] with the Operational Headquarters in Paris and a French major general chosen as EU Operation Commander.[254] The formal authority to approve the operation plan, the rules of engagement and the decision to launch the operation lay with the Council.[255] However, the political control and strategic direction of the

[251] See United Nations Resolution 1494 (2003).

[252] (Council) Joint Action 2003/423 on the European Union military operation in the Democratic Republic of Congo (2003) OJ L 143/50. Art. 1(1) defines the mission as follows: 'The European Union shall conduct a European Union military operation in the Democratic Republic of Congo, named Artemis in accordance with the mandate set out in UNSCR 1484 (2003).'

[253] *Ibid.*, Art. 2.

[254] *Ibid.*, Art. 4. Art. 3 names the 'EU Operation Commander' (Major General Neveux), while Art. 5 names the 'Force Commander' (Brigadier General Thonier).

[255] *Ibid.*, Art. 6. The decision to launch the operation was taken by Council Decision 2003/432 on the launching of the European Union military operation in the Democratic Republic of Congo (2003) OJ L 147/42.

operation was delegated to the Political and Security Committee.[256] The EU Military Committee was tasked to monitor the execution of the military operation.[257] The EU mission – like most Union missions – invited third states to participate in the military engagement,[258] and it requested the Union to seek an international agreement with the Democratic Republic of Congo so as to determine the (diplomatic) status of EU-led forces. These Status of Forces Agreements (SOFAs) are generally required to provide CSDP mission with a clear basis in international law.[259]

(d) From words to actions II: restrictive measures

Economic sanctions are a form of international pressure falling short of force. They are designed to 'burden' hostile regimes so as to persuade them to alter their antagonising course. They have traditionally included 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.[260] The European Union has – long before it sent its first CSDP mission – engaged in these forms of international sanctions. However, as will be seen below, the constitutional basis for economic sanctions or restrictive measures has undergone some dramatic constitutional changes. A particularly problematic aspect within this context concerns the jurisdiction of the European Courts.

(aa) Restrictive measures: competence and procedure

The Union's constitutional approach to the adoption of restrictive measures has evolved dramatically since the early years of the Union.[261] In a

[256] *Ibid.*, Art. 7. Importantly, the provision states: 'This authorization shall include the powers to amend the OPLAN, the Chain of Command and the RoE. The powers of decision with respect to the objectives and termination of the operation shall remain vested in the Council, assisted by the Secretary-General/High Representative.'

[257] *Ibid.*, Art. 8.

[258] *Ibid.*, Art. 10. For an overview of these participation agreements in the various CSDP missions, see Koutrakos, *The EU Common Security and Defence Policy*, n. 133 above, 192 *et seq.*

[259] *Ibid.*, Art. 13. A Status of Forces Agreement (SOFA) is typically concluded to allow the Union to enter the territory of the third state. For civilian missions, these agreements are called Status of Mission Agreement (SOMA). For an overview of these agreements in the various CSDP missions, see Koutrakos, *The EU Common Security and Defence Policy*, n. 133 above, 198 *et seq.*

[260] Art. 41 UN Charter.

[261] An excellent historical overview of the European Community's approach towards economic sanctions can be found in P. Koutrakos, 'Trade, Foreign Policy and Defence in EU

first phase, the power to impose economic sanctions was regarded to have altogether remained within the exclusive foreign affairs competences of the Member States. Under the 'Rhodesia doctrine',[262] economic sanctions were thus considered to go beyond the scope of the Common Commercial Policy. This decentralised approach to economic sanctions led to economic and political fragmentation within the Union and soon gave way to a second constitutional formula. The Member States here attempted to coordinate their national foreign policies within the intergovernmental European Political Cooperation (EPC).[263] If a unanimous diplomatic decision to impose sanctions had here emerged among the Member States, it would subsequently be 'translated' into a Union measure based on its commercial policy power.[264] Solid constitutional foundations were finally given during a third phase through what is now Article 215 TFEU. The provision stipulates the following:

> 1. Where a *decision, adopted in accordance with* Chapter 2 *of Title V of the Treaty on European Union*, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
> 2. Where a *decision adopted in accordance with* Chapter 2 *of Title V of the Treaty on European Union* so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.
> 3. The acts referred to in this Article shall include necessary provisions on legal safeguards. [Emphasis added.]

Constitutional Law: The Legal Regulation of Sanctions, Exports of Dual-use Goods and Armaments (Oxford: Hart, 2001), 58–91.

[262] P. J. Kuyper, 'Sanctions against Rhodesia: The EEC and the Implementation of General International Legal Rules' [1975] *CML Rev* 231–44.

[263] On the nature and history of the EPC, see Schütze, *European Constitutional Law*, n. 9 above, 24.

[264] See Council Regulation 596/82 (sanctions against Soviet Union) (1982) OJ L 72/15. Under this original two-step process, 'the EPC mechanism under international law principles precede[d] the proper legislative process within Community law'. It has been taken to 'reflect the compromise between the Member States' interests to preserve their sovereignty as to matters of security policy on the one hand, and the interests of the EC to guarantee the uniform application of law within the whole of the Community on the other': S. Bohr, 'Sanctions by the United Nations Security Council and the European Community' [1993] 4 *EJIL* 256–68, 266.

Article 215 TFEU has become the principal vehicle to implement UN Security Council Resolutions on economic sanctions into European law.[265] The provision provides a competence for the adoption of economic sanctions against *third countries* in paragraph 1,[266] and extends this competence to restrictive measures to *non-state actors* in paragraph 2.[267] This competence is a shared competence[268] yet, importantly, the competence to adopt restrictive measures follows a compound procedure that combines two very distinct parts of the European Treaties. For Article 215 TFEU can only be activated as a legal base within the *Treaty on the Functioning of the European Union* once the Union has already adopted a decision 'in accordance with Chapter 2 of Title V' of the *Treaty on European Union*. Article 215 TFEU can consequently be used only to implement a prior CFSP decision! The qualified majority required under Article 215 TFEU will thus always be preceded by a (unanimous) decision of the Council under Article 31 TEU.

(bb) Counter-terrorism measures and judicial review

Individual sanctions against (suspected) terrorists have been said to constitute – qualitatively and quantitatively – the heart of the Common

[265] K. Lenaerts and E. de Smijter, 'The United Nations and the European Union: Living Apart Together' in K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy* (The Hague: Martinus Nijhoff, 1998), 448 even assert that 'the Member States introduced a [Union] law obligation for the [Union] institutions to implement UN economic sanctions into [Article 215 TFEU]'.

[266] See Regulation 267/2012 concerning restrictive measures against Iran (2012) OJ L 88/1, which, *inter alia*, establishes certain import and export restrictions and freezes certain economic assets; and Regulation 36/2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No. 442/2011 (2012) OJ L 16/1.

[267] The extension of the Union competence to natural and legal persons under Art. 215(2) was a constitutional achievement of the Lisbon Treaty. Prior to the Lisbon amendment, ex-Art. 301 EC only covered economic sanctions against third states, and the adoption of restrictive measures against individuals therefore required Art. 352 TFEU as an additional legal base. For the controversial use of that legal base in the context of counter-terrorist measures prior to the Lisbon Treaty, see Joined cases C-402/05P and C-415/05P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission* [2008] ECR I-6351. For an analysis of the case in general and its competence dimension in particular, see T. Tridimas, 'Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order' (2009) *EL Rev* 103.

[268] *Contra*, Lenaerts and de Smijter, 'The UN and the EU', n. 265 above, 454: 'Within the European legal order the [Union] enjoys exclusive competence in this area [economic sanctions]'; and N. Lavranos, *Legal Interaction between Decisions of International Organizations and European Law* (Grotingen: Europa Law, 2004), 100.

Foreign and Security Policy.[269] These counter-terrorist measures will generally be adopted under Article 215(2) TFEU.[270]

The Union's counter-terrorism regime has evolved in parallel with the United Nations system.[271] After the 9/11 terrorist attacks in New York, the United Nations thereby adopted a centralised and a decentralised regime. Under the centralised regime, a specialised UN Sanctions Committee draws up a list of terrorist suspects and obliges the UN Member States to act against them.[272] The decentralised regime, by contrast, leaves it to each UN Member State to identify suspected terrorists and their organisations.[273] The European Union has implemented both UN regimes into European law. Regulation 881/2002 puts the centralised United Nations regime into effect,[274] whereas a decentralised European Union regime is established in Regulation 2580/2001.[275] According to the former all funds and economic resources belonging to persons or entities designated by the United Nations Sanctions Committee shall be frozen.[276]

[269] C. Eckes, 'EU Counter-terrorist Sanctions against Individuals: Problems and Perils' (2012) 17 *EFAR* 113, 114; and see also C. Eckes, *EU Counter-terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, 2009).

[270] For a recent confirmation that Art. 215(2) TFEU is the adequate legal basis in this context, see Case C-130/10, *Parliament* v. *Council* (nyr), esp. paras. 63–5.

[271] For the European Union Counter-Terrorism Strategy, see http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/l33275_en.htm.

[272] UN Security Council Resolution 1390 (2002), whose para. 2 states: 'Decides that all States shall take the following measures with respect to Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to Resolutions 1267 (1999) and 1333 (2000) to be updated regularly by the Committee established pursuant to Resolution 1267 (1999) hereinafter referred to as "the Committee"'.

[273] UN Security Council Resolution 1373 (2001), whose para. 1 states: 'Decides that all States shall: (a) Prevent and suppress the financing of terrorist acts; (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts'.

[274] (Council) Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (2002) OJ L 139/9. The Regulation was 'activated' by (Council) Common Position 2002/402 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them (2002) OJ L 139/4.

[275] Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (2001) OJ L 344/70. The regulation was preceded by (Council) Common Position 2001/931 on the application of specific measures to combat terrorism (2001) OJ L 344/93.

[276] Regulation 881/2002, Art. 2.

The latter EU regime imposes the sanctions on a list of (suspected) terrorists established by the Council.[277] The effect of either sanction regime is to temporarily deprive individuals of their property. For that reason they have raised serious issues with regard to the protection of fundamental rights in the Union legal order.

What are the administrative or judicial remedies that suspected terrorists are given to challenge their inclusion in the United Nations or European Union lists? According to Article 215(3) TFEU, the Union must provide the 'necessary provisions on legal safeguards'.[278] Will the Court have jurisdiction to control these safeguards? The jurisdiction of the Court within the CFSP is generally very restricted. According to Article 24 TEU and 275 TFEU, the Court of Justice shall not have jurisdiction 'with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions';[279] yet the Treaties expressly recognise an exception for challenges against restrictive measures adopted under the TEU and TFEU.[280] This clarifies that the European Courts have jurisdiction to review the legality of Union sanctions against suspected terrorists – regardless of whether these were identified by the United Nations or the European Union. (This point was clarified in *Kadi*, where the Court rejected the idea of self-imposed structural limits to its jurisdiction when reviewing EU legislation implementing UN Security Council Resolutions.[281]) However, the Union Courts were ambivalent for a long time as to what standard of review to apply to counter-terrorist measures, and in particular: whether or not to apply a lower review standard when the Union implements the centralised UN regime.[282]

[277] Regulation 2580/2001, Art. 2.

[278] For a discussion of this point, see E. Spaventa, 'Counter-terrorism and Fundamental Rights: Judicial Challenges and Legislative Changes after the Rulings in *Kadi* and *PMOI*' in A. Antoniadis, R. Schütze and E. Spaventa (eds.), *The European Union and Global Emergencies: A Law and Policy Analysis* (Oxford: Hart, 2011), 105.

[279] Art. 275 – first indent.

[280] Art. 275 – second indent: 'However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.'

[281] Case C-402/05P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission* [2008] ECR I-6351. For an analysis of this point, see Ch. 2 above, especially its Coda.

[282] In *Kadi I*, the Court held that the Union judicature must ensure 'in principle the full review of all [Union] acts in the light of the fundamental rights forming an integral

4 Association and accession

From the very beginning, the European Treaties entitled the Union to 'associate' a third state with the Union. The principal idea behind such an association was to offer a softer alternative to accession – that is, Union membership. Union associations are not designed to create new substantive rules for the Union and its Member States. On the contrary, associations are intended to extend *existing* Union law to *non*-Member States. Falling short of Union membership, an association offers third states a special and privileged relationship with the Union by allowing them 'at least to a certain extent, [to] take part in the [Union] system'.[283] Association comes close to a *partial and passive* form of Union membership.

The Treaties envisage three forms of association. The first stems from the colonial inheritance of some Member States. This colonial association is regulated in Part IV of the TFEU, which 'constitutionally' associates all overseas countries and territories that are under the sovereignty of a Member State.[284] This association would 'serve primarily to further the interest and prosperity of the inhabitants of these countries and territories'.[285] In its asymmetry, it contrasted with a second form of association based on *reciprocal* rights between the parties. This 'contractual' association is laid down in Article 217 TFEU, which provides a general form of Union association. A special form of association complements Article 217: the European Neighbourhood Policy. We shall explore these three types of association in sections 4(a)–(c) below. Section 4(d) will finally analyse the (pre-)accession process, which allows some associates to become a full member of the European Union.

part of the general principles of [European] law' (*ibid.*, para. 326) for all Union acts which give effect to the resolutions of the United Nations Security Council – even if it had no discretion. However, it remained unclear whether this statement simply referred to the jurisdiction of the Court, or equally referred to the standard of review. For an extensive interpretation that includes the standard of review, see the judgment of the General Court in Case T-85/09, *Kadi* v. *Commission (Kadi II)* [2010] ECR II-5177, and see also Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council, United Kingdom of Great Britain and Northern Ireland* v. *Kadi* (nyr).

283 Case 12/86, *Demirel* v. *Stadt Schwäbisch Gmünd* [1987] ECR 3719, para. 9.

284 Art. 198(1) TFEU states: 'The Member States agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom. These countries and territories (hereinafter called the "countries and territories") are listed in Annex II.'

285 Art. 198(3) TFEU.

(a) 'Constitutional' association(s): overseas countries and territories

European law principally applies exclusively *within* the territories of the Member States.[286] In certain situations, the Treaties do however extend the territorial scope of Union law beyond the European continent.[287] The most important of these territorial extensions is set out in Part IV of the TFEU, entitled 'Association of the Overseas Countries and Territories'. According to its opening provision, the Member States 'agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom'.[288]

The purpose behind the 'constitutional' association of these Overseas Countries and Territories (OCT) is 'to promote the economic and social *development* of the countries and territories and to establish *close economic relations* between them and the Union as a whole'.[289] Conceived as a

[286] Art. 52 TEU.

[287] See Art. 355 TFEU: 'In addition to the provisions of Article 52 of the Treaty on European Union relating to the territorial scope of the Treaties, the following provisions shall apply: 1. The provisions of the Treaties shall apply to Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands in accordance with Article 349. 2. The special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II[.]' In addition to a few minor additional extensions, the Treaties also recognise a number of express exceptions, such as the Faeroe Islands (Art. 355(5)(a) TFEU) and (partly) the Channel Islands and the Isle of Man (Art. 355(5)(c) TFEU). On the Union law governing these overseas territories, see D. Kochenov (eds.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis* (Alphen aan den Rijn: Kluwer, 2011), esp. ch. 1.

[288] Art. 198(1) TFEU. These countries and territories are listed in Annex II of the Treaties and include Greenland, New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands, Mayotte, Saint Pierre and Miquelon, Aruba, Netherlands Antilles (Bonaire, Curaçao, Saba, Sint Eustatius, Sint Maarten), Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands and Bermuda. On Greenland, see also Art. 204 TFEU, as well as Protocol (No. 34) 'On Special Arrangements for Greenland'.

[289] Art. 198(2) TFEU (emphasis added). The Union competence to create this form of association is thereby found in Art. 203 TFEU: 'The Council, acting unanimously on a proposal from the Commission, shall, on the basis of the experience acquired under the association of the countries and territories with the Union and of the principles set out in the Treaties, lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the Union. Where the provisions in question are adopted by the Council in accordance with a special legislative procedure, it shall act unanimously on a proposal from the Commission and after consulting the European Parliament.'

non-reciprocal association for the benefit of the OCT,[290] the Union vowed to open its internal market to OCT imports and the Member States promised to 'contribute to the investment required for the progressive development of these countries and territories'.[291] While many of the legal principles governing the association are found in Part IV of the TFEU,[292] detailed rules were to be adopted by a Council Decision.[293] The present law is set out in Decision 2013/755 – the 'Overseas Association Decision'.[294]

(b) 'Contractual' association(s): Article 217 TFEU

Whereas Part IV 'constitutionally' associated (dependent) territories via the Member States, the Union may contractually decide to establish an association with (independent) third states. Originally conceived as an alternative to Union membership, the competence to conclude association agreements has evolved into a general competence to conclude (almost) any international agreement. Placed within Title V of the External Action Part of the TFEU, Article 217 TFEU states:

> The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.[295]

What was the scope of this association competence? The power appeared to lack almost any thematic limitations – an impression that the Court confirmed when holding that it provided the Union with a competence to conclude international agreements '*in all the fields covered by the [Treaties]*'.[296] Even the reference to 'reciprocal rights and obligations' was discarded, when the Court allowed the Union to base its special development policy on Article 217.[297] The sole distinguishing feature of association agreements seemed to lie in their capacity to establish some

[290] Art. 198 TFEU – third indent. [291] Art. 199(1) and (3) TFEU.
[292] See Arts. 200–2 TFEU. [293] Art. 203 TFEU.
[294] Decision 2013/755 on the association of the overseas countries and territories with the European Union ('Overseas Association Decision') (2013) OJ L 344/1.
[295] These agreements require unanimous consent in the Council (Art. 218(8) TFEU– second indent), and the consent of the European Parliament (Art. 218(6)(a) (i) TFEU).
[296] *Demirel*, n. 283 above, para. 9 (emphasis added). Most (if not all) association agreements are, however, concluded as mixed agreements – a political compromise that 'fudged' the competence issue. On mixed agreements as a political safeguard of federalism, see Chs. 5 and 9 above.
[297] Case 87/75, *Bresciani* v. *Amministrazione Italiana delle Finanze* [1976] ECR 129. The case concerned the Yaounde Convention – a development cooperation instrument – that had been concluded under the predecessor of Art. 217 TFEU. The Court here held (*ibid.*,

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form of 'common action and special procedure' – that is, an *institutional* framework. This institutional framework is however *external* to the Union, as associated states cannot take part in the internal decision-making of the Union. Association agreements will generally set up an institutional structure designed to maintain (!) the association between the Union and the third state(s). Depending on whether the Union association is with one or more states, we can distinguish between bilateral and multilateral associations. The two most prominent illustrations in this respect are the Union's customs union with Turkey, and the trade association created with the EFTA states.

(aa) Bilateral association: the customs union with Turkey

The 1963 Association Agreement with Turkey (the Ankara Agreement) constitutes the oldest existing association agreement of the Union.[298] The aim of the Ankara Agreement is 'to establish ever closer bonds between the Turkish people and the peoples brought together in the European [Union]'.[299] The aim of closer economic association would find expression in the creation of a customs union between the contracting parties.[300] The customs union covers all trade in goods and involves:

> – the prohibition between Member States of the [Union] and Turkey, of customs duties on imports and exports and of all charges having

para. 22): 'It is apparent from these provisions that the Convention was not concluded in order to ensure equality in the obligations which the [Union] assumes with regard to the associuated States, but in order to promote their development[.]' On Art. 217 TFEU as the basis of the Union's (special) development policy, see section 2 above.

[298] Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the EEC and the Community, on the other (1973) OJ C 113/1. Many provisions within the Ankara Agreement were further clarified by an additional Protocol: Additional Protocol and Financial Protocol (1972) OJ L 293/4.

[299] Ankara Agreement, Preamble 1. According to the Preamble 4, these closer economic bonds would 'facilitate the accession of Turkey to the [Union] at a later date'. The accession context is further underlined by Art. 28 of the Agreement: 'As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the [Union], the Contracting Parties shall examine the possibility of the accession of Turkey to the [Union].' For Maresceau, these parts of the Ankara Agreement show its 'unequivocal pre-accession nature', see M. Maresceau, 'Turkey: A Candidate State Destined to Join the Union' in N. Nic Shuibhne and L. W. Gormley (eds.), *From Single Market to Economic Union Essays in Memory of John A. Usher* (Oxford University Press, 2012), 315, 318.

[300] Ankara Agreement, Art. 2.

equivalent effect, quantitative restrictions and all other measures having equivalent effect which are designed to protect national production in a manner contrary to the objectives of this Agreement;
– the adoption by Turkey of the Common Customs Tariff of the [Union] in its trade with third countries, and an approximation to the other [Union] rules on external trade.[301]

Apart from the customs union in goods, the Ankara Agreement also envisaged the gradual abolition of restrictions on the free movement of persons,[302] services[303] and capital.[304] However, many of the provisions of the Agreement (and its Protocols) are of a programmatic nature. Very few of them are thus directly effective provisions;[305] and its free movement provisions in particular were considered 'not sufficiently precise and unconditional'.[306] The implementation of the Ankara Agreement would therefore have to rely on 'positive integration'. The central decision-making body here is the Association Council.[307] It 'consists of members of the Governments of the Member States and members of the Council and of the Commission of the [Union] on the one hand and of members of the Turkish Government on the other'.[308] The Association Council adopts its decisions by unanimous agreement.[309] These decisions are directly applicable, since they are considered 'an integral part of the [Union] legal system'.[310]

[301] *Ibid.*, Art. 10(2).
[302] *Ibid.*, Art. 12: 'The Contracting Parties agree to be guided by Articles [45–7 TFEU] for the purpose of progressively securing freedom of movement for workers between them.' And Art. 13: 'The Contracting Parties agree to be guided by Articles [49–54 TFEU] for the purpose of abolishing restrictions on freedom of establishment between them.'
[303] *Ibid.*, Art.14: 'The Contracting Parties agree to be guided by Articles [56–61 TFEU] for the purpose of abolishing restrictions on freedom to provide services between them.'
[304] *Ibid.*, Art. 20: 'The Contracting Parties shall consult each other with a view to facilitating movements of capital between Member States of the [Union] and Turkey which will further the objectives of this Agreement.'
[305] See Case C-37/98, *The Queen* v. *Secretary of State for the Home Department, ex p. Abdulnasir Savas* [2000] ECR I-2927; and Joined Cases C-317/01 and C-369/01, *Abatay and others and Nadi Sahin* v. *Bundesanstalt für Arbeit* [2003] ECR I-12301.
[306] *Demirel*, n. 283 above, para. 24.
[307] Ankara Agreement, Art. 22(1): 'In order to attain the objectives of this Agreement the Council of Association shall have the power to take decisions in the cases provided for therein. Each of the Parties shall take the measures necessary to implement the decisions taken.'
[308] *Ibid.*, Art. 23 – first indent. [309] *Ibid.*, Art. 23 – third indent
[310] See Case 30/88, *Greece* v. *Commission* [1989] ECR 3711; and Case 192/89, *Sevince* v. *Staatssecretaris van Justitie* [1990] ECR 3461, para. 15: 'In Demirel, *supra*, the Court held that a provision in an agreement concluded by the [Union] with non-member countries

With regard to the free movement of goods, the Association Council's most famous decision is Decision 1/95.[311] The latter lays down 'the rules for implementing the final phase of the Customs Union' by extending – almost always verbatim – the Union's own customs rules to Turkey.[312] Turkey promised to harmonise Turkish legislation of direct relevance to the operation of the customs union 'as far as possible with [Union] legislation';[313] and, in exchange, the Commission agreed to consult with Turkey when new Union legislation of direct relevance to the customs union was drawn up.[314] The Association Council has also played a central role in the implementation of the other three internal market freedoms, in particular the free movement of workers. The famous decision in this context is Decision 1/80, the 'Magna Carta' for Turkish workers in the European Union.[315]

must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (paragraph 14). The same criteria apply in determining whether the provisions of a decision of the Council of Association can have direct effect.'

311 Decision No. 1/95 of the EC–Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (1996) OJ L 35/1.

312 E.g. Art. 5 of Decision 1/95 reproduces Art. 34 TFEU and states 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between the parties.'

313 Art. 54(1) of Decision 1/95. These areas of direct relevance are defined as follows (*ibid.*, para. 2): 'Areas of direct relevance to the operation of the Customs Union shall be commercial policy and agreements with third countries comprising a commercial dimension for industrial products, legislation on the abolition of technical barriers to trade in industrial products, competition and industrial and intellectual property law and customs legislation. The Association Council may decide to extend the list of areas where harmonization is to be achieved in the light of the Association's progress.'

314 *Ibid.*, Art. 55(1). For a criticism of this arrangement, as well as Decision 1/95 in general, see S. Peers, 'Living in Sin: Legal Integration under the EC–Turkey Customs Union' (1996) 7 *EJIL* 411.

315 J. Bast, 'Association Agreements' in *Max-Planck-Encyclopaedia of International Law* (http://opil.ouplaw.com/home/EPIL), para. 14. The substantive heart of Decision 1/80 is formed by its Arts. 6 and 7. The former states: 'Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State: shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available; shall be entitled in that Member State, after three years of legal employment and subject to the priority to be given to workers of Member States of the [Union], to respond to another offer of employment, with an employer of his choice, made under normal conditions and registered with the employment services of that State, for the same occupation; shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.' Art. 7 then adds: 'The members of the

(bb) EFTA: the European Economic Area

The European Free Trade Association (EFTA) was created in 1960 to promote free trade among its (then) seven member states.[316] These 'outer seven' had refused to join the (inner) six states signing the 1957 Rome Treaty. Seeing the European Union as too integrated, the EFTA states nonetheless felt the need to establish a looser economic counterweight. This strategy did not pay off, for after several defections to the European Union, EFTA consists today of only four European states: Iceland, Liechtenstein, Norway and Switzerland.

What are the contractual relations between the EFTA states and the European Union? Having originally concluded bilateral (association) agreements with each of the EFTA states, the Union subsequently wished to associate them collectively. This collective association took place through the Agreement on the European Economic Area (EEA).[317] The latter entered into force on 1 January 1994 – yet, with Switzerland not ratifying the Agreement,[318] only three EFTA states are finally associated in this way.

What is the nature and structure of the EEA Agreement? It aims to establish a free trade area 'with equal conditions of competition, and the respect of the same rules, with a view to creating a homogenous European

family of a Turkish worker duly registered as belonging to the labour force of a Member State, who have been authorised to join him: shall be entitled – subject to the priority to be given to workers of Member States of the [Union] – to respond to any offer of employment after they have been legally resident for at least three years in that Member State; shall enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years. Children of Turkish workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years.' For the direct effect of Arts. 6 and 7 of Decision 1/80, see *Sevince*, n. 310 above, para. 26; and Case C-351/95, *Kadiman* v. *Freistaat Bayern* [1997] ECR 2133, paras. 27. For an extensive discussion of the free movement of worker rules between Turkey and the EU, see N. Tezcan Idriz, 'Free Movement of Persons between Turkey and the EU: To Move or Not to Move? The Response of the Judiciary' (2009) 46 *CML Rev* 1621.

316 The founding members of EFTA were Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom.

317 Agreement on the European Economic Area (EEA Agreement) (1994) OJ L 1/3.

318 The Union and Switzerland continue to have a separate set of bilateral agreements to associate the latter to the former. On the Swiss agreements, see S. Breitenmoser, 'Sectoral Agreements between the EC and Switzerland: Contents and Context' (2003) 30 *CML Rev* 1137.

Economic Area'.[319] Setting out its objectives in Part I, the Agreement covers the free movement of goods in Part II; Part III addresses the free movement of persons, services and capital; Part IV lists the provisions on competition; while Part V regulates flanking policies that are relevant to the four freedoms.[320] The provisions within Parts I–V are thereby (almost) identical to those in the European Treaties, even if the EEA is not a customs union but a 'fundamentally improved free trade area'.[321] The final Parts of the EEA Agreement deal with institutional and general matters. The Agreement here creates its 'association' institutions, which are an EEA Council,[322] an EEA Joint Committee[323] and an EEA Parliamentary Committee.[324] In addition to these EEA institutions, the Agreement also envisaged the creation of an EFTA Surveillance Authority and the EFTA Court.[325]

[319] EEA Agreement, n. 317 above, Art. 1.

[320] Part V of the EEA Agreement containing rules on 'Social Policy', 'Consumer Protection', 'Environment', 'Statistics' and 'Company Law'.

[321] S. Norberg, 'The Agreement on a European Economic Area' (1992) 29 *CML Rev* 1171, 1173.

[322] According to Art. 89(1) EEA Agreement, the EEA Council 'shall, in particular, be responsible for giving the political impetus in the implementation of this Agreement and laying down the general guidelines for the EEA Joint Committee'. And Art. 90(1) adds: 'The EEA Council shall consist of the members of the Council of the European [Union] and members of the E[U] Commission, and of one member of the Government of each of the EFTA States.'

[323] The EEA Committee 'shall consist of representatives of the Contracting Parties': *ibid.*, Art. 93(1). It 'shall ensure the effective implementation and operation of this Agreement': *ibid.*, Art. 92(1).

[324] The EEA Parliamentary Committee 'shall be composed of equal numbers of, on the one hand, members of the European Parliament and, on the other, members of Parliaments of the EFTA States': *ibid.*, Art. 95(1). It 'shall contribute, through dialogue and debate, to a better understanding between the [Union] and the EFTA States in the fields covered by this Agreement': *ibid.*, para. 3.

[325] *Ibid.*, Art. 108: '1. The EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) as well as procedures similar to those existing in the [Union] including procedures for ensuring the fulfilment of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition. 2. The EFTA States shall establish a Court of Justice (EFTA Court). The EFTA Court shall, in accordance with a separate agreement between the EFTA States, with regard to the application of this Agreement be competent, in particular, for: (a) actions concerning the surveillance procedure regarding the EFTA States; (b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority; (c) the settlement of disputes between two or more EFTA States.' For the relevant EFTA agreements, see www.efta.int/legal-texts/the-surveillance-and-court-agreement.aspx.

The central aim behind the EFTA association is the creation of a homogenous trade area: the EEA. How can economic homogeneity be achieved? The Agreement here follows a dual approach. First, it has 'incorporated' all the *past* jurisprudence of the European Court of Justice: all provisions of the Agreement must, 'in so far as they are identical in substance' to corresponding rules of the Union legal order, 'be interpreted with the relevant rulings of the Court of Justice of the European [Union] given prior to the date of signature of this Agreement'.[326] Moreover, all Union acts contained in the EEA Annexes are to be incorporated into the EFTA legal order. In line with classic international law, the enforcement of the Agreement is thereby left to the contracting parties. According to the 'two pillar' model,[327] enforcement will thus be undertaken by the European Commission and the European Court(s) on the one hand, and the EFTA Surveillance Authority and the EFTA Court on the other.

How would the EFTA states absorb *future* legislative and judicial developments within the Union?[328] Instead of an automatic incorporation of EU law, the Agreement here calls on the EEA Joint Committee. Consisting of representatives of the contracting parties, it is tasked to 'ensure the effective implementation and operation of this Agreement';[329] and in particular to update the Annexes and Protocols of the Agreement in the light of new legislative developments within the Union.[330] The Joint Committee will thereby act 'by agreement between the [Union], on the one hand, and the EFTA States speaking with one voice, on the other'.[331] What happens where the EFTA states do not wish to incorporate new Union legislation? In the absence of a consensus between the Union and the

[326] EEA Agreement, Art. 6.

[327] Norberg, 'The Agreement on a EEA', n. 321 above, 1189.

[328] Union acts that are relevant for the EEA, are labelled as 'Text with EEA relevance'.

[329] EEA Agreement, Art. 92.

[330] *Ibid.*, Art. 102(1): 'In order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee shall take a decision concerning an amendment of an Annex to this Agreement as closely as possible to the adoption by the [Union] of the corresponding new [Union] legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement. To this end, the [Union] shall, whenever adopting a legislative act on an issue which is governed by this Agreement, as soon as possible inform the other Contracting Parties in the EEA Joint Committee. These committees are listed in Protocol 37. The modalities of such an association are set out in the relevant sectoral Protocols and Annexes dealing with the matter concerned.'

[331] *Ibid.*, Art. 93(2).

EFTA states, the disputed part of the EEA Agreement will be provisionally suspended.[332]

What about judicial developments in the Union legal order? In contrast to the original (draft) agreement that envisaged an EEA court,[333] the EEA Agreement also charges the Joint Committee with the task of 'keep[ing] under constant review the development of the case law of the Court of Justice of the European [Union]', and to 'act so as to preserve the homogenous interpretation of the Agreement'.[334] Where no consensus can be reached on the interpretation of a provision, the contracting parties may request the European Court of Justice to give a ruling;[335] and where this fails the parties are entitled to apply 'safeguard measures' and thus to effectively suspend the operation of the agreement in a specific sector.[336]

(c) 'Special' association(s): the European Neighbourhood Policy

Built on the belief that the Union has a duty 'towards its present and future neighbours to ensure continuing social cohesion and economic dynamism', the European Neighbourhood Policy (ENP) was conceived in 2003.[337] The aim of this Union policy is 'to develop a zone of prosperity

[332] *Ibid.*, Art. 102(5).

[333] The original draft agreement had envisaged the creation of the EEA Court in its (then) Art. 95, which would have been composed of five judges from the ECJ and three judges from the EFTA states. But when the ECJ was asked to review the constitutionality of the (draft) EEA Agreement with the EU legal order, it found that the jurisdiction of the EEA Court was 'likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the [Union] legal order, respect for which must be assured by the Court of Justice': Opinion 1/91 (Draft EEA Agreement) [1991] ECR I-6079, paras. 35. Following this negative opinion, another solution had to be found.

[334] EEA Agreement, Art. 105(2). Importantly, the discretion of the Joint Committee is limited by a *procés verbal*, according to which its decisions cannot affect the case law of the Court of Justice (see Opinion 1/92 (EEA Agreement II) [1992] ECR 2821, para. 6). This new arrangement was confirmed to be in line with the EU Treaties. But what about the EFTA Court? The latter is only formally bound by ECJ jurisprudence prior to the signing of he EEA (2 May 1992); yet, the EFTA Court has 'consistently taken into account the relevant rulings of the CJEU given after the said date': Joined Cases E-9/07 and E-10/07, *L'Oréal* [2008] EFTA Court Reports 258, para. 28. For an early analysis of the EFTA Court loyalty, see V. Kronenberger, 'Does the EFTA Court Interpret the EEA Agreement as if it Were the EC Treaty? Some Questions Raised by the Restamark Judgment' (1996) 45 *ICLQ* 198.

[335] EEA Agreement, Art. 111(3).

[336] EEA Agreement, Art. 112.

[337] Commission Communication, 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', COM (2003) 104 final. The policy has been elaborated through various additional Commission Communications, see 2004 Commission Communication, 'European Neighbourhood Policy: Strategy Paper', COM

and a friendly neighbourhood – a "ring of friends" – with whom the EU enjoys close, peaceful and cooperative relations'.[338] Conceived as an alternative to Union membership,[339] it is designed to 'prevent the emergence of new dividing lines' by bringing geographical neighbours 'closer to the European Union'.[340]

This special association for Europe's neighbourhood has – after the Lisbon Treaty – found a formal constitutional basis in Article 8 TEU.[341] The provision states:

> 1. The Union shall develop a *special* relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on *cooperation*.
> 2. For the purposes of paragraph 1, the Union may conclude *specific* agreements with the countries concerned. These agreements *may* contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.[342]

Article 8 TEU obliges the Union to develop a special relationship with the Union's neighbouring countries. It thereby introduces a new type of European Neighbourhood Agreement that shares a strong family resemblance with general association agreements.[343] Neighbourhood agreements are

(2004) 373 final; Commission Communication, 'On Strengthening the European Neighbourhood Policy', COM (2006) 726 final; and Commission Communication, 'A Strong European Neighbourhood Policy', COM (2007) 774 final. For an overview of the ENP, see A. N. Christensen, *The Making of the European Neighbourhood Policy* (Baden-Baden: Nomos, 2011); and N. Ghazaryan, *European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Oxford: Hart, 2014).

338 2003 Commission Communication, 'Wider Europe', n. 337 above, 4.

339 *Ibid.*, 5.

340 2004 Commission Communication, 'Strategy Paper', n. 337 above, 3, 8.

341 The systematic position of the provision within the 'common provisions' of Title I of the TEU is hard to explain. While it was probably not placed next to Art. 217 TFEU because Art. 8 TEU agreements partly overlap with CFSP matters, why was it not placed next to the TEU's provision dealing with Union membership? Perhaps to avoid the suggestion that the 'neighbourhood' status would lead to membership?

342 Emphasis added. See also Declaration No. 3 'On Article 8 of the Treaty on European Union', which states: 'The Union will take into account the particular situation of small-sized countries which maintain specific relations of proximity with it.'

343 The term 'neighbourhood agreement' was used in the 2004 Commission Communication, n. 337 above, 3, but it has not yet been universally accepted. The Union (alternatively) refers to 'Deep and Comprehensive Trade Agreements', 'enhanced agreements' or to the new generation of 'association agreements'. On the similarity of Art. 8(2) TEU and Art. 217 TFEU, see P. van Elsuwege and R. Petrov, 'Article 8: TEU: Towards a New

however special and specific agreements in a dual sense. First, they are *geographically* narrower than general association agreements, since they are restricted to *neighbouring* countries. A restrictive reading of this criterion would limit ENP agreements to countries that share a land or sea border with the Union; yet, the Union appears to have adopted a broader reading that simply requires geographic vicinity.[344] *Thematically*, ENP agreements also appear to be more specific than general association agreements, for Article 8 TEU mentions the special objective of creating 'an area of prosperity and good neighbourliness'. What does this substantively entail? It has been argued that it obliges the Union to establish 'the *most advanced* forms of association' – like that found in the EEA.[345] These agreements will moreover also have an explicit or implicit 'stability and security' dimension.[346]

How has the Union implemented its neighbourhood policy? Past practice has developed mainly prior to the Lisbon Treaty. It is built on the existing bilateral relations between the Union and sixteen eastern and southern neighbours.[347] These bilateral (association) agreements

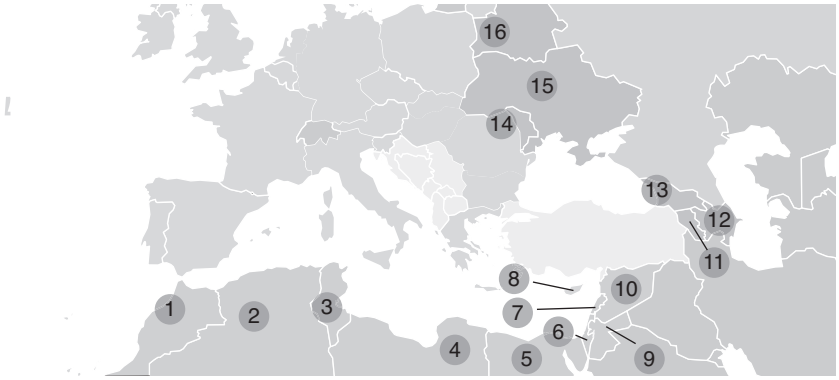
Generation of Agreements with the Neighbouring Countries of the European Union?' (2011) 36 *EL Rev* 688.

[344] See 2004 Commission Communication, 7 (emphasis added): 'The ENP is addressed to the EU's existing neighbours *and to those that have drawn closer to the EU as a result of enlargement*.'

[345] D. Hanf, 'The European Neighbourhood Policy in the light of the new "Neighbourhood clause" (Article 8 TEU)' in E. Lannon (ed.), *The European Neighbourhood Policy's Challenges* (Frankfurt: Lang, 2012), 109, 113, 118 (emphasis added). In this sense already, see 2003 Commission Communication, n. 337 above, 15: 'The long term goal of the initiatives [within the ENP] is to move towards an arrangement whereby the Union's relations with the neighbouring countries ultimately resemble the close political and economic links currently enjoyed with the European Economic Area.' On the long-term aim of a 'Neighbourhood Economic Community', see S. Blockmans and B. van Vooren, 'Revitalising the European "Neighbourhood Economic Community": The Case for Legally Binding Sectoral Mulilateralism' [2012] 17 *EFAR* 577.

[346] From its inception, the ENP was linked to the 'European Security Strategy' (n. 229 above), see M. Cremona and C. Hillion, 'L'Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy', EUI Working Paper LAW No. 2006/39.

[347] The 'European Neighbourhood' includes: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, the Republic of Moldova, Morocco, the Occupied Palestinian Territories, Syria, Tunisia and Ukraine. The Union had concluded association agreements ('Euro-Mediterranean Agreements') with most of its southern neighbours and 'Partnership and Cooperation Agreements' with most of its eastern neighbours. For an analysis of the 'southern' history of the ENP, see P. J. Cardwell, *EU External Relations and Systems of Governance: The CFSP, Euro-Mediterranean Partnership and Migration* (Oxford: Routledge, 2011). For an analysis of the 'eastern' history, see E. Korosteleva,



Key:
1 Morocco; 2 Algeria; 3 Tunisia; 4 Libya; 5 Egypt; 6 Israel; 7 Lebanon; 8 Cyprus; 9 Jordan; 10 Syria; 11 Armenia; 12 Azerbaijan; 13 Georgia; 14 Moldova; 15 Ukraine; 16 Belarus.

Figure 12.3 European neighbourhood.

typically set up joint institutions that are to implement the agreement. Part and parcel of this implementation is the adoption of individual action plans. These plans are the 'operational' instrument of the ENP; and they set out specific policy priorities for a period of three to five years.[348] The Union encourages the achievement of these reform targets by offering financial benefits. The chief financial instrument in this context is the European Neighbourhood and Partnership Instrument (ENPI),[349] which makes funding conditional on the fulfilment of ENP objectives.[350] Once these ENP action plans are implemented, the Union will presumably conclude new (association) agreements in the form of Article 8 TEU agreements.

The European and its Eastern Neighbours: Towards a more ambitions partnership (Oxford: Routledge, 2012).

348 For a list of the individual action plans, see http://ec.europa.eu/world/enp/documents_en.htm.

349 Regulation 1638/2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument (ENPI) (2006) OJ L 310/1. The ENPI aims 'to provide [Union] assistance for the development of an area of prosperity and good neighbourliness' for the benefit of the partner countries (*ibid.*, Art. 1). It defines twenty-nine areas of Union assistance in Art. 2, including the promotion of 'political dialogue and reform' and 'legislative and regulatory approximation towards higher standards in all relevant areas and in particular to encourage the progressive participation of partner countries in the internal market and the intensification of trade'.

350 *Ibid.*, Art. 28 ('Suspension of [Union] Assistance').

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In addition to a bilateral approach towards its neighbours, the Union has also adopted a multilateral approach. The latter envisages the creation of a regional framework for the southern and the eastern neighbourhood. The two institutional expressions of this Union-induced regionalism are the 'Union for the Mediterranean' and the 'Eastern Partnership'.[351] These regional blocs run 'in parallel with the bilateral cooperation between the EU and third States'.[352] Their aim is to further 'facilitat[e] approximation towards the European Union', while equally 'forster[ing] links among partner countries themselves'.[353]

(d) Accession: the Union's enlargement 'policy'

The historic task of the European Union was 'to lay the foundations of an ever *closer* union of the peoples of Europe'.[354] This task has been complemented by the idea of an ever *wider* union,[355] for the European project had always been 'open to the participation of the other countries in Europe'.[356] Having started as the 'Europe of the Six' in 1958, several enlargement 'waves' have increased membership of the Union enormously (Table 12.7).

Future Union membership is today regulated in a single article, namely Article 49 TEU. It states:

> *Any European State* which respects the *values referred to in Article 2 and is committed to promoting them* may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council,

[351] On the history and structure of the 'Union for the Mediterranean', see B. Heese, *Die Union für das Mittelmeer: Zwei Schritte vor einen zurück?* (Berlin: LIT, 2009). A brief overview of the eastern partnership can be found in C. Hillion and A. Mayhew, 'The Eastern Partnership: Something New or Window-dressing', Sussex European Institute Working Paper No. 109.

[352] Joint Declaration of the Prague Eastern Partnership Summit (Brussels, 7 May 2009 8435/09), para. 1.

[353] *Ibid.*, paras. 2 and 9.

[354] 1957 EEC Treaty, Preamble 1.

[355] On the debate between 'deepening' and 'widening', see A. Tatham, *Enlargement of the European Union* (Alphen aan den Rijn: Kluwer, 2009), 3. The Union has recognised the dilemma of choosing between the two dimesnions partly by linking enlargement to its 'absorption capacity', see European Council, 2006 Presidency Conclusions (14–15 December), para. 9: 'The European Council stresses the importance of ensuring that the EU can maintain and deepen its own development. The pace of enlargement must take into account the capacity of the Union to absorb new members.'

[356] Schuman Declaration in A. G. Harryvan and J. van der Harst, *Documents on European Union* (Basingstoke: Palgrave Macmillan, 1997), 61.

Table 12.7 *Enlargement 'waves'*

Northern enlargement	Southern enlargement	EFTA enlargement	Eastern enlargement	Balkan enlargement	**Candidates (* = potential)**
Britain (1973)	Greece (1981)	Austria (1995)	Cyprus (2004)	Bulgaria (2007)	FYRM
Denmark (1973)	Portugal (1986)	Finland (1995)	Czech Republic (2004)	Croatia (2013)	Iceland
Ireland (1973)	Spain (1986)	Sweden (1995)	Estonia (2004)	Romania (2007)	Montenegro
			Hungary (2004)		Turkey
			Latvia (2004)		Albania*
			Lithuania (2004)		
			Malta (2004)		Bosnia & Herzegovina*
			Poland (2004)		Serbia*
			Slovakia (2004)		Kosovo*
			Slovenia (2004)		

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> which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. *The conditions of eligibility agreed upon by the European Council shall be taken into account.*
>
> The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.[357]

Having briefly defined the eligibility conditions for candidate countries, the provision concentrates on the procedure for accession. Let us analyse both aspects in turn.

(aa) Pre-accession: eligibility and admissibility

Article 49 TEU distinguishes between certain 'constitutional' criteria that determine the 'eligibility' of a candidate state, and the 'political' criteria that determine its 'admissibility'.[358]

For a candidate to be eligible for Union membership it needs to be a 'state' that is 'European' and which subscribes to the foundational values of the Union expressed in Article 2 TEU. What stands behind these three constitutional criteria? While the formal notion of 'statehood' is today generally left to international law, the European Union appears to have originally been reluctant to accept formally independent micro-states.[359] Be that as it may, the requirement to be a 'European' state is much more controversial. For even if it 'combines geographical, historical and cultural elements',[360] geography should be controlling. 'Europe' is clearly neither

[357] Art. 49 TYEU (emphasis added).

[358] This terminological distinction is taken from C. Hillion, 'The Copenhagen Criteria and their Progeny' in C. Hillion (ed.), *EU Enlargement: A Legal Approach* (Oxford, Hart publishing, 2004), 1. With the Lisbon Treaty, the distinction has however received a textual blow – oh, you Treaty-makers! – with Art. 49(1) TEU now charging the European Council to decide on the conditions of eligibility. However, as Art. 49(2) speaks of 'conditions of admission', we shall stick to the more logical distinction. On the political nature of all these criteria, see Case 93/78, *Mattheus* v. *Doego Fruchtimport und Tiefkühlkost eG* [1978] ECR 2203, esp. para. 7: '[T]he legal conditions for such accession remain to be defined in the context of that procedure without it being possible to determine the content judicially in advance.'

[359] D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (The Hague: Kluwer, 2008), 25, who mentions, in particular, San Marino and the Principality of Monaco.

[360] Commission, 'Europe and the Challenge of Enlargement' (1992) Bulletin of the European Communities, Supplement 3/92, 7, 11.

'Africa' nor 'Asia'.[361] A European state will moreover have to adhere to the values on which the Union is founded – that is, 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.[362] The Union has presently accepted a number of European states as 'candidate counties',[363] while some states are viewed as 'potential candidates'.[364]

When will an 'eligible' state also be 'admissible'? For a long time, the conditions of admission were as simple as they were unspecified: any future member would simply have to accept European Union law as '[a] condition [i]nherent to [m]embership'.[365] This generally means *all* European law,[366] even if transitional periods often soften this absolute obligation.[367] A new Member State is thus expected to apply the normal Union rules as soon as it is admitted to the Union. These high expectations have given rise to a complex *pre*-accession process.[368] This pre-accession process is organised by the Union to assist candidate states to prepare for Union membership. It has been linked to a number of political (pre-)conditions defined by the European Council in Copenhagen. The three Copenhagen criteria thereby insist that the candidate country has achieved 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities',

[361] For this reason Morocco's application was deemed inapplicable in 1987.

[362] Art. 2 TEU. The provision continues: 'These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

[363] With Croatia having acceded on 1 July 2013, the current candidate countries are Iceland, Montenegro, the former Yugoslav Republic of Macedonia and Turkey.

[364] The potential candidate countries are Albania, Bosnia & Herzegovina, Serbia and Kosovo.

[365] Hillion, 'The Copenhagen Criteria and their Progeny', n. 358 above, 8.

[366] When Art. 49 TEU refers to 'adjustments to the Treaties' this typically refers to institutional amendments necessitated by the enlargement as such: 'The Member States and the candidate do not renegotiate the *acquis*, they only discuss technical changes such as the number of the new Member's seats in the European Parliament and other committees, as well as its coting rights in the Council': Hillion, 'The Copenhagen Criteria and their Progeny', n. 358 above, 9. Nonetheless, the Union has often used accession treaties to implement more structural constitutional reforms.

[367] These transition periods may be given to a new Member State or to the old Member States. For an overview of the various transitional agreements, see K. Inglis, 'The Accession Treaty and its Transitional Arrangements: A Twilight Zone for the New Members of the Union' in C. Hillion (ed.), *EU Enlargement: A Legal Approach* (Oxford, Hart Publishing, 2004), 77.

[368] See M. Maresceau, 'Pre-Accession' in M. Cremona (ed.), *The Enlargement of the European Union* (Oxford University Press, 2003), 9.

'a functioning market economy' and – most generally – the 'ability to take on the obligations of membership'.[369]

The basic pre-accession instrument will typically be an association agreement between the Union and the candidate country, which is complemented by an 'accession partnership'.[370] The former 'provide[s] the bilateral legal basis for the rights and obligations under the association pending eventual accession to the Union'.[371] The latter is a unilateral Union instrument that defines the reform priorities for the individual country as well as the financial resources offered by the Union to assist each applicant to implement these priorities during the pre-accession period.[372] Pre-accession assistance is thereby conditional on the gradual fulfilment of the association agreement and the Copenhagen criteria for each individual accession state.[373] Part of the pre-accession process is an annual screening of the candidates' progress – a process that is conducted by the Commission.[374]

(bb) Accession agreements: procedural and substantive aspects

Once pre-accession negotiations are finalised, Union membership must be concluded on the basis of an accession treaty.[375] Procedurally, Article 49 TEU here distinguishes between a 'Union phase' (first indent) and a 'Member State phase' (second indent). The Union institutions must

[369] European Council, 'Conclusions of the Presidency (Copenhagen, 21–22 June 1993)' in A. G. Harryvan and J. van der Harst (eds.), *Documents on European Union* (New York: St Martin's Press, 1997), 286–7.

[370] Accession partnerships were introduced as a 'new instrument' during the eastern enlargement of the Union, and as part of an 'enhanced pre-accession strategy' by Regulation 622/98 on assistance to the applicant states in the framework of the pre-accession strategy, and in particular on the establishment of accession partnerships (1998) OJ L 85/1.

[371] K. Inglis, 'The Europe Agreements Compared in the Light of their Pre-accession Reorientation' (2000) 37 *CML Rev* 1173, 1189.

[372] Art. 1 of Regulation 622/98, n. 370 above.

[373] *Ibid.*, Art. 4: 'Where an element that is essential for continuing to grant pre-accession assistance is lacking, in particular when the commitments contained in the Europe Agreement are not respected and/or progress towards fulfilment of the Copenhagen criteria is insufficient, the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps with regard to any pre-accession assistance granted to an applicant State.'

[374] For the various strategy and progress reports, see http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index_en.htm.

[375] The latter will normally consist of three parts: the Treaty of Accession, the Act of Accession, and the Final Act. For an overview of these various instruments, see Tatham, *Enlargement of the EU*, n. 355 above, 260–1.

first decide on the admissibility of the new state; and only once Council and Parliament have taken a positive decision on the admissibility of a candidate state are the Member States entitled to conclude an accession agreement with the acceding state. The constitutional requirement of a *dual* consent – from the Union and its Member States – is rooted in the federal nature of the Union in which two political bodies co-exist. Importantly, the final accession treaty is an international treaty that is *not* a Union treaty. It is concluded by the acceding state with the collectivity of the old Member States – and thus comes close to an 'amendment treaty'. Indeed, all accession treaties are part of the primary law of the Union and as such have constitutional status.

What is the typical content of an accession treaty? The substantive heart of each accession treaty will be the 'conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails'.[376] They are normally set out in the 'Act of Accession', which is attached to the treaty.[377] Part I will here typically spell out the new Member State's obligation to accept the entire Union *acquis*,[378] while Part II deals with permanent adjustments to the European Treaties. Subsequent parts will then detail the transitional arrangements as well as provisions governing the implementation of the Act.[379] (Long transitional derogations from the ordinary Union rules are not unknown – especially with regard to the free movement of workers.) Finally, the Act may contain a general safeguard clause with a special sanction regime for 'a serious breach of the functioning of the internal market or a threat to the Union's financial interests or an imminent risk of such a breach or threat'.[380] This

[376] Art. 49 TEU – second indent.

[377] See Croatia Accession Treaty (2012) OJ L 112/10, Art. 1(3): 'The conditions of admission and the adjustments to the Treaties referred to in paragraph 2, entailed by such admission, are set out in the Act annexed to this Treaty. The provisions of that Act are an integral part of this Treaty.'

[378] See Act Concerning the Conditions of Accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (2012) OJ L 112/21, Arts. 2–6.

[379] These are, respectively, governed by Part IV and Part V in the Croatia Act of Accession.

[380] *Ibid.*, Art. 38: 'If Croatia fails to fulfil commitments undertaken in the context of the accession negotiations, including commitments in any sectoral policy which concerns economic activities with a cross-border effect, thereby causing a serious breach of the functioning of the internal market or a threat to the Union's financial interests or an imminent risk of such a breach or threat, the Commission may, until the end of a period of up to three years after accession, upon reasoned request of a Member State or on its own initiative, take appropriate measures.'

extraordinary sanction regime will typically expire after a period of three years. From that moment onwards, breaches of Union law by the new Member State can only be judged through the 'ordinary' constitutional rulebook. The acceding state has now become a full Member State of the European Union.

Conclusion

The European Union is a (major) civilian and a (minor) military power. In the past, its external actions on the international scene chiefly consisted in trade relations with third states. To that effect, it had been given the power to formulate and enforce a common commercial policy for its Member States. This Union competence was an exclusive competence in that it prevented the Member States from operating within its scope. The scope of the CCP competence has however varied with time. Originally confined to trade in goods, it covers today the whole gamut of international economic law and thus allows the Union fully to engage in most aspects of multilateral and bilateral trade agreements.

Title III of the External Action Part of the TFEU allows the Union to establish a development *aid* policy. This second Union policy has 'as its primary objective the reduction and, in the long term, the eradication of poverty'.[381] This shared competence allows the Union generally to act vis-à-vis all developing countries. It contrasts with its regionally specific development policy for ACP countries. These former colonies are associated by means of the Cotonou Agreement, which continues to provide them with extra-budgetary support through the EDF. (However, the Union's special development policy towards ACP countries might – eventually – be integrated into the Union's general development policy. Constitutionally, the Lisbon Treaty seems to have paved the way for such a 'unification', for, in deleting ex-Article 179(3) EC, it has removed a constitutional guarantee that protected the special nature of the ACP development regime.[382])

What about the Union's broader international engagements and, in particular, security and defence? With the failure of the 1952 European Defence Community, the Union has traditionally left the classic heart of

[381] Art. 208(1) TFEU.

[382] The deleted ex-Art. 179(3) EC provided that the Union's general development competence 'shall not affect cooperation with the African, Caribbean and Pacific countries in the framework of the ACP–EC Convention'.

foreign policy to its Member States. This (partly) changed with the 1992 Maastricht Treaty; yet, the CFSP has – even after the 2007 Lisbon Treaty – special constitutional foundations. Placed outside the External Action Part of the TFEU, it continues to be legally isolated from the (supranational) external policies of the Union. Its intergovernmental decision-making procedures rely on the European Council to define strategic interests, whose implementation principally requires unanimity among the Member States. These political safeguards of federalism have meant that the Union continues to have difficulties in translating its abstract words into concrete actions. However, as we saw above, the Union has engaged in a number of military and civilian missions; and it has been a loyal – yet critical – actor in the enforcement of the United Nations' sanction regime and in the international fight against terrorism.

The final section within this final chapter explored the closest relations a third state may have with the European Union: association and accession. Two general types of Union association were distinguished: the constitutional 'Association of the Overseas Countries and Territories', and the 'contractual association' under Article 217 TFEU. The latter competence has been used to create a customs union with Turkey and a free trade area with the EFTA states. Despite the formal reciprocity required under Article 217 TFEU, there exists a substantial asymmetry between the Union and its associates. For the latter must normally take over all relevant Union legislation – without any substantial input into the shaping of European law.[383] But this passive role is the price they pay to get access to the Union internal market without Union membership. The Union is of course open for (European) associates to become full Member States. However, it also recognises that there are limits to its expansion and for that reason the Union has created a special type of association for its neighbours. This European Neighbourhood Policy is now constitutionally anchored in Article 8 TEU and aims to provide a circle of friends around the Union.

[383] The task of passively taking over the Union *acquis* is only (very) partly compensated by soft participation rights in the Union legal order. For the EFTA states, these rights are chiefly set out in Arts. 99–101 of the EEA Agreement. For a brief analysis and evaluation of these soft participation rights, see Norberg, 'The Agreement on a EEA', n. 321 above, 1183–7; and M. Cremona, 'The "Dynamic and Homogeneous" EEA: Byzantine Structures and Variable Geometry' (1994) 19 *EL Rev* 508, 512: 'However, this consultation has not been made part of the formal [legislative] procedures [of the EU], and could therefore not be seen as an "essential procedural requirement" from the point of view of the valid adoption of [Union] legislation.'