

Contents

10.1 The Legal Dynamics	181
10.2 The Political Realities	183
10.3 Frictions v Deficiencies	185
10.4 An (In)effective Global Player?	187
References	188

10.1 The Legal Dynamics

Quantum leaps have been made in the evolution of the rules that regulate the Union’s international relations. At the dawn of European integration, the original three Communities possessed but a limited array of external powers. Moreover, in accordance with the principles of legality and attributed powers, these powers were closely circumscribed, at least in the sense that no general competence was bestowed upon the EC that could impede the Member States’ exercise of their reserved sovereign prerogatives. Nevertheless, over time, with the sometimes implicit, sometimes explicit support of national governments, the ambit of the Community’s external powers steadily widened. At the same time, the structures that had been created in parallel for a mutual tuning of the various foreign and defence policies moved ever closer to the supranational. This motion reached an apogee in 1987 and its true zenith in 1992, resulting in the erstwhile ‘second pillar’ of the EU.

As recounted in earlier chapters of this book, the initial provisions governing the CFSP and the CSDP suffered from an overdose of ambiguity, leading to frictions with EC policies. These repeated tussles, in turn, sparked the reforms undertaken with the Treaty of Amsterdam and, to a lesser extent, the Treaty of Nice. In some respects though, at those points in time, the black letter text was merely catching up, as the new policies had developed an own dynamic over a relatively short period.

From a formal-legal perspective, the Treaty of Lisbon still marks the latest innovation we have witnessed. Quite possibly, with no other major amendments currently being foreseen, it presented the greatest sea change yet. In the first decade since the Lisbon Treaty's entering into force, most of the remaining scattered dots were connected at long last. Article 21 TEU unequivocally unified the objectives of the CFSP/CSDP on the one hand, and the external policies contained in the TFEU on the other. The Union's single legal personality and the revamped procedure for concluding international agreements paid a great service to the cause of transparency. The legal measures of the CFSP and CSDP have been streamlined and aligned with the common set of EU instruments. The democratic quality of the Union's external policies has been beefed up too, by expanding the powers of the Parliament to cover the CCP, but also by introducing the ordinary legislative procedure in e.g. the field of development cooperation. An integrated, maximally coherent approach has now tangibly come within grasp.

At present, the requirement of consistency in EU external action crops up abundantly in the primary law. Prior to the entry into force of the Lisbon Treaty, the middle layers of the Union, composed of the former Community competences, had already attained a (crude) equilibrium amongst themselves. Simultaneously, the turf wars with the outer layers appeared to have ended in their favour as well.¹ Whereas the lines between the spheres have only been redrawn slightly, the balance is ostensibly reinforced by Article 40 TEU, which expounds that the various layers should be considered separate but equivalent. Hitherto, the predicted, concomitant dilemmas for the Court of Justice did not manifest themselves in an acute way.

As demonstrated before, the principle of sincere cooperation deploys its effects across the entire range of external competences, therewith touching all the layers in equal measure. In turn, this necessitates a permanent vigilance among civil servants, policy wonks and legal officers of both the Union and the Member States. Justice and Home Affairs topics are noticeably rising in prominence, with the national competences in the field becoming more than ever entangled in the fabric of EU law.² While the frequency of its arising has gone down, supranational competence creep may still occur through the implied powers mechanism (no longer so implied after its codification)—with the obligation of 'Union loyalty' rendering resistance largely futile. This entails that, in the familiar pattern we have observed on countless occasions before, the Member States' external powers could eventually be downsized in this domain as well.³

¹Case C-91/05, *Commission v Council* (ECOWAS).

²In the present volume this subject has not received detailed discussion; for incisive studies, see e.g. Flaesch-Mougouin and Rossi (2013). In the metaphor adhered to, the external aspects of the JHA are to be located in the middle layers, alongside inter alia the EEP and EHRP. The same goes for the external aspects of e.g. transport, energy, and social policy.

³Notwithstanding the insertion into the Treaties of several red lines and safeguard clauses. See also Matera (2017).

10.2 The Political Realities

For all the great promise that the past and present legal dynamics may hold for the future, the effectiveness of the EU as a global player depends predominantly on the political realities: as always, a cardinal precondition for rules to function smoothly is the goodwill of those who are to put them in practice. Foreign policy is traditionally an extremely sensitive domain that goes to the heart of a country's national sovereignty. Of course, the Member States consciously agreed to attribute at least some competences to the EU, and either consented or acquiesced to their gradual expansion. Even so, they have not cast aside their hesitations altogether, and signs of obstinacy have been coming to light time and again.

After the failures of the primordial Common Foreign and Security Policy, in face of the Balkan wars of the 1990s, the Iraq crisis of 2003 provided the first crucible for the revamped CFSP and CSDP. Due to unbridgeable divisions among the Member States, no common stance could be agreed upon, wherewith the policies faltered; in spite of the new, more advanced arrangements, the EU could not help to disappoint in the same vein as before. A streamlined set of legal instruments and innovative abstention mechanisms may then come in very handy, but their added value is limited if the decision-makers refuse to utilise them. Whereas the vacillation was much less palpable in the run-up to the 2011 Libya intervention, the subsequent prevarications in the Syria dossier serve as another negative case in point.

In similar vein, as depicted earlier, the EU feigns to be vigorously committed to a proactive external human rights policy.⁴ At the same time, when evaluating the EHRP's actual operation, the adage of the pot calling the kettle black springs to mind. As we have seen, the Union and its Member States refuse to indulge in serious introspection, are happy to subject their treaty partners to criticism and resort to retaliatory measures, turning a blind eye to their own deficiencies in living up to the standards that are alleged to be non-negotiable. While the Charter of Fundamental Rights could offer a useful yardstick, it proves to be of limited practical significance in the external relations of the EU, considering that its enforcement takes shape in a largely unidirectional way. Ditto can be said for the Union's environmental policy, when the EU professes to adhere to ambitious standards in the wider world but where the internal differences of opinion between Member States simmer on. Domestic resistance to an elevation of the level of protection (as e.g. manifest in the opposition to a stronger curbing of emissions) impairs the efficacy of the EEP in equal fashion.

In sum, despite the Union's official motto being 'united in diversity', the internal heterogeneity might at the present day and time have become slightly too virulent, with inescapable, damaging external ramifications. Admittedly, the unwieldy plurality of interests possesses a longer pedigree, but it multiplied in linear fashion with the accession of every new Member State. Obviously, the EU's doubling in size since the turn of the last century aggravated rather than alleviated the problem.

⁴See Chap. 6.

At this point, it should be stressed that the political reality hampering the effectiveness of the Union's external policies does not exclusively pertain to the conduct of the Member States.⁵ Apart from the Council, many other EU institutions, agencies and bodies are known to engage in occasional foot-dragging. For instance, the strife was legendary between the Members of the Commission carrying distinctive aspects of EU external relations in their portfolios. At present, the fact that the Commission is not always prone to side with the Council, though imperative for the adoption of external rules in e.g. the CCP and EEP, continues to constitute a further cause for delay and stagnation. In recent years, the enhanced position of the High Representative did limit the number of clashes that might otherwise have occurred.⁶ This pattern rhymes with the intention of the authors of the Lisbon Treaty to let the office operate as a *trait d'union* between the Commission and the Council, connecting the supranational with the intergovernmental sphere. Simultaneously, frictions emerge between this upgraded office and MEPs demanding to be heard, and complaining of a lack of oversight. Also, the HR has to walk a tightrope between the different national foreign offices and will find his hands tied without sufficient backing in the FAC.⁷ Moreover, as outlined, the CFSP and CSDP are overcrowded with a multitude of bodies and agencies, the roles and tasks of which have not been delineated that strictly.⁸ Again, even where the black letter text may be regarded as unequivocal, this does not prevent (pragmatic-political) conflicts of interest from arising. The EEAS was created with the aim of spanning the whole gamut, bolstering coherence. It alas did not get off to a brilliant start, and essentially forms yet another addition to the pile.⁹

The EU Courts have thrown their own spanners into the works. Though officially impartial and independent, they have not shown themselves to be immune to particular policy choices, with their asymmetric rulings on the effect of international treaty norms presenting a most salient example.¹⁰ Here, the Union's judiciary is *inter alia* seeking to defend a particular view of world trade law that suits the strategic interests of the Union, epitomising once again how legal rules are made to bow to political necessity.

Lastly, while there is of course every reason to hail the greater powers of the Parliament, the absence of parliamentary interference did throughout time prove highly efficient, guaranteeing a speedy decision-making. The more extensive involvement of the Parliament has undeniably increased the transparency of EU action.¹¹ Yet, the jousts between individual parties and representatives are known to

⁵Cf. Gosalbo Bono and Naert (2016) and de Waele (2013).

⁶The innovation did not, however, bring to a complete end the competition between the various Commission DGs.

⁷As pointed out already at an early stage by Wouters (2004).

⁸See Chap. 2.

⁹Cf. the appraisals in Bátorá and Spence (2015).

¹⁰See Chap. 9.

¹¹Cf. Kleizen (2016).

result in hard-wrought compromises that fail to satisfy all those concerned. As a result, in the post-Lisbon era, political haggling has wound up an unavoidable recurring feature in the great majority of the Union's external policies.¹²

10.3 Frictions v Deficiencies

The question may now be addressed whether the gap that yawns between the legal and the political world is systemic and inevitable. For, to the extent that the suboptimal performance of the EU could be ascribed to the suboptimal design of the rules that govern its external relations, novel solutions may be sought and implemented to close the rift. If however the identified frictions prove to be perennial and insoluble, no modification of the legal rules will succeed in bringing the political reality more in line with them.¹³ An exhaustive treatment of this issue is beyond the scope of this book. All the same, some tentative inferences may be drawn.

Evidently, the Member States are keen to preserve certain core privileges of sovereignty. Where the EU has for instance not yet reached the stage where every aspect of military and defence policy is covered by common rules, it cannot be surprising that the Member States have not been willing to resign themselves to the prevalence of an 'internal market logic'.¹⁴ Once however that a truly common defence is established, and the attendant (cost) effectiveness demonstrated, one may assume that the reluctance subsides quickly. Likewise, the EU High Representative does not have the stature of a real foreign minister, and presently neither his authority nor that of the External Action Service trumps that of the national foreign offices. By consequence, the frictions between the HR and the Member States (and between the Commission and the Council) are bound to persist, until the Union evolves into a unitary polity and national diplomatic services are fully absorbed by the EEAS. Thus, in these two cases, we encounter no deficiencies of the present rules, rather an inherent tension; in all likelihood, the discrepancy between the existing rules and the deviating conduct can only be overcome once the Member States proceed to transform the EU into a full-blown federation.¹⁵

As regards the double-heartedness in the treatment of third countries, one may follow a different trail of thought. European law allows for the creation of special relationships through association; but, if so desired, the status of EU member may be conferred.¹⁶ Although the Treaties are not straightforward with regard to the requirements for membership, the institutions and the Member States clearly prefer the accession of certain third countries to others. Nevertheless, to appease all

¹²Save for the policies in Title V TEU, which still keep the Parliament at the periphery of decision-making.

¹³Naturally, the cynic may then opt for aligning the legal world with the political reality.

¹⁴See Chap. 3.

¹⁵But cf. Schütze (2009).

¹⁶See Chap. 8.

neighbours, hybrid frameworks have been established (e.g. the ENP). Both practices sit uncomfortably with the rules of primary law. Yet, as the inclinations of Member States to entertain a certain type of relation with a particular third state appear to be inherently political, they are likely to prevail even if the Treaty rules are considered deficient, and subsequently modified. Ditto with regard to the way in which the EU imposes its external human rights standard: as there is no question of a deficiency in the internal rules, nor in the legal means for promoting them externally, any dissimilar application towards third countries must be the result of innate political preferences that cannot be changed by legal norms.

As mentioned, both the environmental and the development cooperation policies of the EU are facing pockets of national opposition.¹⁷ One could venture to suggest that these frictions are caused by the shared nature of the competences concerned. We would thus encounter a deficiency here that may eventually be resolved. However, since some advocate the EU giving up its extant powers, a greater transfer could only turn out to be counterproductive. The Member States perceive the current rules to be suboptimal, but only their (unlikely) abrogation would bring the recurrent frictions to an end.

At the same time, Article 40 TEU functions to resolve tensions flowing from a vertical antithesis (conflicts between the EU and Member States), as well as those from a horizontal one (discrepancies between EU policies vis-à-vis one another). The Achilles heel of this provision is that it proclaims the equality of the various layers. Nonetheless, the EU Courts entrusted with preserving the boundaries have to decide in favour of one, to the detriment of another. Accordingly, their rulings reflect a political choice that may not be to the liking of every European or national actor, which may in turn result in non-compliance. Arguably then, the provision presents a cause for friction rather than a prophylactic; it may for that reason indeed be considered deficient. True, the previous rendition of this provision contained a structural bias towards the competences of the middle layer. Yet, it incontrovertibly did more to boost the consistency of the Union's external action as a whole.

In sum, whereas the rules that govern the EU's international relations might nowadays convey an impression of harmony, their actual application displays a less rosy picture. The institutions as well as the Member States exhibit deviant behaviour, which may only to a limited extent be ascribed to systemic deficiencies. For the largest part, it seems impossible to alter the political realities by altering the Treaties. Admittedly, in some respects, the road does appear negotiable; but in view of the struggles involved in the latest attempts, there exists no sense of urgency for enacting a comprehensive series of amendments. For now, one thus needs to acquiesce to the majority of discrepancies, even if the enduring fracture lines render the practice of EU external relations law much more byzantine than the theory.

Of course, the latter inference is not to be understood in a normative and exonerating sense: for, as long as the rationale of a particular rule is sound, transgressors ought to be held accountable for their actions. Furthermore, whenever

¹⁷See Chaps. 5 and 7.

ambiguities in the Treaties are claimed to have provoked the non-compliance, the counsel of the EU Courts should always be sought preceding a *farà da sè* manoeuvre, and their dicta obeyed as rigorously as elsewhere.

10.4 An (In)effective Global Player?

Due to the emphasis placed in the preceding sections on the discrepancies between the abstract norms and the actual facts, one might easily get the impression that in reality, the EU hardly achieves what it sets out to attain. Somewhat disparagingly, it has been portrayed as a ‘patchwork power’.¹⁸ To counter this presumption, we perhaps ought to conclude by underlining some of its sterling successes across time and space.¹⁹

First of all, the EU constitutes a notably attractive experiment—a construct that has inspired others to engage in regional integration as well. ASEAN, the African Union and the Andean Community figure as prominent emulators. Apart from the EU being a role model itself, its special relationships with third countries have also exemplified how new forms of bilateral and multilateral cooperation can be undertaken.

Secondly, the EU functions as a market player, on the one hand using its competences to shield the Member States from wanton influxes of products from the outside (e.g. through anti-dumping measures), on the other hand employing its powers to pry open foreign agorae, facilitating trade currents, and accelerating economic progress.

Thirdly, the EU operates as a rule generator, exporting its own norms and principles, but participating in the creation and enforcement of norms and principles on a larger scale too (e.g. within the UN and the WTO), even fostering ideas of justice and inclusiveness.²⁰

Fourthly, the EU has performed the role of stabiliser, exporting cardinal values such as the rule of law and fundamental rights, seeking to ensure cohesion, stability and democracy in third countries, promoting international law and multilateral solutions, and placing emphasis on the importance of regional linkages (inter alia in its Global Strategy).

Fifthly and finally, the EU forms a magnet to its neighbouring countries, spurring them to mimic the practices of the Member States, so that they may eventually qualify for membership themselves. The wholesome effects of the Union’s stimuli can be gleaned by looking at the socio-economic advancement of the countries that chose to join since 1973.

In these differing capacities, the EU has over the years proven to be a far from ineffective global player. True, its influence comes across as markedly

¹⁸Gstöhl (2009).

¹⁹The following distinction is derived from Cremona (2004).

²⁰Albeit not in an incontestable way: see Chap. 6.

weaker beyond its periphery, in some respects rendering it an accomplished continental, instead of a genuine world power.²¹ This weakness is exacerbated by the shifting context in which it operates, whereby many of the principles that traditionally structured the international community find themselves in flux. A stealthy benefit is that other major players like the United States and Japan are losing as much, if not more, of their clout. At the end of the day, despite recurrent frustrations about opportunities that are squandered, the EU Member States do manage to sing from a single hymn sheet with increasing regularity.

If nothing else, the foregoing meant to illustrate that the legal foundations buttressing the Union's external relations have become stable enough. Though there will always remain room for improvement, they provide it with a solid enough basis to build on its past achievements.

References

- Bátora J, Spence D (eds) (2015) *The European External Action Service – European diplomacy post-Westphalia*. Palgrave Macmillan, Basingstoke
- Cremona M (2004) The Union as a global actor: roles, models and identity. *Common Mark Law Rev* 41:553–573
- de Waele H (2013) 'Name Me Your Friends, and I Will Tell You Who You Are' – the Union and the Member States in the global arena. In: de Waele H, Kuipers JJ (eds) *The European Union's emerging international identity – views from the global arena*. Martinus Nijhoff, Leiden, pp 239–256
- Flaesch-Mougin C, Rossi L (eds) (2013) *La dimension extérieure de l'espace de liberté, de sécurité et de justice de l'Union européenne après le Traité de Lisbonne*. Bruylant, Brussels
- Gosalbo Bono R, Naert F (2016) The reluctant (Libon) Treaty and its implementation in the practice of the council. In: Eeckhout P, Lopez-Escudero M (eds) *The European Union's External Action in Times of Crisis*. Bloomsbury/Hart, Oxford, pp 13–84
- Gstöhl G (2009) 'Patchwork Power Europe': the EU's representation in international institutions. *Eur Foreign Aff Rev* 14:385–403
- Kleizen B (2016) Mapping the involvement of the European Parliament in EU external relations – a legal and empirical analysis. CLEER working papers 2016/4
- Matera C (2017) An external dimension of the AFSJ? Some reflections on the nature and scope of the externalisation of the AFSJ domains. In: Fletcher M, Herlin-Karnell E, Matera C (eds) *The European Union as an area of freedom, security and justice*. Routledge, London, pp 359–388
- Schütze R (2009) *From dual to cooperative federalism: the changing structure of European law*. Oxford University Press, Oxford
- Webber D (2014) Declining power Europe? The evolution of the European Union's world power in the early 21st century. Monash European and EU Centre working paper 2014/1
- Wouters J (2004) The Union Minister for Foreign Affairs: Europe's single voice or Trojan Horse? In: de Zwaan JW, Jans JH, Nelissen FA (eds) *The European Union: an ongoing process of integration*. T.M.C. Asser Press, The Hague, pp 77–86

²¹Webber (2014).