Introducing a Layered Global Player

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1.1 Introduction

In this chapter, we will familiarise ourselves with the layered structure of the European Union, its presence and activities on the global scene and the legal underpinnings thereof. In the following sections, we will be discussing, in subsequent order, the differing characteristics of the various layers (Sect. 1.2), the division of competences and the attendant interrelation between the EU and its Member States (Sect. 1.3), the Union's international legal personality (Sect. 1.4), EU treaty making (Sect. 1.5), and the system of judicial review (Sect. 1.6). Once we have become acquainted with these general features, the ground is sufficiently prepared for an in-depth study of the Union's 'outer', 'middle' and 'inner' layers that contain its different external policies, and are explored further in parts I, II and III of this book.

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1.2 The EU as a Layered Global Player

Although the EU is still regularly qualified as an international organisation and although its legal order, up to the present day, continues to be based on international treaties, it contains a number of elements that are commonly found in national federal systems. In a number of policy areas, for example, the Union enjoys exclusive competences, entailing that the Member States have no part of their own to play on the international plane. Since the entry into force of the Lisbon Treaty, there exists a *Kompetenzkatalog* (albeit in weak form), modelled after the one present in the German constitution, specifying the areas where the EU countries have relinquished, retained or decided to partly transfer their powers.[1] Moreover, already several decades ago, the European legal system was equipped with a quasi-federal doctrine of 'implied powers'.[2] Nevertheless, compared to other international organisations as well as national states (federal or otherwise), the Union remains a rather unique creature—an unprecedented experiment in transnational cooperation that has hitherto proven to be remarkably successful.

The unique character of the EU resides mostly in its layered structure, whereby external relations are conducted on the basis of different sets of rules. Consequently, external policies may be enacted and furthered in different ways and to differing extents, dependent on the specific powers that have been attributed in the layer concerned.[3]

In Title V of the Treaty on European Union, one finds the main foundations for EU external action. Chap. 1 of this Title contains some general provisions; Chap. 2 the Common Foreign and Security Policy. All other external policies have been tucked away in the Treaty on the Functioning of the EU.

The 'outer layer' or 'skin' of the European Union consists of the Common Foreign and Security Policy.[4] The CFSP has a relatively young pedigree, only officially becoming part of EU law with the Treaty of Maastricht in 1993. Nevertheless, it forms a general framework that in theory encompasses all 'foreign policy' issues, and potentially governs all the Union's activities on the global scene. The CFSP represents the EU's 'front office', as in everyday reality, it is the most visible way in which the Union manifests itself to its international partners. Nevertheless, in legal terms, the CFSP has not proven to be an all-encompassing policy: rather than outstripping or replacing the other external fields of competence at the European level, it occupies a special, separate domain that has less prominence than one might think.

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[1] Articles 3–6 TFEU.

[2] See Case 22/70, *Commission* v *Council* (ERTA). More on this in Sect. 1.4.1 below.

[3] Among the first to promote this particular view of the EU's institutional set-up were Curtin and Dekker (1999). Similarly, Krajewski (2004) depicted the body of rules as a 'multi-level constitution' of EU foreign relations.

[4] Which consists moreover of the Common Security and Defence Policy, but the CSDP is closely connected to the CFSP and can be viewed as its sub-domain. The interrelation between the two is clarified further in Chap. 3.

The 'middle layers' are composed of those areas of external competences that previously formed part of European Community law, and are now contained in the Treaty on the Functioning of the EU. From the inception of the European Communities, the most prominent of these competences has been the one pertaining to the Common Commercial Policy (CCP). Over time, other external policies have taken shape and gradually acquired their own legal basis in the EC Treaty. In this book, three of these policies are singled out for more detailed discussion: the rules pertaining to the environment, to human rights and to development cooperation.[5] As we will observe, in contrast to the outer layer, there is no trace of intergovernmental law- and policy-making here; entrenched in the TFEU, we find the supranational approach or classic 'Community method', with an ever-stronger role for the Commission and the Parliament, and an array of possibilities for the European Court of Justice to exercise judicial control.

In the 'inner layer', we encounter the EU Member States themselves, without which the EU institutions would not be able to function. The Member States, in their own individual capacities, continue to lie at the core of the Union. Yet they have voluntarily consented to become ever more enveloped by European law, to the detriment of their once fully autonomous and sovereign position. They nevertheless do retain a number of external competences, and at least in those fields, they do remain active and visible on the international scene. Moreover, despite the grand ambitions of the CFSP, the Member States remain at liberty to conduct an own foreign policy that reflects their own national interests, within certain limits.[6] Additionally, political and diplomatic relations with non-EU countries are still to a considerable extent maintained by the Member States themselves, albeit that they do operate as collective within EU structures where the Treaties so dictate (for example, in the enlargement process, whenever official steps are to be taken with regard to (potential) acceding countries). In the third part of this book, we will zoom in on this 'hard core' of the layered global player, evaluate when and how Member States can occasionally still escape and deviate from European rules, examine where the EU has drawn the red lines, and explore the ways in which rules of public international law continue to play a role here.

1.3 The Union's Legal Personality

The EU has no physical existence but is an intangible creature, a juridical construction like many others. In civil law, already in classical antiquity, the concept of a 'legal person' was invented so as to enable traders to engage in commercial transactions in a non-private capacity. The persistence of this concept has been

[5] Including economic, financial, technical cooperation and humanitarian aid.

[6] See e.g. Case C-124/95, *The Queen, ex parte Centro-Com Srl* v *HM Treasury and Bank of England*. More on these limits in Chap. 9, Sect. 9.3.

remarkable: at the present day and time, budding lawyers across the world have to familiarise themselves with this abstraction at some point during their studies.

Generally, (the possession of) legal personality denotes the capacity to enter into legal relations, and to be recognised as being capable to enter into legal relations, despite the fact that one is not a natural person. A company may, for example, conclude contracts, bring claims and be held accountable in courts of law. Due to its legal personality, other natural and legal persons will regard it as an equal and competent actor that they can do business with. The judiciary will take the same view and regard the entity as a valid vehicle that is competent to act, can be held accountable for its actions and is to be distinguished from the (natural) persons who are sitting on its board or are active in its employment.

As originally confirmed by Article 210 of the EEC Treaty, the European Economic Community possessed such legal personality, which entailed that it had the capacity to enter into legal relations and was recognised as being capable to do so.[7] However, this appeared to pertain to *internal* matters—thus denoting that the Community could, for example, acquire goods, rent buildings, hire personnel, etcetera. The question was whether Article 210 extended further and also formed an affirmation of its *international* legal personality—the capability to operate as an international actor and, e.g. negotiate and conclude treaties, be recognised in diplomatic traffic, bring claims before and be held accountable before international courts and tribunals.[8] For the European Coal and Steel Community, the possession of international legal personality was expressly confirmed in Article 6 of ECSC Treaty. The European Atomic Energy Community was granted the status in Article 101 of the EAEC Treaty. As regards the European Economic Community, however, no explicit provision existed. Reasoning *a-contrario*, one could have assumed that international legal personality had been deliberately withheld. The matter was addressed in the *ERTA* case of 1971, in which the ECJ reached the opposite conclusion.[9] In its judgment, the Court ruled that Article 281 TEEC had to be taken to mean that the Community enjoyed the capacity to establish contractual links with third countries over the whole field of objectives included in Part one of the EEC Treaty. This brought an end to academic speculation and settled the matter for the next 20 years.

[7]See also what was originally Article 211 of the EEC Treaty: 'In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Community shall be represented by the Commission.'

[8]Other privileges include the right to send representatives and be represented in international forums, and the right to enjoy immunities also accruing to other actors.

[9]Case 22/70, *Commission* v *Council* (ERTA).

Box 1.1 The *ERTA* Case
In the Spring of 1970, the Member States of the EEC, meeting in the margins of a Council of Ministers session, prepared to conclude the European Road Transport Agreement. Subsequently, however, the Commission proceeded before the European Court of Justice, contending that not the Member States but rather the Community itself ought to seal this deal. The ECJ assumed a valiant position, which in retrospect may be regarded as giving birth to the field of EU external relations law. One key section of this hallmark ruling pertained to the capability of the EEC to conduct itself as an actor at the international level to begin with—an issue the Court was not inclined to spill too much ink on. Hence, it deigned to give an affirmative answer, yet in almost *obiter dictum* fashion.

The discussions on international legal personality were reignited in the 1990s, upon the conclusion of the Treaty of Maastricht. Thereby, a wholly new actor was created (the European Union), which could potentially go on to occupy an own place on the international scene, distinct from both the Member States and the EEC, ECSC and EAEC frameworks. Although several countries advocated the attribution of such international legal personality to the Union, in the 1991 negotiations that preceded the signing of the TEU, others were vehemently opposed. This difference of opinion is said to have resulted in the absence of any word or provision on the topic in the final text authorised in 1992. However, this *blocage* did not prevent the Union from evolving further in actual practice, nor could it restrain scholars who preferred to take a more flexible position on the matter.

By the end of the decade, in many quarters, the EU was regarded as possessing 'presumptive personality'. In other words, its (international) legal personality was generally presumed to exist, notwithstanding the continuing absence of a written provision on the issue, even after the rounds of amendments pursuant to the Treaty of Amsterdam (1997) and the Treaty of Nice (2000). The arguments for this positive assessment ran along three lines. Firstly, scholars took their cue from the style and language of the Treaty provisions, emphasising the manner in which the objectives of the EU were formulated, and the way in which the EU presented itself.[10] To their mind, the idea of international legal personality loomed large across the board, and was actually attributed in an implicit manner. The mere constructing of a Union edifice had inevitably led to a separate entity, which could only operate successfully if some form of international legal personality was involved, irrespective of whether the founding members agreed to it or not.[11] Secondly, there was the everyday practice in which the Union did in fact act and present itself as an actor in its own right; there was also the subsequent acceptance

[10]Most notably in Article 11 TEU (pre-Lisbon numbering).
[11]Cf. Klabbers (1998).

and recognition of its actions by third countries and international organisations.[12] This energetic performance received a fresh impetus in 1999, when the Treaty of Amsterdam introduced a provision that explicitly provided for an EU competence to negotiate, sign and conclude treaties under the CFSP.[13] Thirdly and lastly, combining some of the above arguments, scholars pointed to the standards outlined by the International Court of Justice in the renowned *Reparation for Injuries* case. Still today, *Reparation for Injuries* (1949) represents the most authoritative pronouncement on the issue of international legal personality of international organisations. In this case, the ICJ acknowledged that the UN was to be considered an international legal person because it was intended to exercise and enjoy, and was in fact exercising and enjoying, functions and rights that could only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on the international plane; the UN would be incapable of carrying out the intentions of its founders if it was devoid of such *persona*.[14] Since the EU, similar to the United Nations in the *Reparations* case, was entrusted by its founders with certain functions, duties and responsibilities, was exercising these, and since international legal personality was an exigency for its efficacy as well, as a matter of principle, it had to be considered to enjoy that status. Nevertheless, for almost two decades, one would continue to look in vain for any form of explicit confirmation in the Treaties.

Only with the advent of the Treaty of Lisbon, which entered into force on 1 December 2009, was the question resolved once and for all: the current Article 47 TEU endows the Union *expressis verbis* with the desired quality. Of course, this endowment was inevitable, as the Lisbon Treaty collapsed the 'three-pillar structure', renamed the EC Treaty into the Treaty on the Functioning of the EU, abolished the European Community, and designated the Union as its one and only successor. Nevertheless, the phrasing of Article 47 TEU is once again limited to 'legal personality', not referring to *international* legal personality. Of course, from manifold provisions in the Treaties, one may establish the broader ambit of that pronouncement. For sure, the Lisbon Treaty could not possibly have wanted to turn back the clock and revert the EU to a pre-*ERTA* position. As the EU is nowadays the one and only entity with the capacity to enter into relations with the outside world, international legal personality forms part and parcel of its natural condition. All the same, because of the extremely short phrasing in Article 47 TEU, the ruling in the *ERTA* case remains eminently valuable and may still be applied by analogy today: it effectively spells out that the new provision, just like Article

[12]This was a gradual process however. For instance, in the early 1990s, the Member States had to operate as a collective for the conclusion of a memorandum of understanding on the administration of the Bosnian city of Mostar, as the Union itself was considered incompetent to enter into the agreement on its own behalf.

[13]Article 24 TEU (pre-Lisbon numbering). In what was then Article 38 TEU, a similar competence was installed for the former 'third pillar'.

[14]*Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, ICJ Reports 1949, p. 178.

210 TEEC before, is not limited to the internal sphere but should be seen as covering all external aspects as well.

1.4 The Division of Competences

1.4.1 The Existence of External EU Competences

For international actors seeking to engage in legal transactions with like-minded parties, the possession of legal personality is but one precondition. For, as the idea of the 'rule of law' dictates, no public authority can exercise any form of power if the corresponding competence has not first been attributed to it. In the European Union, this idea is embodied in the principle of conferred powers, at present solidly entrenched in Article 5 TEU. An additional reason for abstaining from ultra vires or *praeter legem* acts is that they may trigger liability: after all, third parties may be led to believe that their contract partner was qualified to act, could continue to demand performance and may have to be offered some form of compensation. A lack of competence forms no excuse or justification: once signed and concluded, the agreement entered into remains binding in principle and under international law (*pacta sunt servanda*). Its obligations will therefore have to be met, and its terms executed in good faith.[15] Thus, apart from international legal personality, the EU needs to possess a specific competence as well. It cannot act lawfully if there exists no legal basis for the desired action. If an incorrect legal basis was selected, the act will ordinarily still be valid under international law, but internally, one will have to erase, rewind and start anew.[16]

At the dawn of European integration, two express external competences existed, namely for enacting the Common Commercial Policy (then Articles 113 and 114 TEEC) and for setting up association agreements with third countries (then Article 238 TEEC).[17] The array of possibilities was, however, considerably broadened with the Court's ruling in *ERTA*.[18] In that case, one of the (other) controversial issues was whether the EEC was competent to conclude the European Road

[15]In line with what is stipulated in Article 27 of the Vienna Convention on the Law of Treaties 1969: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

[16]If, after an international agreement has entered into force, the ECJ finds at a later stage that it was actually concluded on a wrong legal basis, the *measure concluding the agreement* will be invalidated. In order to protect third parties and comply with the VCLT rules, the agreement itself will remain valid and binding, not just by virtue of public international law, but also as a matter of EU law: see Case C-327/91, *France* v *Commission*. Moreover, the effects of the decision are ordinarily maintained until the moment a 'corrective' act is adopted.

[17]In addition, Articles 229, 230 and 231 TEEC mandated the establishment of close cooperation with the United Nations, the Council of Europe and the OECD, and other 'appropriate' international organisations.

[18]Case 22/70, *Commission* v *Council* (ERTA).

Transport Agreement without disposing of the (explicit) external competence. The ECJ took its cue from the internal competences in the field of transport, and stated that it was necessary to take into regard the whole scheme of the Treaty. It went on to rule that the authority to enter into international agreements did not arise only from an express conferment, but could equally flow from other provisions of the Treaty, and from measures adopted by the institutions within the framework of those provisions. The Court then proceeded to assert that whenever the Community, with a view to implementing a common policy envisaged by the Treaty, adopted provisions that laid down (internal) common rules, the Member States henceforth no longer had the right (acting individually or collectively) to take up international obligations that affected those common rules. Therefore, whenever such common rules came into being, the Community and the Community only would be able to take up and carry out the corresponding obligations towards third countries. Clearly, the ECJ stood favourably vis-à-vis an enhancement of the Community's role and powers: through this doctrine of 'implied powers', the EEC would henceforth enjoy external powers in all fields where it enjoyed corresponding internal powers. Some authors christened this 'the principle of parallelism' (viz. of internal and external powers).[19]

Although many consider the *ERTA* ruling to form a striking example of judicial activism, it makes good sense from the perspectives of efficiency and transparency. After all, an abundance of practical problems and frictions would ensue if Member States retained complete liberty on the external front as regards topics where an internal EEC approach had already been agreed upon. An 'implied powers' doctrine averted the prospect of uncoordinated external representation of the EEC by the various Member States in those domains where a common interest to tackle the issues had become apparent.

All the same, the exact ambit of the *ERTA* principle was uncertain: did the external powers remain with the Member States until the corresponding internal powers had been exercised (as was the case with road transport), or did the mere attribution of internal competence suffice to presume a corresponding external competence? Support for the latter position offered the *Kramer* case of 1976, yet the judgment simultaneously confirmed the possibility of two distinct approaches to the question.[20] One year later, the ECJ's Opinion 1/76 provided decisive evidence that the *Kramer* position, further expanding the *ERTA* doctrine, had to be seen as the most relevant precedent.[21] This entailed that an external competence could indeed be inferred from the mere existence of the internal competence, without an actual exercise thereof being required. The twin conditions were, however, restated: the Treaty would have to confer internal competence for attaining a specific objective,

[19]In legal doctrine, the Roman maxim 'in foro interno, in foro externo' is also often employed.

[20]Joined Cases 3, 4 and 6/76, *Criminal Proceedings against Kramer and Others*.

[21]Opinion 1/76, *Draft agreement establishing a European laying-up fund for inland waterway vessels*.

and participation in the relevant agreement had to be necessary for the attainment of that objective (usually dubbed 'the principle of complementarity').

The implied powers mechanism was put to good use in the next few years, but its importance did diminish over the course of time, whenever more external competences were explicitly attributed. For example, in 1986, with the Single European Act, legal bases were added covering external environmental action and similar measures concerning research and development. Furthermore, in 1993, the Maastricht Treaty saw the insertion of clauses on development cooperation, monetary policy and international financial cooperation.

Presently, the EU has a wealth of external competences at its disposal. Nonetheless, the implied powers mechanism continues to play a residual role for those fields where there is no express power or where there only exists an 'incomplete' one.[22] In its modern jurisprudence, on the one hand, the Court has attached great importance to the 'necessity' element of Opinion 1/76, stressing that an external competence can only be implied if it would be impossible to realise an EU policy through domestic measures alone.[23] On the other hand, the existence of an (exclusive) external competence has been admitted when the envisaged external act pertains to an area that is largely occupied by earlier EU measures.

Box 1.2 The 'ILO effect'

In Opinion 2/91, the ECJ was asked to verify if the EC had competence to accede to ILO Convention No. 180 concerning safety in the use of chemicals at work. The Court found that the matters covered by this Convention did not affect the minimum standards contained in Community social policy directives but that there were other directives that did give workers more extensive protection. This part of the *acquis* could well be affected by the commitments arising from the Convention. The foregoing assessment led to the 'ILO effect' of an (exclusive) implied competence being held to exist when an area is already covered to a large extent by internal rules.

With the Treaty of Lisbon (following the trail of its ill-fated predecessor, the Constitutional Treaty), an attempt was made at codifying the implied powers doctrine. The outcome has been criticised for its murkiness, and many commentators have rightly questioned the wisdom of trying to cement the gist of a case law that is still evolving in everyday reality.

Article 216(1) TFEU provides that the EU may conclude an agreement with one or more third countries or international organisations where (1) the Treaties so

[22]For example, the provisions on energy and transport still do not refer to corresponding external competences.

[23]E.g. in the *Open Skies* judgments: see Case C-467/98, *Commission* v *Denmark*; Case C-468/98, *Commission* v *Sweden*; Case C-469/98, *Commission* v *Finland*; Case C-471/98, *Commission* v *Belgium*; Case C-472/98, *Commission* v *Luxembourg*; Case C-475/98, *Commission* v *Austria*; Case C-476/98, *Commission* v *Germany*; Case C-523/04, *Commission* v *Netherlands*.

provide or (2) where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties or (3) is provided for in a legally binding EU act or is likely to affect common rules or alter their scope. The first situation speaks for itself. The second situation covers the *ERTA* doctrine in its modern form. In the third situation, the EU has already exercised its powers, and in the legal act adopted, it has either been conferred the pertinent treaty-making power, or a subsequent (external) act affects the instrument that was adopted earlier (the 'ILO effect'); in both these cases, the EU will have obtained the relevant external competence.

Confusingly, Article 3(2) TFEU seeks to indicate the nature of these competences but phrases them in slightly different terms. It attributes an exclusive external EU competence when (a) its conclusion is provided for in a legislative act of the Union or (b) its conclusion is necessary to enable the Union to exercise its internal competence or (c) in so far as its conclusion may affect common rules or alter their scope.

The two regimes differ in more than one respect. Situation (ii) under Article 216 (1) TFEU is broader than situation (b) under Article 3(2) TFEU since the former grants an external competence when an internal competence has not yet been exercised; the latter assumes, on the contrary, that the conclusion of an act is necessary for the (simultaneous or subsequent) adoption of an internal measure. Situation (iii) under Article 216(1) TFEU is broader than situation (a) under Article 3(2) TFEU since the former triggers an external competence on the basis of basically any legally binding act.

The key to making sense of both provisions would appear to solely reside in the realisation that Article 3(2) TFEU pertains to the grant of an *exclusive* competence. Consequently, Article 216(1) TFEU can be seen as containing the general rules for the attribution of an external competence and outlining the basic system; it does not specify whether the competence is exclusive or shared. Indeed, the phrasing of Article 3(2) TFEU does not match that of Article 216(1), but its main intention is to specify in which cases the attributed competence is an exclusive one. In other words, Article 216(1) can be regarded as the *lex generalis* on implied powers, with Article 3(2) as a *lex specialis*, indicating when those powers are exclusive.[24] Unfortunately, we cannot close the file with the foregoing assertion and will need to return briefly to the issue below in order to sketch the full picture. First, however, some further elaboration is in order with regard to the nature of EU external competences.

[24]Thus, we can e.g. conclude that when a power to conclude an international agreement is conferred by a non-legislative act, it will have to be considered as shared.

1.4.2 The Nature of External EU Competences

As discussed above, if an actor with international legal personality seeks to adopt a binding external act, the relevant competence has to exist, but the *nature* of that competence has to be ascertained as well, in order to prevent the possible invalidity of the act. In the EU, three main types of competence are to be distinguished: exclusive, shared, and complementary ones. The Union's *Kompetenzkatalog*, contained in Articles 3 through 6 TEU, outlines which competences are exclusive, which are shared, and which are complementary.[25] What these qualifications actually denote was already clarified long before, in many years of ECJ case law. In Article 2 TEU, the main threads of the Court's jurisprudence have been codified, and one may find further guidance.

When the Treaties confer an *exclusive* competence in a certain area, only the EU may legislate and adopt legally binding acts. Thus, in a field where the powers of the Union are exclusive, the Member States have no independent role to play on the international stage. Even when the EU has not (yet) exercised its exclusive competence, the Member States may not act or legislate, unless they have been so empowered by the EU or when they are implementing EU measures that instruct them to act or legislate. Nowadays, the Common Commercial Policy, laid out in Articles 206–207 TFEU, forms a prime specimen of an exclusive external competence.[26]

If the EU and the Member States *share* a competence in a specific domain, they may both legislate and adopt legally binding acts in that area. The Member States may exercise their competence to the extent that the Union has not exercised its competence. In spite of what one might presume, this is by no means a wholly static affair. The EU may gradually move to cover ever more ground within a specific domain, enacting new rules and expanding the reach of its policies, so that eventually Member States could well be left with only an extremely limited power. In the past decades, such pre-emption has taken place on more than one occasion. Conversely, it is possible for Member States to 'recoup their losses' at one point, but only to the extent that the Union has decided to cease exercising its competence.[27] The former will therefore have to stay vigilant and closely monitor when

[25] A long-standing point of mystery, unresolved by these provisions, remains the nature of the Common Foreign and Security Policy. According to some authors, the drafters of the Treaties sought to underline the specificity of the CFSP as a wholly distinct policy field, not subject to pre-emption nor merely complementary to Member State activities. See e.g. Cremona (2008), p. 64; Dashwood (2013), p. 6.

[26] In the past however, the ambit of the CCP has considerably shifted. This will be discussed in greater detail in Chap. 4.

[27] An explicit 'relinquishing' decision from the side of the EU is required for this situation to arise. Thus, a Member State may not assume that it has regained its powers by virtue of the fact that the EU has not put them to use for a protracted period of time: see Case 804/79, *Commission* v *United Kingdom*.

and where a certain tipping point will be reached, should they want to prevent the wholesale erosion of a shared competence.

In practice, most of the external activities of the Union (and its predecessors) have so far pertained to fields in which competence was shared. Shared competences necessitate a tandem approach of the EU and the Member States with regard to the issues at stake, as well as a joint effort in the relevant multilateral forums. In environmental matters, to mention but one example, a joint effort is thus required in relevant international organisations (so-called 'mixed participation'). This is equally the case for the negotiation and conclusion of international treaties or conventions in those areas (so-called 'mixed agreements'). As will be illustrated later on in this book, the management of mixity can be a most complicated affair. Striking the right balance between the interest of the Union and the Member States regularly proves difficult, and dogged turf wars are no rare occurrence.[28]

Finally, there are those areas where the EU may support, coordinate or facilitate actions of the Member States, but only under the conditions laid down in the Treaties and without thereby superseding the competences of the Member States in those areas. A supporting EU measure will still be binding, but mainly seeks to add to rules enacted by a Member State or Member States. Such a measure may not entail harmonisation of the legislation of the Member States. The competence concerning education, vocational training, youth and sport forms an illustration of this particular breed.

While the above distinction is easy enough to grasp, a minor complication arises from the existence of 'shared parallel competences'. In such a field, both the EU and the Member States may conduct policies of their own, but the measures they adopt are not supposed to clash, and expected to complement and reinforce each other. The Member States' powers are thus generally shielded from the application of the principle of pre-emption, meaning that the EU competence cannot expand into their reserved domain. On the external front, the development cooperation and humanitarian aid competence, contained in 208–211 TFEU, can be considered exemplary: whereas the Member States retain their principal powers in the area, the Union has over time assumed an autonomous role by adopting its own rules and principles, and by setting up (technical/financial) schemes administered by EU bodies, offices and agencies.

A further complication is due to the divergent phrasing of Article 3(2) and Article 216(1) TFEU that was already queried above. For one thing, the new clauses suggest that an exclusive competence can arise when the *agreement* to be concluded by the Union can affect common rules or alter their scope, whereas in *ERTA*, it was the *possibility* that one or more Member States entered into such an agreement that would lead to this result. The novel Treaty provisions also seem to rule out direct pre-emption on the basis of internal legislation alone, but this too contradicts a main tenet of the Court's earlier case law. Moreover, there is no indication that the *Herren der Verträge* desired to reconfigure the regime in this peculiar way.

[28]See further Chap. 9, Sect. 9.3.3.

Overall then, the codification exercise has not been satisfactory in this respect either. For some years, it left us with an imperfect, albeit not entirely unworkable, outcome.

As always, it fell to the ECJ to shed light on the exact breadth and purport of Article 216(1) and Article 3(2) TFEU, which it first attempted to do in the course of 2014. In the *Commission* v *Council* judgment concerning the Convention on the protection of broadcasting organisations' rights, the Court rehearsed the main tenets of its post-*ERTA* case law, stressing that for the arising of exclusive implied powers, it is not necessary that the (envisaged) international treaty and the existing EU secondary law in the field overlap fully. It may suffice that an area is largely covered by EU rules (rehearsing the 'ILO effect'), but to establish whether exclusivity could be justified on that basis, a specific analysis of the relationship between the secondary law and the international treaty will have to be conducted.[29] One month later, a similar vindication of the earlier ECJ jurisprudence, indicating that little weight should be attributed to the slightly deviant terms in the TFEU, was provided in Opinion 1/13 concerning the Hague Convention on child abduction.[30] Here also, the Court insisted on the continuing relevance of the pre-Lisbon case law, repeating that for the existence of an implied power it was not necessary that the pertinent EU legislation completely coincided with the international treaty and that to that purpose internal rules may already be affected by an external act when an area is largely covered by them. Again, to arrive at a sound conclusion, a comprehensive and detailed analysis of the relationship between the international treaty on the one hand and Union law on the other must be carried out—something that should include an analysis of their foreseeable future development, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system they establish.[31]

Both Treaty provisions, Article 3(2) and Article 216(1) TFEU, are therefore to be read in conformity with the vested pre-Lisbon jurisprudence of the ECJ. On that footing, implied powers may then be (instantly) exclusive under the conditions set out above, now contained in Article 3(2) TFEU. Though we find no reference to implied powers of a non-exclusive nature, and some authors have feared their extinction, that type should still be considered capable of arising as well, especially in areas of shared activity between the Union and the Member States.[32]

What this ultimately boils down to is that, despite the vast number of explicit competences that have now been placed at the Union's disposal, it should not be

[29]Case C-114/12, *Commission* v *Council* (Convention on the protection of broadcasting organisations rights). See also Opinion 1/03, *Competence to conclude the new Lugano Convention*.

[30]Opinion 1/13, *Accession of third states to the Hague Convention on the civil aspects of international child abduction*.

[31]Ibid., paragraphs 72–74. In this vein, see also Opinion 3/15, *Competence to conclude the Marrakesh Treaty*.

[32]Cf. Cremona (2008), p. 62.

overlooked that there are still numerous areas where the internal legal basis does not indicate the possibility for external action in the same field (e.g. agriculture, consumer protection or social policy). Consequently, the *ERTA* doctrine and its progeny certainly did not fall from grace, but retain significant value instead.

1.5 Treaty-Making by the EU: The General Sequence

As remarked, in case the Union seeks to establish durable linkages with third countries or international organisations, commonly in the form of an international treaty, a proper and sufficient legal basis should be available.[33] Yet, for the agreement to be valid under EU law, certain procedural requirements should be observed as well.[34] The general sequence to be followed is spelled out in Article 218 TFEU and roughly comes down to the following.[35]

As a preliminary step, either the Commission or (for topics within the remit of the CFSP) the High Representative will go and explore the possibilities and opportunities to engage in new treaty relations. They will subsequently submit recommendations to the Council, specifying on what topic and with which potential partner(s) negotiations may be opened. From this first stage onwards, in accordance with Article 218(10) TFEU, the European Parliament has to be immediately and fully informed.[36] The relevant committee of the Parliament will usually be briefed that the Council proposes to open negotiations. MEPs may then stage a debate on this. The Court has made clear that this duty to continuously provide relevant information cannot be diluted with regard to CFSP agreements.[37]

[33]The EU may engage in any type of undertakings binding under international law, irrespective of their formal designation: see Opinion 1/75, *Draft Understanding on a Local Cost Standard*.

[34]Again however, disregard of these 'internal' requirements does not automatically prejudice the validity and bindingness of the agreement under international law.

[35]Since the entry into force of the Lisbon Treaty, all proposed agreements need to be subjected to this procedure, irrespective of whether they lie within the scope of the CFSP or of any other external EU competence. For the Common Commercial Policy however, one should note that there is the *lex specialis* regime of Article 207(3) TFEU, which contains a number of deviations (detailed further in Chap. 4 of this book). An additional exception is to be found in Article 219 TFEU, for international agreements on monetary matters.

[36]Since the 1970s, this has been standard practice in the so-called Luns-Westerterp procedure, later codified in the various framework agreements on relations between the Parliament and the Commission. On this see e.g. Thym (2008) and Passos (2016).

[37]Case C-658/11, *Parliament* v *Council* (Mauritius agreement); see also Case C-263/14, *Parliament* v *Council* (Tanzania agreement).

Box 1.3 Taking Parliament Seriously: The Mauritius Agreement Case
In Summer 2011, the Council adopted a decision on the signing and conclusion of an agreement between the EU and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the Union-led naval force, and the conditions after transfer of suspected pirates. It was adopted on the basis of Article 37 TEU and Article 218(5) and (6) TFEU. Parliament contested the choice of legal basis, alleging that the Council had breached Article 218(10) by failing to inform it properly. The Court ultimately held that the legal basis was correct and dismissed the Parliament's first plea. However, it did accept the second argument and proceeded to annul the decision on that ground. It found as a matter of fact that the Council, after having announced to Parliament the opening of negotiations, did not inform the latter of the adoption of the decision and the signing of the agreement until 3 months later, and 17 days after their publication in the Official Journal. That negligence was held to constitute a manifest, unacceptable breach of Article 218(10) TFEU.

Next, the Council may take a decision authorising the opening of negotiations, whereby it names the EU negotiator or head of the EU's negotiation team. At this point, it may also issue certain negotiation directives and designate a special committee in consultation with which the negotiations must be conducted. The installation of such a committee aims to ensure that the outcome of the negotiations corresponds with the overall wishes of the (members of the) Council and prevents potential 'red lines' from being crossed. The Commission must provide the special committee with all information necessary for it to monitor the progress of the negotiations, such as the general objectives and the positions taken by the other parties involved. The Parliament will receive periodic briefings, and is thus able to exert influence on the course of the negotiations as well.[38] However, neither the level of detail in the Council's negotiating directives nor the powers attributed to the committee in those directives may have the effect of completely 'tying the hands' of the negotiator.[39]

The exact identity of the negotiator or negotiating team has been left undefined. In principle, the HR (or a delegated official) serves as negotiator for CFSP agreements, and the Commission for non-CFSP agreements. The latter chimes with the conferral onto the Commission of the general task of externally representing the EU, set down in Article 17(1) TEU. By not carving the usual choices in stone here, the Treaties do leave every room for deviations in practice, whenever pragmatic reasons militate in favour of assigning other actors.

[38]MEPs cannot participate directly in these negotiations, but they may be granted observer status by the Commission, subject to the diplomatic, legal and technical possibilities in the dossier concerned.

[39]Case C-425/13, *Commission* v *Council* (EU-Australia ETS negotiations).

Once the negotiations are concluded, a proposed text will be submitted to the Council. If this text is found agreeable by all its members, the Council may eventually adopt a decision authorising its signing. Optionally, the envisaged agreement can also be singled out for provisional application (i.e., preceding its official conclusion and eventual ratification by Member States).[40]

Then, Parliament is either asked for its consent, or merely consulted (or neither, in case the agreement falls predominantly within the scope of the CFSP).[41] It will have to give its consent when the envisaged treaty is an association agreement, when it involves the agreement on accession to the ECHR (as foreseen in Article 6 TEU), an agreement establishing a specific institutional framework by organising cooperation procedures, an agreement with important budgetary implications for the EU or an agreement that covers fields where either the ordinary legislative procedure (i.e., Article 294 TFEU) applies or a special legislative procedure where consent by the European Parliament is required.[42] In all other cases, with the exception of CFSP agreements, Parliament merely has to be consulted.[43]

Box 1.4 The Unstoppable Advance of the Parliament; The Demise of ACTA

Since the entry into force of the Lisbon Treaty, the European Parliament assumed a prominent role in the conclusion of international agreements. It has, inter alia, been involved in the conclusion of the Terrorist Finance Tracking Programme (TFTP/SWIFT) and the Passengers Name Records (PNR) agreements with the US and Australia. In July 2012, in a high-profiled dispute, it rejected the Anti-Counterfeiting Trade Agreement (ACTA). ACTA was a proposed international agreement on the protection of intellectual property rights between the EU, its Member States and 10 other countries. In the face of massive public outcry, and heated debates in the Parliament itself, the Commission sought to obtain the ECJ's opinion on ACTA's compatibility with the Treaties. Before the Court could proceed to do so, the EP voted it down, mainly due to concerns about the agreement's endangering of civil liberties.

[40]Provisional application can be terminated by a party to the agreement without further notice and without giving reasons (see Article 25(2) VCLT). This renders it a weak position to be in for too many years, if only from the perspective of legal certainty. Under international law, parties usually resort to it for (agreements containing) minor amendments to existing treaties. The EU shows a greater enthusiasm, with regularity applying all parts of mixed agreements that fall within the Union competence provisionally. For further reflections, see Quast Mertsch (2012).

[41]The Court has construed the word 'exclusively' in Article 218(6) TFEU to mean 'predominantly' in Case C-263/14, *Parliament* v *Council* (Tanzania agreement).

[42]In case of urgency, the Parliament and the Council may agree upon a time-limit for consent.

[43]Again, a time-limit may be set, here by the Council. If Parliament fails to deliver its opinion before the expiry of the deadline, the Council may press ahead with the conclusion.

Hereafter, on the proposal by the negotiator, the Council may adopt a decision concluding the agreement. As with its predecessors, this decision will be published in the Official Journal.

Throughout the whole procedure, the Council will take its decisions by qualified majority voting. This applies to the decision to open the negotiations, as well as those to sign and conclude the proposed agreement. However, the Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of an (internal) EU act, as well as for association agreements and accession treaties. This also entails that all CFSP agreements are authorised, adopted and concluded by unanimity.

In case the treaty lies within a field of exclusive competence, it may be considered ratified with the conclusion by the Council. However, in case of a shared competence and, correspondingly, a mixed agreement, the conclusion of the treaty will only be final once all Member States have proceeded to ratify it, in accordance with their domestic constitutional requirements. Consequently, when earlier a decision was taken on the provisional application of a mixed agreement, that application can only pertain to the elements that lie within the Union's sphere of competence.

It deserves mentioning that since the turn of the last century, instead of treaty-making, the EU increasingly resorts to non-binding agreements such as memorandums of understanding. Neither the procedure of Article 218 TEU nor a *lex specialis* applies here—which does not mean though that 'anything goes'. The scarce case law reveals that the Council calls the shots, authorising the Commission to initiate negotiations where necessary. Contrary to what the latter presumed, it does not possess the right to sign a non-binding agreement resulting from the negotiations but requires the former's prior approval for that.[44]

1.6 Judicial Control in the Various Layers

Officially, the Union has been endowed with a 'common institutional framework' since 1992. Yet, this amounted to a paper reality then, and at the present day and time, it still has not been realised in full. Following Article 13 TEU, there are seven official institutions: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice, the European Central Bank and the Court of Auditors. However, there is still no perfect unity in the way these institutions manifest themselves in the (sub-)domains of European Union law. Perhaps the most salient deviation resides in the role of the Court of Justice in EU external relations law; for the bifurcated system of judicial protection

[44]To reason otherwise would infringe the principle of distribution of powers in Article 13(2) TEU and the principle of institutional balance: see Case C-660/13, *Council* v *Commission* (Addendum to the EU-Switzerland MoU).

underscores that the *commonality* of the institutional framework continues to be slightly fictitious.

In principle, as in EU law in general, the Court has been granted full jurisdiction to interpret the Union's legal instruments, rule on their validity, express itself on possible infringements of Union law by Member States, and decide on preliminary questions referred by national courts.[45] It has been established in case law that international agreements also lie within this purview. Therefore, national courts may also approach the ECJ when any clauses of such agreements are equivocal or if their legality seems dubious.[46]

In addition, at the conclusion of any treaties or conventions, following Article 218(11) TFEU, the ECJ can be asked to pronounce on the compatibility of those agreements with the Treaties and/or EU secondary law.[47] This *ex ante* procedure is optional and not compulsory, but employed with great regularity all the same.[48] One should not be misled by the nametag 'opinion', and realise that the content of the document outlining the Court's position is binding in its entirety. By consequence, if the pronouncement turns out to be negative, the envisaged agreement cannot enter into force unless it is amended (the standard route to resolve any incompatibilities) or the Treaties revised.[49] Of course, a harsh verdict may occasionally result in wholesale abandonment of the proposal.

The background idea of this procedure is that one ought to prefer prevention to the cure: if an agreement were to be enacted which proves incompatible with EU law afterwards, the international obligations vis-à-vis third parties remain in place nevertheless.[50] For that reason, a compatibility assessment in advance is to be preferred.

There is no time-limit for submitting a request for a Court opinion, and it is not necessary that the decision to open negotiations has already been taken. All the same, the overall purpose of the envisaged agreement must be known before the ECJ is in a position to pronounce itself.[51] Usually, the agreement will have been

[45]See respectively Articles 258–260, Article 263 and Article 267 TFEU.

[46]See e.g. Case 181/73, *Haegeman* v *Belgium*.

[47]The Court has extended its competence to assess envisaged agreements of the EU whereby the Member States act as its medium (Opinion 2/91, *Conclusion of ILO Convention No. 170 concerning safety in the use of chemicals at work*) and, more controversially, to some agreements concluded by the Member States on their own behalf (Opinion 1/13, *Accession of third states to the Hague Convention on the civil aspects of international child abduction*).

[48]An extensive discussion provides Adam (2011).

[49]The latter remains a rare occurrence in EU law, and has never been triggered by the incompatibility of a proposed international agreement. However, the Court's controversial position in Opinion 2/94, where it denied that the Community was competent to accede to the ECHR, did in the long run result in a specific legal basis being inserted (at the Treaty of Lisbon, with the revision of Article 6 TEU).

[50]Again, in line with Article 27 VCLT (cf. supra, footnotes 15 and 16).

[51]See e.g. Opinion 2/94, *Accession of the Community to the European Convention on Human Rights*, paragraph 13, and Opinion 1/09, *Creation of a unified patent litigation system*, paragraph 53.

negotiated but not yet concluded. In case the agreement has been concluded already, the Court will not give an opinion.[52] The appropriate remedy for a Member State or institution that wishes to contest the agreement is then to bring an action for annulment against the decision to conclude the agreement (Article 263 TFEU).

As said, the EU knows a bifurcated system of adjudication: whereas in general, the Court enjoys an unfettered jurisdiction over the full breadth of Union law, a special exception has been made for the Common Foreign and Security Policy. At the very moment the CFSP was incorporated in the original three-pillar framework, at the Treaty of Maastricht, the Court was consciously excluded from this particular domain. The reasons for this exclusion are commonly thought to be threefold.[53] First, there is the idea that judicial control would constrain the Member States' room for manoeuvring in this highly political environment. Traditionally, foreign and security policy is an extremely sensitive field, where the national interest takes pride of place. This renders it undesirable to let lawyers and judges step in and separate the 'rights' from the 'wrongs'. A second and closely connected reason pertains to the nature of the measures enacted: pursuant to the broad powers and very general objectives of the CFSP, the instruments adopted are thought not to lend themselves well for legal review and judicial supervision. They are after all not intended as proper legislation, and imperfectly drafted to boot. Third and last, there is the fear of judicial activism—the risk that the ECJ would pick up the gauntlet in the same way it did before, disregarding the Member State's more limited ambitions, promoting further integration and extending the scope of the CFSP beyond the black-letter text. In the mid-1990s, the Court was deliberately brought into the former 'third pillar' so as to strengthen the rule of law there. Its integral exclusion from the CFSP was kept intact at the Treaties of Amsterdam and Nice (signed in 1997 and 2000).

The ECJ has nevertheless managed to broaden its grasp. It felt compelled to do so, driven by the need to ensure that no legal measures adopted in the intergovernmental domains of the Union would encroach upon the *acquis communautaire* (then made up of the primary and secondary rules of the 'first pillar').[54] In the groundbreaking *ECOWAS* litigation, from the outset, it seemed doubtful whether the Court was able to review the legality of a CFSP decision that was claimed to affect the exercise of external EC competence. The Council, supported by Spain and the United Kingdom, submitted that the ECJ had no jurisdiction whatsoever to rule on the legality of any measure falling within the CFSP. Their objections were, however, quickly brushed aside. Citing what was then Article 47 TEU, the Court

[52]Unless when it deems that there are imperative reasons to speak out nevertheless: see Opinion 3/94, *Framework agreement on bananas*, and Opinion 1/13, *Accession of third states to the Hague Convention on the civil aspects of international child abduction*.

[53]Cf. Garbagnati Ketvel (2006), pp. 79–80.

[54]Earlier case law suggested, and many scholars assumed, that such 'cross-pillar surveillance' would be possible vis-à-vis CFSP measures. A 1998 ruling in respect of a former 'third pillar' act foreshadowed the Court's comprehensive approach; see Case C-170/96, *Commission* v *Council* (Airport Transit Visa).

recalled that none of the provisions of the EC Treaty were to be affected by a provision of the EU Treaty. For that reason, it posited that it had to ensure that acts falling within the scope of Title V TEU—at least those that were by their nature capable of having legal effects—did not encroach upon the powers conferred by the Treaty on the European Community. From this followed that the jurisdiction of the Court did extend to ruling on the merits of an action for annulment brought against a CFSP act.[55]

Admittedly, the Constitutional Treaty had already intended to create an opening in this direction, but due to the breakdown of that project, the prospect initially failed to materialise. The provision concerned was nevertheless picked up by drafters of the Lisbon Treaty, and the pivotal clause is currently located in Article 275 TFEU. It does, however, still uphold the general negative rule with regard to the jurisdiction of the ECJ in the Common Foreign and Security Policy: in principle, the Court shall neither have jurisdiction with respect to the Treaty provisions on the CFSP nor with respect to acts adopted on the basis of those provisions. Nevertheless, in the second section of Article 275 TFEU, two exceptions are made, the prefigurations of which had been cropping up in the earlier case law of the ECJ.

First, in accordance with Article 40 TEU, the Court may monitor whether CFSP acts do not encroach upon other primary or secondary rules of EU law.[56] Thus, if a CFSP measure affects other EU competences, inhibits the exercise thereof in some way, or tramples over certain procedural requirements, it will have to be set aside. Yet, as Article 40(2) TEU stipulates, the '*ECOWAS* doctrine' or 'border surveillance competence' now works both ways. After the *ECOWAS* judgment and prior to the entry into force of the Treaty of Lisbon, legal acts adopted under Title V TEU could be scrutinised by the Court for a possible encroaching upon the 'acquis communautaire', and they would always be annulled if that was the case. Since the entry into force of the Lisbon Treaty, however, any other EU acts encroaching upon the CFSP suffer the same fate. Thus, where in the past one could say that 'the first pillar always wins', in the post-Lisbon era, this is no longer so.[57] Conceptually, one could say that through the new 'mutual non-affectation clause', a legal parity has been achieved between the 'outer' and the 'middle layers' of the EU external relations framework. Unfortunately, this change forces political and judicial authorities to engage in much more complex analyses. Careful attention has to be paid to the 'centre of gravity' of a proposed measure. When the limits and proper location of a suspect measure cannot be determined with complete certainty, a dual

[55]Case C-91/05, *Commission* v *Council* (ECOWAS). The contested CFSP decision that purported to implement a CFSP joint action was ultimately annulled for disavowing the EC competence on development cooperation (and clashing with parts of the Cotonou Agreement, enacted on the basis of that competence (now contained in Article 209 TFEU)).

[56]In line with Article 25 TEU, such acts will merely comprise 'decisions'. Moreover, in line with Article 24(1) TEU, which rules out the adoption of legislative acts, these will mainly be of a technical and executive nature.

[57]See e.g. Case C-263/14, *Parliament* v *Council* (Tanzania agreement).

legal basis may have to be utilised with increasing frequency.[58] This in turn places an increased burden on the shoulder of policy officers, who have to premeditate their actions well in advance when choosing the provision(s) on which to base the envisaged legal instrument.[59]

Box 1.5 *Retour à Mauritius*: An Atypical Case of Border Surveillance?
We noted above how the Parliament contested the choice of legal basis for the decision signing and concluding the agreement between the EU and the Republic of Mauritius. The Parliament hereby argued for the application of Article 218(6)(a)(v) TFEU, which provides it with the right to give (or withhold) consent. Instead, the decision was adopted by the Council on the basis of Article 218(6) TFEU, second sub paragraph, which does not entail such extensive EP involvement. On that count, the Court eventually sided with the Council, but it did not consider itself barred from reviewing whether Article 218(10) TFEU had been violated in the process. Tentatively, one might argue that the Court engaged in an atypical form of 'border surveillance' in order to verify the procedural prerogatives of the various actors.

The second exception to the general exclusion of Court jurisdiction in the CFSP, laid down in Article 275 TFEU, is that the ECJ is entitled to review the legality of decisions adopted by the Council under Title V TEU that impose restrictive measures on natural or legal persons.[60] This remedy reflects and reinforces the approach the EU Courts have taken in a long string of cases. Most of these were initiated in the wake of the attacks of 11 September 2001, and the subsequent measures adopted by the EU as part of the 'war on terror'. Notable samples are the *Kadi*,[61] *PMOI/OMPI*[62] and *Sison*[63] cases, in which, ultimately, the protection of the fundamental rights of the suspected natural and legal persons prevailed over the (alleged) overriding security interests. The defects of the adopted sanctioning measures that 'blacklisted' the targeted companies and individuals were so severe

[58]On this, see more generally Case C-178/03, *Commission and Parliament* v *Council* (Incorporation of the Rotterdam Convention), and Case C-166/07, *Parliament* v *Council* (International Fund for Ireland).

[59]As argued in van Elsuwege (2010), the trusted 'centre of gravity' test may well prove wholly unsuited for this specific domain.

[60]As regards judicial review of the measures subsequently adopted on the basis of Article 215 TFEU, the jurisdiction of the EU Courts is self-evident.

[61]Joined Cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat International Foundation* v *Council and Commission*.

[62]Case T-228/02, *Organisation des Modjahedines du peuple d'Iran* v *Council*; T-157/07, *People's Mojahedin Organization of Iran* v *Council*; Case T-256/07, *People's Mojahedin Organization of Iran* v *Council*; Case T-284/08, *People's Mojahedin Organization of Iran* v *Council*.

[63]Case T-47/03, *Sison* v *Council*; Case C-266/05 P, *Sison* v *Council*; Case T-341/07, *Sison* v *Council*.

that the ECJ felt obliged to proceed to (partially) annul them.[64] Whereas this was comparatively easy where the EU itself had adopted those measures of its own motion, a complication arose in those cases where they constituted the follow-up of rules laid down within the framework of the United Nations. Nevertheless, in the first appeal judgment in the *Kadi* case (2008), the Court displayed an unprecedented audacity, asserting that it was able to review the legality of every EU legal act, including those giving effect to UN Security Council resolutions. Emphasising the autonomous character of the Union legal order that could not be prejudiced by an international agreement, it proceeded to award an absolute priority to the EU system of human rights protection. This stern defiance of UN rules, tacit negation of the supremacy of the UN Charter and contravention of the will of the Security Council resulted in historic, groundbreaking jurisprudence.[65] Henceforth, the judicial review possibilities absent at the UN level would at least be guaranteed within the EU legal order. At the same time, this did not preclude further litigation, in particular on the standard and remit of the fundamental rights that need to be safeguarded in 'terrorist cases'.[66] In the final instalment of this saga, handed down shortly after the de-listing of the claimant by the Council, the ECJ underscored that decisions to impose restrictive measures may be subjected to intense scrutiny, and that courts should not limit themselves to a marginal assessment, leaving too wide discretion to public authorities.[67]

Originally, the prime vehicle for effectuating these two exceptions appeared to be the action for annulment (i.e., application of Article 263 TFEU). For border surveillance, the usual protagonists are thereby the Member States and the institutions; for a review of restrictive measures, natural and legal persons. In the seminal *Rosneft* judgment, the Court also allowed for the submission of preliminary references on the validity of CFSP acts, provided that the instrument concerned is either suspected of violating Article 40 TEU, or imposes sanctions on companies or individuals. In its response to a referral from a British tribunal, where a Russian oil company contested the lawfulness of its blacklisting, the ECJ held that neither the TEU nor the TFEU outlawed this procedural avenue. The Court signalled that the coherence of the system of judicial protection requires that, alongside the possibility of a direct action, the power to declare such acts invalid under Article 267 TFEU

[64]The 'blacklists' led to a wholesale freezing, in every Member State of the Union, of the financial assets and resources of the persons and enterprises concerned.

[65]The early stance of the CFI had been rather reluctant, and it only grudgingly accepted its being overruled: see Case T-306/01, *Yusuf and Al Barakaat International Foundation* v *Council and Commission*, and Case T-315/01, *Kadi* v *Council and Commission*. The judgments triggered an avalanche of scholarly writing; further references can e.g. be found in de Búrca (2009) and Cuyvers (2011). A comprehensive study offers Eckes (2014).

[66]Meanwhile, at the UN level, in the wake of the first *Kadi* appeal judgment, a special Ombudsperson was installed that can be approached by those alleging to have been blacklisted erroneously. For further details, see Boisson de Chazournes and Kuijper (2011).

[67]Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others* v *Yassin Abdullah Kadi*.

should be reserved to it as well whenever questions on their legality are raised before Member State courts.[68]

Prima facie, nothing stands in the way either of the Court reviewing the compatibility with the EU Treaties of international agreements concluded under the CFSP competence: Article 218(11) warmly welcomes the opportunity. We do await a wholehearted confirmation of this option, as it has never been effectuated so far, apart from the scrutiny of agreements that were principally based on a TFEU competence but contained a secondary CFSP component.

In recent years, some other intriguing cracks have emerged. Essentially, these gambits testify of an unflappable judiciary that is keen on protecting individual rights, and regards the exclusion rule in Article 275 TFEU as an exception that ought to be construed narrowly. Hence, in *H.*, the Court found itself competent to also review purely administrative decisions (in the case at hand, one pertaining to staff management within an EU police mission) that adversely affect individuals.[69] Equally, in *Elitaliana*, it made clear that it enjoyed jurisdiction to interpret and apply financial provisions with regard to public procurement, even when the call for tenders fell within the purview of the CFSP.[70] On a related note, already at the turn of the last century, the CFI ruled in *Hautala* that Regulation 1049/2001, in tandem with the general principle of transparency, had to be interpreted as demanding public access to documents lying within the scope of Title V TEU.[71] In the Court's view, such access could not be denied on the sole ground that these had been prepared within the field of foreign and security policy. It thereby did stress that the judicial assessment must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts, or a misuse of powers.[72]

Overall then, judicial control over EU external action forms quite a mixed bag. There would seem to exist an adequate system of remedies in the Union in general, which extends to the CFSP where it appears most crucial. It may nonetheless be questioned whether the exclusion rule contained in Article 275 TFEU totally comports with the minimum standards flowing from international human rights conventions and whether it does not excessively impede access to justice and the right to effective judicial protection. The ECtHR has hitherto been reluctant to look

[68]Case C-72/15, *Rosneft Oil Company OJSC* v *Her Majesty's Treasury*, *The Secretary of State for Business, Innovation and Skills, The Financial Conduct Authority*.

[69]Case C-455/14 P, *H.* v *Council, Commission and EU Police Mission in Bosnia and Herzegovina*.

[70]Case C-439/13 P, *Elitaliana SpA* v *Eulex Kosovo*.

[71]See Regulation 1049/2001/EC regarding public access to European Parliament, Council and Commission documents, OJ [2001] L 145/43.

[72]Case T-14/98, *Hautala* v *Council*. Ms. Heidi Hautala requested access to a report of a working group on conventional arms exports. The Council acquiesced in the kernel of the Court's decision, but did lodge an appeal challenging the application of the grounds of refusal listed in said Regulation. The ECJ rejected this claim in Case C-353/99 P, *Hautala* v *Council*.

into this.[73] The ECJ has downplayed the issue, and sought to justify a continued compartmentalisation in its notorious Opinion 2/13.[74] The matter still needs to be confronted head-on if the EU were to accede to the ECHR after all, as foreseen and mandated in Article 6 TEU.

1.7 Conclusion

In the past centuries, the way in which states conduct their external relations has visibly evolved. For quite some time the executive was placed in pole position, the legislature and judiciary squeezed to the margins.[75] Few considered the attendant lack of oversight problematic. Initially, the disposition of the EEC bore a close resemblance to this setup, but as we have observed, countless shifts occurred—partly through formal amendments, partly through court action. Just like nation states, the EU and its predecessors witnessed an identical expansion of the entire spectrum of external relations, today no longer restricted to a splendidly isolated sphere but permeating ever more different policy fields.

Since the early 1990s, commentators have rushed to emphasise and exacerbate the Union's structural maladies, in particular the democratic deficit, its weak popular legitimacy, limited transparency and overall inefficiency. The Common Foreign and Security Policy was singled out for particularly harsh criticism, and at the present day and time, the discontent with regard to the effectiveness the EU's 'outer layer' has not subsided. Below the radar, however, many more results were achieved than is generally acknowledged. Moreover, the Union is not a unitary actor with a single foreign policy, nor does it pretend to be. It remains a multifaceted legal creature, with only a *common* foreign policy where possible. Additionally, in the Union's 'middle layers', one encounters a very sophisticated framework for managing legal relations with the outside world. True, the composition is bewilderingly complex—but necessarily so, due to the great variety of interests of the actors involved, which all need to be careful balanced.

Over the course of the past decades, the layered structure has been refined and polished in several ways. Since 2009, the Lisbon Treaty has brought considerable extra clarity. It for example resolved the hitherto problematic issue of legal personality, and carved out the division of competences in greater detail. The relationship between the various institutions, bodies and agencies, as well as the interaction between the various layers, is now clearer than before. Yet, until the layered system is replaced with a unitary architecture, many will consider its achievements suboptimal—and the series of disparaging pessimistic and, indeed, defeatist remarks with

[73]Compare the ECtHR judgments in *Bosphorus Hava Yollari Turizm* v *Ireland*, Application No. 45036/98 and *Posti & Rahko* v *Finland,* Application No. 27824/95.

[74]Opinion 2/13, *Accession of the European Union to the European Convention on Human Rights*.

[75]Kuijper (2014).

regard to the future of this global player are likely to persist, ignoring every progress in the opposite direction.

Equally relentlessly though, in its present form, the EU is pushing ahead with pursuing objectives that were already set down in the early 1990s, but perhaps in a much too abstract and ambiguous way. Currently, a slow but sure synchronisation of the external policies of the Member States is taking place, epitomised by the entrenching of the position of the High Representative, the enactment of a uniform set of legal instruments, the gradual emancipation of the European External Action Service, and the contemporary muscle afforded to the Parliament. Further shifts will inevitably be occurring, inside, outside, as well as in between the various layers, mainly as resultant of the dynamics between the different actors and competences involved.

It is this quasi-permanent evolution of the EU as a global player that makes the study of its external relations law so challenging and rewarding. In the preceding sections, we have become acquainted with some basic features and concepts. The ground is now sufficiently prepared for a more in-depth study of the outer, middle and inner layers.

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