Part 2:
Balancing EU Values with External Action Objectives

Recent Tendencies in the Separation of Powers in EU Foreign Relations: An Essay

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I. The Development of the Place of Foreign Affairs in Western Democracies Outlined

When analysing the constitutional systems of nation States, it is self-evident that separation of powers is an ideal, not the reality. In many constitutional systems, the separation of powers is better described as a form of counterbalancing the powers of the legislative, the executive and the courts. We also know that the different powers sometimes overreach themselves in their balancing battle with the other powers and then a "better" balance has to be "restored" or brought about. One could argue – tongue in cheek – that a large part of politics is overreach and reaction on the battlefield of the balance of powers between the different branches of government.

Elements of this tussle between the different powers are parliaments that put their nose into everything that the executive does and try to regiment any regulatory power delegated by law in such detail that the scope for actually governing becomes very small or even non-existent.[1] However, there are also instances where the executive abuses its delegated powers of regulation and does not return to the legislative power for guiding principles, even when that is clearly provided for, or where the executive is not transparent in its government, thus hindering the general power of oversight of the legislature.[2] Obviously, all of this can only function ful-

1 A recent example in EU foreign relations law are overly detailed directives for negotiation issued by the Council under Article 218, paragraph 4, TFEU that rob the Commission of any margin of manoeuvre. See Judgment of 16 July 2015, *Commission* v *Council,* C-425/13, EU:C:2015:483. Another example in the same field is Judgment of 6 October 2015, *Council* v *Commission,* C-73/14, EU:C:2015:663, in which the Council challenged the submission of a written statement by the Commission on behalf of the European Union without prior approval of the Council.

2 An example of this in EU foreign relations law can be found in Judgment of 24 June 2014, *Parliament* v *Council,* C-658/11, EU:C:2014:2025, where the Court

ly when the legislature is democratically elected and the executive, at the political level, is either indirectly legitimised by being supported by a majority of the legislature or is directly elected, thus benefiting from independent democratic authority. In the latter case, the separation of powers is sharper than in the first.

The ideology of the separation of powers comes to the fore at its sharpest in the relationship between the two political branches of government and the judiciary. Although there are systems where judges (and public prosecutors) are also elected, they are relatively rare. Even if the executive normally appoints judges and prosecutors, the procedure is surrounded by guarantees that the appointment is on the basis of merit. The nomination of judges is in principle for life, or until the pensionable age, and can only be cut short for well-defined reasons and according to onerous procedures.[3] The courts in turn are restricted, if they have to judge government and legislative acts, to quashing the act for specific reasons; they cannot replace the act by their judgment. The legislature has the power not only to review its own acts, but also to over-rule the courts, except if these have the authority to declare laws unconstitutional. In general, in most of such national constitutional systems the courts have been more stringent in reviewing the acts of the executive than in striking down the acts of the legislature because of the latter's superior claim to direct democratic legitimacy.

Traditionally, even in modern democracies, not only the courts, but also the legislature, have shown particular deference to the executive in the field of foreign affairs. A certain role is perhaps played here by the close

found that the Council infringed Article 218, paragraph 10, TFEU, when it did not immediately and fully inform the Parliament at all stages of the procedure.

3 In this respect the national safeguards for the independence of judges are better than those for the Judges and Advocates General of the European Courts. For instance, compare Article 64 of the French Constitution ("Les magistrats du siège sont inamovibles") and Article 97 of the German *Grundgesetz* ("Die Gesetzgebung kann Altersgrenzen festsetzen, bei deren Erreichung auf Lebenszeit angestellte Richter in den Ruhestand treten") with Article 253 TFEU, that provides for a renewable term of 6 years. Improvements in the selection of CJEU judges have been achieved through the activities and recommendations of the so-called 255-Committee, as introduced by the Lisbon Treaty. Several contributions about the beneficial work of this Committee are to be found in M. Bobek (ed), *Selecting Europe's Judges, A Critical Review of the Appointment Procedures to the European Courts* (Oxford: OUP, 2015).

link between the exercise of the foreign affairs power and the Head of State, whether King or President. This figure is symbolic for the one and undivided State, which interacts with other States in the same way as the proverbial billiard ball.

Parliaments have usually restricted themselves to broad policy review and limited interference with the foreign affairs budget. If parliaments legislate in this context, they do so mostly in the form of semi-constitutional acts, such as laws on the procedure for concluding treaties, acts concerning the details of the relation between treaties and customary international law on the one hand and national laws and acts of decentralised authorities on the other, laws on the immunity of international organisations present in the country, or laws laying down the framework for implementing binding decisions of international organisations. The quantity and variety of legislation on foreign affairs is normally very limited, compared with legislation in other domains of government. This tendency is even stronger in the EU, since so many questions in the field of external relations are laid down in the Treaties themselves.[4]

The judiciary usually shows the utmost restraint in striking down foreign policy related acts of the government, especially if these represent political choices. In some countries, it is not unusual for courts to express the view that foreign policy choices of the government should be respected, either because the Ministry of Foreign Affairs has superior expertise in the matter, or because there are factors involved which are considered inherently not to be amenable to judicial review.[5] The ultimate danger that the national courts encounter in foreign relations cases is that their judgments in such cases will cause political conflicts with foreign nations or

4 See on this tendency B. de Witte, "Too Much Constitutional Law in the European Union's Foreign Relations?" in M. Cremona and B. de Witte (eds), *EU Foreign Relations Law – Constitutional Fundamentals* (Oxford: Hart, 2008), 3-15, at 10.

5 This is the so-called "political question doctrine", which was at the heart of such US Supreme Court cases as *Baker* v *Carr* 369 US 186 (1962) and *Youngstown Sheet and Tube Cy.* v *Sawyer* 343 US 579 (1952). The latter was basically a war and foreign relations case and the former was a redistricting case, but the Court was loth to accept such doctrine, even though Justice Brennan in *Baker* v *Carr* developed elaborate criteria for political questions the Court should not decide. European Supreme Courts have been equally hesitant to accept the concept in concrete cases. See e.g. P. J. Kuijper and K. C. Wellens, "Deployment of Cruise Missiles in Europe: The Legal Battles in the Netherlands, the Federal Republic of Germany and Belgium", *Netherlands Yearbook of International Law* XVIII (1987), 145 – 218.

even result in responsibility under international law for their country. The sway that the government held over the courts in matters of foreign affairs until some 25 years ago is best illustrated by the formal letters that Ministries of Foreign Affairs sent to the courts that were confronted by questions of this kind, such as the recognition of States, questions of State immunity, the so-called Act of State and even the direct effect of treaties. The Courts were normally supposed to follow these letters.[6]

Over the last two to three decades, however, this traditional restraint on the part of the courts and the legislature vis-à-vis the executive, incarnated by the Ministry of Foreign Affairs, has been subject to erosion in most States. This is the culmination of two important long-term evolutions which have affected foreign affairs in almost all States since the Second World War. First, there is the so-called democratisation of foreign policy, that is to say foreign policy has been taking an increasingly prominent place in general political discourse, especially in Western democracies, and is no longer a subject that is principally discussed amongst a small group of specially schooled experts. Discussions on foreign policy are no longer carried on primarily by "serious people" in such exclusive clubs as the Council on Foreign Relations in New York, the Royal Institute of International Affairs in London, the *Institut français des relations internationales* in Paris, or *het Nederlands Genootschap voor Internationale Zaken* in The Hague. Ministers of Foreign Affairs and Ambassadors no longer belong in important numbers to the nobility of a country, but are products of the modern meritocracy and the Ministers have reached their position through their affiliation with a political party. The number of organisations

6 In France there was a practice of this kind relating to the question of direct effect of international agreements that was reported in Judgment of 26 October 1982, *Hauptzollamt Mainz* v *Kupferberg,* 104/82, EU:C:1982:362. In the US there was the phenomenon of the so-called "Bernstein letters", which gave the view of the Department of State on whether an act of another State, mostly in cases of nationalization, qualified as an Act of State necessitating abstention by the US courts. Moreover, the Department also wrote letters on the recognition and on the immunity of foreign States and governments. Since the adoption by Congress of the Hickenlooper amendment and the Foreign Sovereign Immunities Act in the '60s and the '70s there was less need for the Department to write such letters. See R. Mok, "Expropriation claims in the US courts: The Act of State Doctrine and the FSIA – A Road Map for the Expropriated Victim", *Pace International Law Review* 8, no. 1 (1996), 199-236, at 208-209 and C. A. Bradley, *International Law in the US Legal System* (Oxford: OUP, 2013), 10-12 and 19-21.

active in the field of foreign policy and international economic relations has grown enormously in number and diversity: think tanks of many different ideological stripes, non-governmental organizations (NGOs) such as Oxfam, Greenpeace and Amnesty International, or Human Rights Watch. Foreign policy issues thus sometimes play an important role in elections and parliaments have lost their restraint vis-à-vis the Ministry of Foreign Affairs: nominations of ambassadors are taken hostage and individual budget lines in the budget of the Ministry are cut in order to show parliamentary displeasure with detailed aspects of foreign policy.[7]

The second secular trend that has transformed foreign policy – and which is closely linked to the trend of democratisation – is the specialisation in the field. It is exemplified by the enormous growth of (specialised) international organisations at the worldwide and regional level, both in number and in size, after the Second World War. The diversity in think tanks, pressure groups and NGO's, mentioned above, is also a symptom of this specialisation. At the national level, the number of departments of government that have substantial international affairs divisions or even directorates-general has grown enormously, to the point where even Ministries of Home Affairs have such departments. This has led to considerable problems of coordination between the Ministry of Foreign Affairs, the practitioners of "high foreign policy", and the specialised ministries, the "low foreign relations" people, both inside the government at home and inside embassies and delegations abroad. In practice, the most that Ministries of Foreign Affairs are able to achieve is to play the lead coordinating role. On the other hand, when foreign policy knots have to be cut between departments or for reasons of coalition politics, central coordination has been assumed more and more over the last decades by the prime minister or the president, and by the cabinet office or kitchen cabinet of these government leaders. The European Union and its summitry have been an important force in this development, which has seen the term

7 In the European context, the European Parliament obtained certain promises from the first High-Representative and Vice-President of the Commission Lady Ashton with respect to the organization of the EEAS on its foundation, by cautioning her that it would not hesitate to use its budgetary powers. See K. Raube, "The European External Action Service and the European Parliament", *The Hague Journal of Diplomacy* 7, no. 1 (2012), 65-80, and M. Bien, "How the European Parliament had its 'say' on the EEAS", *Nouvelle Europe*, http://www.nouvelle-europe.eu/node/946, (2010).

"Sherpa" descend from the Himalayas to the presumably equally risky conference rooms in New York, Brussels, Geneva and Nairobi. This concomitant phenomenon of specialisation may usefully be called the "presidentialisation" of foreign affairs.

As far as the restraint of the judiciary in respect of questions of foreign relations is concerned, there is little doubt that everywhere courts are getting more and more involved in foreign policy questions. In part, this is a consequence of the growing number of human rights conventions and other so-called legislative conventions in international law. NGO's and individuals or groups of citizens bring more cases where specific foreign policy actions of a government are measured against such international conventions before national courts. This phenomenon was already known from the US and began to grow in Europe in the 1980s with the so-called cruise-missile cases.[8]

The anti-cruise-missile movement also serves as illustration of the fact that foreign affairs is an area of government (and of EU activity) where not only the horizontal separation of powers, between the branches of government and, within these branches, between different departments, but also the vertical separation of powers plays a role. Municipalities in the Netherlands and Germany declared themselves at the time to be "nuclear-arms-free zones". These were symbolic declarations to be sure, but they do raise the question of how far municipalities, provinces, regions or *Länder* can go in (pretending to) carry(ing) on their own foreign policy. In some unitary States, the central government can take repressive measures against foreign policy decisions of lower government bodies. In modern federal States, the extent of the foreign affairs powers of the federated States is normally well regulated in the constitution – which does not mean that there are not serious problems from time to time.[9]

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8 For further information see P J. Kuijper and K. C. Wellens, *supra* note 5. See also L. F. M. Besselink, "The Constitutional Duty to Promote the Development of the International Legal Order: the Significance and Meaning of Article 90 of the Netherlands Constitution", *Netherlands Yearbook of International Law* 34 (2003), 89-138.

9 See the tribulations of the US government in the early 2000's on the occasion of the implementation of the International Court of Justice's judgment in the *LaGrand* cases. For further information see: B. Simma, H. Carsten, "From LaGrand and Avena to Medellin – a Rocky Road Toward Implementation", *Tulane Journal of International and Comparative Law* 14, no. 1 (2005), 7-59. A more recent assessment of the situation in the US is given by M. J. Glennon and R. D. Sloane, *Foreign Affairs*

Having thus outlined with a broad brush the development of the separation of powers in the field of foreign affairs in western democracies, and the Member States of the EU in particular, it is now time to turn to the foreign affairs powers of the EU itself and their development up until the Treaty of Lisbon, and to see whether the evolution in the Member States and elsewhere in the western world is reflected in the situation at EU level and what this means for the separation of powers, both horizontal and vertical, in the field of EU foreign relations.

II. The Evolution of EU Foreign Affairs Powers Up to the Lisbon Treaty

The twin trends of specialisation and democratisation of foreign affairs, which affected the Member States, have also influenced, after a certain delay, the development of the foreign relations powers of the European Union.

Specialisation in the field of EU foreign relations became possible as a consequence of the well-known *ERTA* decision of the Court of Justice in 1970.[10] This judgment, based on the doctrine of implied powers, extended the potential treaty-making power of the (then) EEC to all domains covered by the Treaty, and made recourse to the Community treaty-making power compulsory in cases where treaty-making action by the Member States would have affected internal EEC legislation. This doctrine has led to the entry of the Community (subsequently the Union) into more and more specialised areas of external relations, such as maritime and aviation policies, international norms on health, on product safety, on the protection of species, and on other environmental norms such as the protection of the ozone layer, in step with the development of internal rules in these and other areas. In the different versions of the EEC, EC and EU Treaties since Maastricht some of these implied foreign relations powers under the *ERTA* doctrine were made explicit in different articles in Part Three of the

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Federalism, The Myth of National Exclusivity (Oxford: OUP 2016), in particular Chapter VI.

10 Judgment of the Court of 31 March 1971, *Commission* v *Council*, Case 22-70, EU:C:1971:32. See also J. Klabbers, "22/70, *Commission* v *Council (European Road Transport Agreement),* Court of Justice of the EC, [1971] ECR 263", in C. Ryngaert et al. (eds), *Judicial Decisions on the Law of International Organizations* (Oxford: OUP, 2016), 19-28.

TFEU. The *ERTA* doctrine itself is now enshrined in Article 3, paragraph 2, TFEU, which has recently been interpreted by the Court of Justice as authority for the continuation of the development and application of the *ERTA* doctrine as laid down in its existing case law.[11] Moreover, it has been given a fairly liberal interpretation in Opinion 2/15, especially in the context of broad international trade agreements, where (alleged) Article 3, paragraph 2, TEU powers co-exist with exclusive trade policy powers under Article 207 TFEU.[12] Hence, there is nothing that stands in the way of greater specialisation in the field of EU external relations and the need for more specialised expertise in the European External Action Service (EEAS) and the Commission.

Here we come to an interesting counterpoint to this trend of specialisation in EU foreign relations and that is the creation and development of, first, foreign policy cooperation and, later, the aspiration to conduct an actual Common Foreign and Security Policy in the EU, enshrined in an intergovernmental pillar at Maastricht. The different fields of specialised low foreign policy were there first and the instruments for high foreign policy were developed a little later, in parallel and with a separate institutional basis that was set apart from the EC/Union institutions. This separate institutional basis was first created inside the Council Secretariat and with the Secretary-General of that Secretariat as High Representative: the so-called second pillar in the Treaties of Maastricht and Amsterdam. In a way, this development was contrary to the natural development of specialisation in foreign affairs that took place in the Member States. In the Member States specialisation developed organically outwards from classic foreign policy. In the EU/EC, between Maastricht and Lisbon, classic, "high", foreign policy was placed, almost as another specialisation, alongside and separate from the "low" foreign policy in areas that were the external reflection of the internal market and the different Union policies. In the Lisbon Treaty, an attempt was made to place the "high" foreign policy in a separate quasi-institution, the EEAS, to be situated between the Commission and the Council, and under a "new" High Representative, who was nominated by the Council and the President of the Commission with a view to carrying out a double function: High-Representative of the Coun-

11 See Judgment of 4 September 2014, *Commission* v *Council (Negotiation of a CoE Convention),* C-114/12, EU:C:2014:2151.

12 See Opinion of the Court of 16 May 2017, 2/15, *EU-Singapore Free Trade Agreement,* EU:C:2017:376.

cil in Foreign Affairs and Vice-President of the Commission (HR/VP). He or she was destined, if not to sit on top of both "high" and "low" foreign policy, at least to have a power of direction over the former and a power of coordination over the latter. This institutional adaptation is a reflection of the trend mentioned earlier, according to which the national Ministries of Foreign Affairs have sought to establish centralised control over the many bits and pieces of "low", technical foreign policy conducted by many different departments of government in the Member States. It is as if the Foreign Ministries of the Member States tried to achieve at the European level what they had never fully achieved at the national level. The likelihood of actually arriving at this objective does not seem very realistic, but it represents nevertheless a first step towards presidentialisation of EU external relations.

There can be little doubt that the trend of democratisation of foreign policy that has taken hold in the Member States has been reflected step by step in the increasing powers granted to the European Parliament (EP) in the successive treaty amendments beginning with the Maastricht Treaty. First, its powers in general were improved and this led to the Parliament acquiring full legislative powers in the areas of foreign relations that were covered by the *ERTA* doctrine and fell under the (normal) legislative procedure after the Maastricht/Amsterdam Treaties. Before the entry into force of the Lisbon Treaty, the common commercial policy remained an exception, because it was allegedly too technical a subject for members of parliament to occupy themselves with in detail. Then, it became clear many matters that had become subjects of commercial policy (the so-called "behind-the–borders measures") actually had great impact on policies that hitherto had been regarded as being typically internal, such as taxes on domestic products, animal and plant health rules, and product safety measures.[13] Thus, a power of parliamentary approval of trade agreements found its way into the TFEU.

13 Covered respectively by Article III:2 General Agreement on Tariffs and Trade (GATT), the Agreement on Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers on Trade.

III. The Post-Lisbon Institutional Balance on Paper

The Lisbon Treaty has obviously influenced the balance between the institutions in what is now called external action, that is to say a combined foreign policy of the "high" (Common Foreign and Security Policy, laid down in the TEU) as well as of the "low" character (laid down in the TFEU). First, the diplomatic service (the EEAS) that, together with the Member States in the Council, conceives and runs this external action has received the status of quasi-institution in the Lisbon Treaty. Led by the HR/VP, it is the new kid on the block in EU external relations and has clearly executive tasks, as we will see in more detail below. It has no officially recognised exclusive conceptual power, as the Commission has in the TFEU; the HR/VP and the EEAS may make proposals, but in the TEU the weight of the conceptual power is with the European Council and the Council of Ministers, with input from the Member States. Another new kid is the President of the European Council, which at his level, i.e. the presidential/heads of State level is supposed to maintain international relations with his counterparts and act as emissary of the European Council in the international sphere. This is where the Treaty of Lisbon continues the trend of "presidentialisation".

The Lisbon Treaty has made of the European Parliament almost a normal parliament, that is to say with full budgetary powers, with nearly full legislative powers (together with the Council of Ministers), including the right to approve or reject international agreements, as most national Parliaments have, agreements under the common commercial policy no longer excepted. The EP only lacks this power in the field of the CFSP, a continuing abnormality compared to national Parliaments.

Lisbon has clearly made the Commission, in general, more "executive", in particular through the better and clearer regulation on the delegation of legislative powers and of implementing powers in the TFEU and "low" foreign policy (Articles 290 and 291 TFEU). The latter article, moreover, makes it perfectly clear that the Council can only reserve executive powers for itself in specific and well-reasoned instances. Thus, the Council has become more legislative, while the Commission has become a more executive organ in the field of TFEU external policy. The Treaty text now says explicitly what was previously only implicit, namely that normally the Commission is the representative of the Union in the wider world (Article 17, paragraph 1, TEU) except in the field of the CFSP, where this is the role of the HR/VP (Article 18, paragraph 2, TEU). It is obvious that

this new situation potentially sharpens the rivalry between these two executives on the international scene, which in theory should be reconciled by the coordinating powers of the HR/VP.

A somewhat similar trend is visible in the Treaty text concerning the CFSP. The provisions on the CFSP (Article 24, paragraph 1, second subparagraph, TEU) now stress that legislation is not permitted in this area. The legislative activity of the Foreign Affairs Council takes place only in the domain of the TFEU external relations, but "high" foreign policy has become purely decisional after Lisbon.[14] Moreover, the Council, or rather its Secretariat, has lost all executive powers in the field of CFSP after the creation of the EEAS. According to the Treaty text (Articles 26 and 27 TEU), the Council of Ministers develops the guidelines given by the European Council[15] into a detailed Common Foreign and Security Policy. Although the HR/VP may contribute through proposals to this development of the CFSP, in the end the HR/VP and the EEAS have the task of carrying out the CFSP as developed by the European Council and the Council of Ministers of Foreign Affairs. In doing so the EEAS, through the EU delegations (formerly the Commission's delegations) is the voice of the Union

14 Terms that were deemed to have a "legislative flavour", such as "common action" and "common position" were banned from the "new" TEU, especially at UK insistence. "Legislative acts" are not possible (Article 31, paragraph 1, TEU). Hence every CFSP act is now a decision, but such decisions will define certain actions or positions of the Union (Article 25 TEU). Van Middelaar has made an interesting distinction between "events policy" (European Monetary Union crisis and refugee crisis) and "legislative policy", and argues that the EU institutions have been built for the latter and are therefore bad at the former and must urgently adjust in order to show the citizens that they can also master the former. It might be possible to characterise "high foreign policy" (which includes defence policy) as events policy and "low foreign policy" as legislative policy. See L. van Middelaar, *De Nieuwe Politiek van Europa* (Amsterdam: Historische UItgeverij, 2017), in particular Part III "Regeren of niet. Emancipatie van de uitvoerende macht" (To Govern or not to Govern. Emancipation of the Executive).

15 In reality, the European Council could do no more than agree on a very broad European Security Strategy under the Amsterdam Treaty (2003), updated in 2008. A new European Security Strategy under the Lisbon Treaty was completed in the summer of 2016 under the title *Shared Vision, Common Action: A Stronger Europe*. European Council Conclusions of 28 June 2016, point 20, and Council Conclusions on the Global Strategy on the European Union's Foreign and Security Policy, 17 October 2016, Council doc. 13202/16. The work of developing more concrete security strategies was largely left in the hands of the Council of Ministers for Foreign Affairs.

in international organisations and at international conferences. In the CFSP as in the TFEU domain there is therefore a parallel trend of making the distinction between the Council as legislator (or policy-maker in the CFSP) and the Commission and the EEAS as executives sharper and clearer. At the same time the official recognition of the Commission as external representative in the TFEU, has been accompanied by the loss of its delegations in third countries to the EU and the EEAS. The Commission's civil servants are part of the EU's delegations, but perform the role of representatives of specialised ministries in the embassies of the Member States.

The position of the Court of Justice of the European Union (CJEU) in all of this has not changed much; the description of its jurisdiction and its principal task – ensuring that the rule of law is upheld – is not fundamentally different from what it was before. This does entail, however, much more activity in the field of foreign relations law and in interpretation of treaties than most of the highest courts in the Member States have on their plate, for the simple reason that foreign relations law is a question of the interpretation of the founding treaties of the Union much more often than it is a question of constitutional law in the Member States. It is perhaps also for this reason that the Member States as constitutional law makers were wary of the Court taking on its normal tasks in the field of the CFSP, fearing it might get more say in "high" foreign policy than national supreme courts normally have (Articles 24, paragraph 1, and 40 TEU and Article 275, first sentence, TFEU). It remains a pity that the Court of Justice thus has been prevented from showing that it could find its own way of practicing judicial restraint in political foreign policy cases, as the highest courts of many Member States have done. On the other hand, it may try to find a way to do so, by using its power of "border police" at the TFEU-CFSP border laid down in the Treaty (Article 275, second sentence, TFEU).[16]

After the entry into force of the Lisbon Treaty, on paper, certain things became clearer: the distinction between legislative or policy-making institutions (Council and Parliament, or Council alone) and executive institutions (Commission and EEAS), even though the Commission maintained

16 C. Hillion, "A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy", in M. Cremona and A Thies (eds), *The European Court of Justice and External Relations Law – Constitutional Challenges* (Oxford: Hart, 2014) 47-72.

its right of initiative in the TFEU foreign relations. The recognition of Parliament as having the power to approve all international agreements (except in CFSP) is the most important in this overall picture. Other things became more complicated: the recognition in the Treaty of several external actors of the EU: Commission, HR/VP and EEAS, and President of the Council. Still others did not change very much: the power of the CJEU, leaving it a small opportunity to exercise marginal review of the scope of the CFSP and to protect the rights of individuals targeted by CFSP restrictive measures.

After the Lisbon Treaty, what happened in reality in respect of the balance between the institutions? In order to have a better idea, there will first follow a short section on general developments, which sets the scene for a more detailed discussion of the evolution of the balance between the institutions as it developed after Lisbon – largely through intensive litigation in the CJEU.

IV. The Post-Lisbon Institutional Balance in Action

A. Some Preliminary Observations

First of all, it is important to recall once again that we are not primarily concerned here with the vertical balance of powers between the Union and the Member States; we are concentrating on the horizontal balance between the institutions. The vertical balance is a subject that can never be entirely avoided in the field of EU foreign relations, if only because it is linked to the possibility of certain agreements becoming mixed or not. This has immediate repercussions on the position of the Commission as negotiator in relation to the Council, as well on the relation between the Parliament and the Council, for the simple reason that the Council is the institution in which the Member States are represented. In this way, the confirmation of the broad interpretation of what falls under the common commercial policy, combined with a liberal interpretation of Article 3, paragraph 2, TFEU on implied external relations powers will reduce the need for making what are in essence trade agreements into mixed agree-

ments and thereby enhance the powers of the Commission and the Parliament in their relations with the Council.[17]

Secondly, the new powers of treaty approval of the European Parliament have had immediate political consequences for the Commission-Council-Parliament triangle in the field of external relations. It becomes more difficult for the Council to let a Commission proposal rot in the Council archives simply by doing nothing, when a considerable majority in the EP has a strong interest in a legislative proposal. This was palpable in the case of the Commission proposals in respect of two Regulations on the Union's new powers in the field of direct foreign investment, where a considerable number of Member States were extremely sceptical in the Council and might normally perhaps have succeeded in shelving the proposals. However, the (positive) interest in these proposals on the part of important segments of the EP helped to bring about a compromise text that was also broadly acceptable to the Commission.[18] It is clear in a different way during the negotiation of treaties where Parliament can also exercise its influence for the simple reason that it can say no to the final result, if its wishes are not sufficiently expressed in the directives for negotiation or, even at a later stage, in the draft text.[19]

Thirdly, it is important to realise, though this may sound trite, that the horizontal balance between the institutions in the field of foreign affairs under the Lisbon Treaty is in part directly influenced by where the frontier between the CFSP and the TFEU lies. This determines in particular how much power the Commission, the HR/VP and the EEAS, the Parliament and the Council have in relation to each other. This question is ultimately

17 See Opinion 2/15, *supra* note 12.

18 Parliament and Council Regulation 1219/2012/EU establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ 2012 L 351, p. 40, and Parliament and Council Regulation 912/2014/EU establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ 2014 L 257, p. 121.

19 This is still a relatively unexplored possibility for the Parliament, but the CETA and TTIP negotiations show that there are gains to be made by the Parliament here. This may lead to delicate cases before the Court about the balance between the institutions, as Parliament's assertiveness on this point is political and the Council's right to authorize, and to give directives for, negotiations is formally protected by Article 218, paragraphs 3 and 4, TFEU.

in the hands of the Court, which itself has to be careful not to cross certain lines laid down in Article 275 TFEU when deciding this issue.

Fourthly, a helicopter view of the application of the new rules on delegation and implementation of Union law under Articles 290 and 291 TFEU in the field of trade policy, in particular trade defence, shows that the rules on the implementation of these Treaty articles, as laid down in Regulation 812/2011,[20] have been included into the relevant basic regulations on anti-dumping, countervailing duties and safeguards[21] and are routinely applied. Thus, the Commission has been shifted more clearly into the executive role that thus far was still occupied in the last instance by the Council.

Finally, the ambitions laid down in the Lisbon Treaty with respect to a more unified and stronger external representation – which hailed back to the work of the Constitutional Convention and the Treaty for a Constitution of Europe – were quickly bypassed by the political mood in most of the Member States by the time of the entry into force of the Treaty in late 2009. This led to the strange spectacle of the Member States in the Council wanting to turn back the clock in the field of external relations, pretending that the Treaty of Lisbon limited the powers of the EU in this domain. This was in flagrant contradiction with the openly avowed message from the Member States accompanying the external relations provisions of the Constitution and the Treaty of Lisbon. It led to an almost total paralysis on the question of who ought to be the representative of the Union in international meetings and organisations and who had the right to say what in such meetings and organisations – a paralysis which was only lifted in late 2011 by an extremely complicated compromise.[22] It also led to a re-

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20 Parliament and Council Regulation 2011/182/EU laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ 2011 L 55, p. 13.

21 E.g. for anti-dumping, the latest codification is Parliament and Council Regulation 2016/1036/EU on protection against dumped imports from countries not members of the European Union, OJ 2016, L 176, p. 21, Article 15. For recent examples of implementing regulations of the Commission based on Article 15 see Commission Implementing Regulations 2016/387 and 2016/388 imposing anti-dumping and countervailing duties on pipes and tubes of ductile cast iron originating in India, OJ 2016 L73, p. 1.

22 See "General Arrangements for EU Statements in Multilateral Organizations", in P. J. Kuijper, J. Wouters et al. (eds), *The Law of EU External Relations,* 2nd ed. (Oxford: OUP 2015), 38.

vival of very old questions of general scope, such as the question whether or not the Commission could retract a proposal that it had made, but had been totally perverted or "*dénaturé"* in the legislative stage by the Council so that the Council (and the Parliament) could no longer validly legislate. In short, the Member States no longer wanted the Treaty they had written and approved themselves.[23]

This led to a long series of external relations cases, many of which will play a role in the following overview of the development of the separation of powers and the balance between the institutions after the entry into force of the Lisbon Treaty.

B. The Border between CFSP and TFEU and the Balance Between the Institutions

As was already suggested above, any shift in the boundary line between CFSP and TFEU external relations modifies the balance between the political institutions involved in external action generally. An increase in the domain of CFSP means an increase in power for the Council and the HR/VP relative to a diminution of power for the Commission and the Parliament. It will also imply a limitation of the scope of competence of the CJEU, which itself may be called upon to sit in judgment on the question where the boundary line runs precisely.

This is well illustrated by the two so-called *Pirates cases,*[24] i.e. the two cases concerning the nature of the agreements by which the Union could deliver any Somali pirates who were captured in the framework of Operation Atalanta, the CFSP contribution to the UN action against the Somali

23 See P. J. Kuijper, "From the Board, Litigation on External Relations Powers after Lisbon: The Member States Reject Their Own Treaty", *Legal Issues of Economic Integration* 43, no. 1 (2015), 1-16. This rejection was particularly clear in all cases that related to foreign affairs powers, such as the interpretation of Article 3, paragraph 2, TFEU on implied powers, Article 207 on the scope of the common commercial policy, and Article 209 on the scope of the development policy.

24 See Judgment of 24 June 2014, *European Parliament* v *Council (Agreement with Mauritius),* C-658/11, EU:C:2014:2025 and Judgment of 14 June 2016, *European Parliament* v *Council (Agreement with Tanzania),* C-263/14, EU:C:2016:435. See further on these judgments the chapters by Marise Cremona and by Mauro Gatti in this volume.

pirate and robber groups.[25] These agreements organised the delivery of the captured pirates to neighbouring countries such as Mauritius and Tanzania with a view to being tried for piracy.[26] This was deemed necessary, since bringing the pirates back to the Member States whose warships had arrested them would interrupt the operations and/or lead to a prolonged period of pre-trial detention on board naval vessels ill equipped for such detention. Moreover, the pirates thus could not be formally charged with their alleged misdeeds within a reasonable period of time, which could easily lead to mistrials after arrival on European soil. These agreements had been concluded as CFSP agreements by the Council, on the basis that they were concluded in the framework of the Atalanta operation and were indispensable to the success of that operation and, therefore, had to be regarded as an integral part thereof. The Parliament and the Commission, however, were of the view that the substance of the agreements fell under the external aspects of judicial and police cooperation in the field of criminal law (Articles 82 and 87 TFEU) and was also part and parcel of development cooperation, insofar as they sought to assist these countries in developing their police and judicial resources.

The Court decided in favour of the Council, thus denying any decision-making role to the Parliament in respect of CFSP agreements. It, however, accepted that Parliament had at least a right to be informed at all stages of the treaty-making procedure of Article 218 TFEU, which laid down an integrated procedure for the preparation, negotiation, and conclusion of all agreements whether in the CFSP or TFEU domains, since paragraph 10 of that article made no distinction between these two types of agreements of

25 For Operation Atalanta, see Council Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ 2008 L 301, p. 33, last updated by Council Decision 2016/713/CFSP amending Joint Action 2008/851/CFSP, OJ 2016 L 125, p. 12.

26 These agreements were approved by: Council Decision 2011/640/CFSP on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, OJ 2011 L 254, p. 1 and Council Decision 2014/198/CFSP on the signing and conclusion of the Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the United Republic of Tanzania, OJ 2014 L 108, p. 1.

the Union. The Court did not restrict itself to textual arguments, but also invoked the fundamental principle that the people should participate in the exercise through the intermediary of a representative assembly, of which Article 218, paragraph 10, TFEU is the expression at the European level. This is the case even if the Parliament is restricted to exercising general scrutiny on the basis of the information received pursuant to that provision.[27]

Finally, it is important to point out that the Court saw no reason to regard the HR/VP (and the EEAS) as the responsible authority in respect of the lack of information during the treaty-making process under the CFSP. It took the view that, since the Council had broad responsibility during all the different phases of that process,[28] especially in the CFSP, the Council was responsible for fulfilling the obligation of keeping the Parliament informed during all the different stages, including the negotiation itself (even if in these cases that was principally carried out by the HR/VP).[29]

There is no doubt that these judgments reinforced the Council's powers in the different phases of CFSP treaty-making relative to those of the Commission and of the HR/VP, while leaving powers of general scrutiny of CFSP treaty-making to the European Parliament through forceful recognition of its right of being fully informed by the Council at all stages of the treaty-making process, in particular the preparatory phase. This recognition was achieved primarily by giving great weight, not so much to the subject-matter of the CFSP agreement, which arguably fell in the police and judicial cooperation provisions of the TFEU, but by seeing this subject-matter through the prism of its object and purpose.[30]

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27 Judgment of 14 June 2016, *European Parliament* v *Council (Agreement with Tanzania), supra* note 24, paras 70-71.

28 These phases are: authorisation for opening negotiation to the HR or the Commission, issuing of directives for negotiation, the actual negotiation itself, the designation of a special committee, the acceptance of the result of the negotiations as finalised by the negotiator, signature, possibly provisional application, and conclusion. This is a weak point in the Court's reasoning; the Council only hears about the progress of the actual negotiations through reports of the Commission or, in this case, of the HR/VP. It is difficult to make the Council responsible for this part of keeping the Parliament informed of all stages of the negotiation.

29 Judgment of 14 June 2016, *European Parliament* v *Council (Agreement with Tanzania), supra* note 24, paras 73-74.

30 This is in line with the pre-Lisbon Judgment of 30 May 2006, *Commission* v *Council (ECOWAS),* C-459/03, EU:C:2006:345. This case ruled that an EU grant for capacity-building in relation to the elimination of small-arms and light

Nevertheless in a different constellation, concerning the treatment of EU personnel and personnel of the Member States seconded to civil or military missions created by the Union as part of UN missions or autonomous CFSP actions, the broad object and purpose test may not be decisive for the Court. Since it concerns the treatment of individual members of EU personnel (from Commission, EEAS or Council Secretariat), the application of the Statute of EU personnel and the access to the CJEU under that Statute prevails over the lack of competence of the Court in CFSP matters.[31] The principle of equal treatment of persons in the same situation is then seen by the Court as decisive for the treatment of Member State personnel in the service of an EU mission set up under the CFSP, including their right of access to the CJEU.[32] The decisions of the head of mission are and remain acts of staff management, even if they take place in the context of a CFSP mission. Hence the General Court and, on appeal, the Court of Justice have jurisdiction to review such acts for their legality under actions for annulment and for non-contractual liability.[33] In short,

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weapons in the ECOWAS countries ought to have been based on the EC Article on development assistance and not on the CFSP articles. This case made clear that the criteria of content, object and purpose of an act in order to determine its proper legal basis also operated across the CFSP/Community law boundary. Together with the post-Lisbon Judgment of 28 April 2015, *Commission* v *Council (Hybrid Act),* C-28/12, EU:C:2015:282, which determined that a hybrid act, i.e. an act simultaneously containing a TFEU legal basis and an intergovernmental legal basis (decision of the governments of the Member States meeting within the Council) was not possible, if the TFEU basis required approval or consent of the Parliament and a qualified majority in the Council, which was nullified by the unanimity required by the intergovernmental aspect of the act. Under the present Treaty provisions only an international agreement of the EU including CFSP provisions as well as TFEU-based provisions can be concluded as a single Union agreement without arguably raising incompatibilities in decision-making, if it can be presented as an association agreement under Article 217 TFEU, requiring unanimity in the Council and approval by Parliament. An early example is the accession of the European Union to one of the basic treaties of the ASEAN, which contains both development and political aspects: Council Decision 2012/308/CFSP on the accession of the European Union to the Treaty of Amity and Cooperation in Southeast Asia OJ 2012 L 154, p. 1.

31 This is laid down, by the way, in the relevant CFSP decisions. See Judgment of 18 July 2016, *H.* v *Council, Commission and EUPM in Bosnia/Herzegovina,* C-455/14 P, EU:C:2016:569, paras 54 ff.

32 *Id.*, para 57.

33 *Id.*, para 58.

the exclusion of the jurisdiction of the CJEU over the CFSP is not absolute if there are good reasons to assume otherwise.[34]

C. *The Powers of the Commission as Negotiator and Litigator in International Relations Relative to those of the Council*

The powers of the Commission as negotiator on behalf of the Union and more generally as external representative of the Union in TFEU external relations, including in international litigation, have not changed much under the Lisbon Treaty, except that the EEAS has taken over some of its representative functions from it and from the rotating presidency (heading up delegations to third countries and (most) international organisations and being *porte-parole* there). In respect of litigation on behalf of the Union, the Commission's power had already been recognised by the Court in 2006, in a case concerning possible implication of US tobacco companies in large scale cigarette smuggling which deprived the EU of large sums of excise revenue.[35] This judgment of the Court was reinforced by the provision of Article 17, paragraph 1, TEU to the effect that the Commission was the external representative of the Union, except in respect of the CFSP.

In respect of the Commission's role as negotiator there has always been some tension between two approaches. Firstly, the "mandate approach", often propagated by the Council, which saw the Commission as the mandatory of the Council with no margin of manoeuvre of its own. Secondly, the "directives" approach, adhered to by the Commission, and broadly shared in the doctrine, which latched on to the "directives" or "guidelines" that the Commission received from the Council according to the Treaty language and which gave it a certain measure of autonomy.[36]

If one goes a step beyond negotiation and also a step beyond classic international agreements and one enters the world of non-binding agreements, memoranda of understanding (MoUs), common declarations, polit-

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34 In the case in question the good reasons were the rights of the individuals carrying out those missions, whether from the Commission or from the Member States.

35 Judgment of 12 September 2006, *Reynolds Tobacco et al.* v *Commission,* C-131/03 P, EU:C:2006:541, para 94.

36 Opinion of Advocate General Wathelet of 17 March 2015, *Commission* v *Council (Negotiating Directives),* C-425/13, EU:C:2015:174, paras 84 and 91.

ical commitments – and the Commission, like national ministries of foreign affairs, has not feared to tread on these shifting sands – the reaction of the Court has been very reluctant. It had another view of what was binding or not and felt that the strict doctrine of attribution did not leave any room for the Commission to underwrite an administrative agreement with the US anti-trust authorities about exchange of information and cooperation in competition cases.[37] At best, the Commission, within the framework of the Transatlantic Dialogue with the US, could agree, in the Court's view, to an arrangement called "Guidelines on Regulatory Cooperation and Transparency". But the Commission should satisfy the condition that it had followed the usual procedures prescribed in the Treaty in the field of the common commercial policy – which indeed happened to be the case.[38] In the post-Lisbon situation these precedents were to be tested once again.

As far as the Commission's role of negotiator is concerned, the classic position followed broadly in the academic literature, namely that the Commission has a certain margin for manoeuver within the framework of the directives for negotiation that the Council has issued to it, was wholeheartedly embraced by the Court. Directives cannot, in the view of the Court, become so detailed that no margin of discretion for the Commission as negotiator remains. What is possible, according to the Court, is that the Council lay down clear timetables and reporting requirements that should be followed by the Commission. These are procedural matters, but on substance the Commission should always be granted some room to find a deal.[39]

Where the Commission as litigator before international and foreign courts is concerned, the Court followed the line that was to be expected, given its judgment in the *Reynolds* case.[40] As in that case and in an intervention as *amicus curiae* before the US Supreme Court in a case concerning extra-territorial jurisdiction under the US *Alien Tort Claims Act*,[41] the Commission had extensively consulted with the relevant Council Working Groups about the line to be followed in the written submission of the

37 Judgment of 9 August 1994, *France* v *Commission,* C-327/91, EU:C:1994:305.
38 Judgment of 23 March 2004, *France* v *Commission,* C-233/02, EU:C:2004:173.
39 Judgment of 16 July 2015, *Commission* v *Council (Negotiating Directives),* C-425/13, EU:C:2015:483.
40 See Judgment of 18 July 2016, *H.* v *Council, supra* note 31.
41 See *Kiobel* v *Royal Dutch Petroleum Co*., 133 S.Ct. 1659 (2013).

Commission on behalf of the Union, before sending it off to the International Tribunal of the Law of the Sea (ITLOS).[42] The Council argued that the Commission needed its permission before it could do so. The Court did not agree; the Commission was the external representative of the Union in such cases and as long as the Commission had obviously fulfilled the duty of loyal cooperation between the Union institutions among themselves and with the Member States, it was free to communicate its observations to ITLOS.[43]

However, in the case concerning the negotiation and the adoption of a non-binding agreement with Switzerland on increasing its financial contribution to the functioning of the internal market after its expansion with a new Member State, Croatia, the Commission seemed to believe that it had received sufficiently broad guidelines from the Council, not only to conduct and finalise the negotiations, and agree on the sum to be paid, but also to sign the non-binding commitment with Switzerland. Given that the Council's guidelines did not say anything about signing and concluding an agreement, even if it was non-binding, the Court reacted to the case brought by the Council against the Commission by limiting even further than it had already done in the earlier cases the conditions under which the Commission could bring about non-binding international legal acts. Again, the strict attribution of powers in the Union system of government was at the basis of this. Even in the case of a non-binding agreement, and even if the result of the negotiations of the non-binding agreement was in conformity with the directives for negotiation, the Commission cannot presume that the assessment of the agreement by the treaty-making institution(s) would be positive. Conditions might have changed (and presumably the composition of the treaty-making institution(s) also) during the relatively long period between the issuing of the directives by the Council and the completion of the negotiations by the Commission.[44] Hence, the Commission needed the Council's prior approval.

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42 The ITLOS had been asked four preliminary questions about matters of jurisdiction in cases concerning so-called IUU fisheries by fishing vessels, not flying the flag of any of the Member States to a Regional Fisheries Agreement. See ITLOS Case no. 21, *Request for an advisory opinion submitted by the Subregional Fisheries Commission (SRFC)*, https://www.itlos.org/en/cases/list-of-cases/case-no-21.

43 *Council* v *Commission, supra* note 1, paras 84-87.

44 Judgment of 28 July 2016, *Council* v *Commission (Swiss contribution),* C-660/13, EU:C:2016:616, paras 39-43.

Post-Lisbon, therefore, the balance of power between the Council and the Commission relating to negotiating agreements and litigating international disputes or disputes in the Courts of third countries has not been fundamentally changed. The Commission has retained a certain independence and margin of discretion in negotiation (subject to the Council's directives) and also in litigation (subject to loyal cooperation with the Council, and with the Member States, in cases which fall in the mixed domain). The Commission's position is somewhat more secure than before, having been bolstered by the Court's two recent decisions.

It is important to mention also the strengthening of the Commission's position in the legislative procedure generally by the Court's decision broadly to accept the Commission's long-standing position on its right to withdraw its proposal, even when the legislative process is in the final stage approaching an agreed text between Council and Parliament, when that text will have the effect of totally distorting (*dénaturer*) the original proposal, to the point of depriving it of its original rationale (*raison d'être*).[45] This was an enormously important protection of the Commission's right of proposal, especially of the spirit underlying its proposals. It is not without significance that the proposal at issue in the Court case was a piece of legislation on the method of disbursing balance of payments support to third countries. In the external relations sector this safeguarding of the Commission's power of proposal is of particular importance.

However, the Court has reinforced the discipline of the Council over the Commission in the case of the negotiation and conclusion of non-binding instruments. Both institutions (and presumably also the Parliament) have to follow the normal treaty-making procedure by analogy, which implies that the Commission cannot act on its own, as national executives very often can, when agreeing non-binding instruments.[46]

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45 Judgment of 14 April 2015, *Council* v *Commission (Commission's right of withdrawing its proposals),* C-409/13, EU:C:2015:217. This was clearly so in the case submitted to the Court where the Council and the Parliament sought to replace the provision of a proposed framework regulation on the awarding of Macro-Financial Assistance (MFA) to third countries in short-term balance of payments difficulties, which aimed to enact implementing powers, subject to strict conditions, to be used by the Commission under the examination procedure (the most stringent procedure) by an *ad-hoc* procedure operated by the Council and the Parliament.

46 Judgment of 28 July 2016, *Council* v *Commission,* C-660/13, EU:C:2016:616. Such actions by the executive alone are, of course, always subject in most demo-

All this stands apart from the improvement of the Commission's and Parliament's position in the field of trade, where the need for mixed agreements has been reduced by the changes in the Treaty and by the Court's Opinion 2/15.[47]

D. Current Challenges for Separation of Powers in the EU

After having sketched, in the preceding paragraphs, how the CJEU has reacted to the new balance between the institutions in the field of foreign relations brought about by the Lisbon Treaty, there is still room for informed speculation about additional questions.

For instance, it is well known that the balance between the institutions, not to say the separation of powers, has played a certain role in the apparently unshakeable view of the CJEU that the WTO agreement cannot have direct effect. As it appears from such older cases as *Portugal* v *Council* and *Van Parys*[48], one of the important reasons why the Court was reticent to grant direct effect to provisions of the WTO agreements was that the Court, in doing so, would basically put itself in the Commission's position as negotiator or in the Council's position of legislator by declaring certain offending provisions of Union law as being set aside as contrary to self-executing provisions of GATT or other WTO agreements. This clearly was a bridge too far for the Court. What will the effect of the new powers of the European Parliament in treaty-making in the field of trade be on this separation of powers approach to (the lack of) direct effect of trade agreements, in particular the WTO agreements? This may well depend on the factual situation. Parliament's approval of a trade agreement brings important additional (democratic) legitimation to such an agreement. If Union law remains unchanged after the conclusion of such an agreement, but appears to be in conflict with the agreement (possibly after a decision of an international dispute settlement organ), this added democratic legitimation may serve as an argument to grant direct effect to the relevant provision of

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cratic states to the general political oversight by parliament and that would not be different for the Commission.

47 See notes 12 and 17 and accompanying text.

48 Judgment of 23 November 1999, *Portugal* v *Council*, C-149/96, EU:C:199:574 and Judgment of 1 March 2005, *Van Parys*, C-377/02, EU:C:2005:121, para 53. See further the chapter by Miro Prek and Silvère Lefèvre in this volume.

the trade agreement. It might be different if the agreement included a recital or an article denying direct effect to the trade agreement, or if the EU legislature (Council and Parliament together) enacted implementing legislation that later turned out to be at odds with the agreement.

It is clear that there are different possible approaches to this new element that has been introduced into the Court's underpinning of its "no direct effect policy" to certain trade agreements because of the Parliament's new powers in this domain. The result of the pressures going either way will be eagerly awaited.

Another point on which the Parliament's new powers of approval of trade agreements may be brought to bear is the recourse to the procedure of Article 218, paragraph 9, TFEU relative to "establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects". It has already been mentioned how the EP is seeking to exert at least some political influence on the execution by the Commission of the directives for negotiation that the Council issues to the Commission to guide it in its negotiations, given that the legal powers in this respect are reserved to the Council. The same goes for the exercise of the power of Article 218, paragraph 9, TFEU, which is after all about the management of an international delegation of legislative power to a treaty body or an organ of an international organisation and, without doubt, should be deserving of considerable attention from the European Parliament. Presumably, there were good reasons to provide for such a delegation of powers and it is an important and often used instrument in international organisations and treaty bodies. [49]Nonetheless, there are equally good reasons for Parliament to demand some political power of scrutiny (for instance by a special standing parliamentary committee that could react quickly) over deciding the Union's position in a treaty body or organ of an international organisation, when it will take a decision that will be binding on the Union, even if Article 218, paragraph 9, TFEU gives no legal power to the European Parliament to exercise such scrutiny.

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49 A well-known example is the power of the World Health Organization to adopt binding International Health Regulations. Similarly, the ICAO is authorized to adopt so-called SARPS (standards and recognized practices). Multilateral Environmental Agreements very often give the power to modify lists of dangerous substances, e.g. of endangered species, with binding effect.

This is a point where the strength of the legal concept of institutional balance can be tested and where it may exist separately from the shifting EU constitutional texts. Would the Court accept such parliamentary scrutiny on the basis that the balance between the institutions requires it, as it would be anomalous for the Parliament to be able to exercise a right of consent over international agreements (including trade agreements), but not over the position of the Union when binding decisions are taken based on delegation to a treaty body based on such an agreement approved by Parliament? Or would it reject such scrutiny, as it was not provided for in the TFEU and the right to fix the position of the Union in such cases was limited to the Council alone?

The Parliament's power to approve trade agreements may also have consequences for the adoption of mixed agreements. If a mixed agreement is to a very large extent a trade agreement and its being mixed is a compromise between the Commission and the Member States in the Council,[50] normally there will be no specification about what part of the agreement is exclusive EU competence, what part is shared competence, and what is exclusive competence of the Member States. That is precisely the point of the compromise. However, even in most modern, so-called "deep and comprehensive" trade agreements commercial policy within the meaning of Article 207 TFEU in reality easily covers more than 90-95% of the agreement. In the past this meant, that such a "false mixity compromise" was an arrangement in which the Council delegated its exclusive power to conclude trade agreements back to the Member States and their Parliaments. Such distortion, if not to say breach, of the Treaty at that time was essentially victimless, as the Member States in the Council simply gave themselves a second bite at the cherry, even though it was probably already then contrary to *Donckerwolcke's* requirement that re-delegation of trade policy power to the Member States is only possible if done explicitly.[51] It can be argued that at the time such approval by national parliaments added an aspect of necessary democratic legitimacy, as the EP had no formal powers in the field of trade at all. In the new situation, such a

50 For the reduced risk of such mixed trade agreements being necessary, see Opinion 2/15, *supra* notes 12 and 17. See also the contribution by Chamon in this volume.

51 Judgment of 15 December 1976, *Donckerwolcke,* 41/76, EU:C:1976:182, para 32. It is to be noted that this case deals with a limited and discrete re-delegation, while giving back the power to stop a Union act that is for 90-95% exclusive power to one national Parliament is an entirely different matter.

compromise of "false mixity" is in essence at the expense of the Parliament's right to decide on its own about trade policy matters and not to have to share this power with national parliaments. The latter are not empowered to, and probably are not capable of, weighing up the different elements going into such an agreement at the European level. It is obvious that mixed agreements have an unsettling effect on the balance between the institutions in Union treaty-making now that the Parliament also weighs on the scales. Even if Parliament implicitly accepts the "false mixity", again the prohibition of implicit re-delegation kicks in.

The CETA episode has been a first tragic example of the problems set out here; it will be interesting to see what lessons the institutions will draw from it.[52] For the moment the Commission, after Opinion 2/15, has taken the road of henceforth proposing trade agreements that adhere strictly to the criteria laid down in this Opinion of the Court and thus would follow only the Union procedure for concluding such agreements. It remains to be seen what the reactions of the Member States and the Council would be. And if they are negative and Member States in the Council continue their long-standing practice to add elements to the Commission's proposed directives for negotiations assuring that the agreement becomes mixed, what would be the reaction of the other institutions in the legislative triangle? How strongly would the Commission defend its position by withdrawing its recommendation containing those directives, thus confronting the Council with the choice with no agreement or a Union-only-agreement?[53] Would the European Parliament support the Commission by announcing that it will not accept a mixed agreement? What alternative routes may be devised so that Member State Parliaments may contribute to the treaty-making process through their Member States in the Council without impinging on the exclusive powers of the Union? The questions of a politico-legal character determining the future shape of the Union's common commercial policy are myriad.

The new powers of the European Parliament in the field of trade and external relations are also likely to have external repercussions. As the Union's institutions in this field know only too well, the legislative powers

52 For more details, see P. J. Kuijper, "Post-CETA: How we Got There and How To Go On", *Revue trimestrielle de droit européen* 53*,* no. 3 (2017)*,* 181-187.

53 In analogy to the case *Commission* v *Council*, *supra* note 45. See also P. J. Kuijper, "Post-CETA", *supra* note 52.

of the US Congress in the field of "Commerce with foreign Nations"[54] can cause considerable problems to other states. Legislation in direct conflict with the rights of the US's treaty partners in the WTO Agreements occurs with some regularity and the necessary litigation in the WTO is time consuming and requires a relentless effort to push the US toward conformity. It is to be expected that the European Parliament may be subject to the same temptation – to put it charitably – of testing the limits imposed by the WTO Agreements and their interpretation by WTO panels and the Appellate Body, with the likely result of being rebuffed by these WTO bodies, when other WTO Members bring cases to the dispute settlement system. Obviously the Council and the Commission have more constitutional possibilities than the US executive to restrain the Parliament from giving in to such temptations in trilogues, but sometimes compromises that none of the three can refuse may still carry considerable risks.[55]

Finally, the question may be asked whether the EEAS does not itself constitute an institution that is the embodiment of the notion of balance between the institutions.[56] There is indeed no doubt that the creation of the EEAS was an act of balance between the Council and the Commission, insofar as the EEAS was destined to float in a kind of vacuum between the Commission and the Council Secretariat, with the Member States as a collective third party also involved in this new, *sui generis* institution. However, this view of the EEAS was correct only at the moment of its creation. Once that moment had passed, the EEAS had to find its own place in the new balance between the institutions in external relations, which had been created by the Lisbon Treaty. That place is a kind of amalgam between the position of the Secretariat of the Council in the old CFSP and the position of the half-yearly presidency of the Council during the pre-Lisbon period, while it also functions as negotiator in the field of CFSP/CSDP under

54 See Article I, Section 8, of the US Constitution.

55 This may be the case with the compromise reached in September 2017 between the Council, the Parliament and the Commission on the inclusion of environmental elements and labour rights in the calculation of anti-dumping and countervailing duties by the Commission, when applying trade defence measures. See European Commission, "Commission welcomes agreement on new anti-dumping methodology", Strasbourg, 3 October 2017, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1735.

56 See S. Blockmans, "Setting Up the European External Action Service: An Act of Institutional Balance", *European Constitutional Law Review,* no. 2 (2012), 246-279.

guidance of the Council in a way comparable to the Commission in the TFEU external relations.

It is obvious from a short passage in the *Pirates* cases that the Court also has some difficulty placing the EEAS in this new context and actually charges only the Council with informing the Parliament regularly on the progress of negotiations in CFSP agreements, while it was the EEAS that actually negotiated the agreement.[57] One might have expected that Court would give the same room for manoeuvre to the EAAS, as negotiator, as it gave to the Commission in the *Negotiating Directives* case,[58] but in that case the Court might have been accused of meddling in the institutional balance of the CFSP in too direct a fashion and without obvious need for deciding the case. Further developments have to be awaited before there are further indications about what exactly the position of the EEAS in the balance between the institutions may be. Serious arguments may also be made that the double-hatted character of the HR/VP and, consequently, of her service, the EEAS, has upset a functioning balance between the institutions. In this connection, the widespread negative reaction to the fusion between the functions of President of the Commission and President of the European Council, as suggested by Jean-Claude Juncker in his State of the Union speech of September 2017 is telling.

The title of this contribution announced that it was intended as an essay – an attempt to sketch the separation of powers (in Union language, institutional balance) in the field of external relations from the perspective of the evolution of foreign relations powers in national States with a democratic tradition. This perspective was then used for an appreciation of the changes brought to this balance between the institutions by the Lisbon Treaty and the Court's interpretation of these changes. It is hoped that this perspective has contributed to assuage the fears in the Member States that these changes are not as revolutionary as they may seem, while alerting observers of the process to the many issues and questions that are in need of an answer in the months and years to come.

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57 See Judgment of 14 June 2016, *European Parliament* v *Council (Agreement with Tanzania), supra* note 24; see also *supra* note 27 to note 29 and accompanying text.

58 See Judgment of 16 July 2015, *Commission* v *Council (Negotiating Directives)*, *supra* note 39.