

# Assessing EU Multilateral Action: Trade and Foreign and Security Policy Within a Legal and Living Framework

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# **Assessing EU Multilateral Action: Trade and Foreign and Security Policy Within a Legal and Living Framework**

## **Abstract<sup>1</sup>**

The European Union seeks to contribute to “effective multilateralism”, as laid down explicitly in the EU treaty and in various conceptual documents such as the European Security Strategy. Drawing on research on the EU’s actual performance as an international actor, this paper provides a framework for assessing the varying levels of multilateral action in EU external policies. In particular, it focuses on two institutional factors: (1) the capacity to coordinate internally a given EU position and (2) the capacity to represent an EU position externally. These two factors are analysed systematically for the common commercial policy and for the common foreign and security policy. In this context, both the legal framework – from the Nice to the Lisbon Treaty – and the living framework – the actual use of the provisions – are taken into account. Based on data from 2000 to 2009, our findings indicate that the EU is relatively stronger in supporting international law (multilateral legal basis) than in pooling resources with other international actors (multilateral implementation).

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# Assessing EU Multilateral Action: Trade and Foreign and Security Policy Within a Legal and Living Framework

## *Introduction*

During a conference at the European University Institute in June 2010, the European Commission's President José Barroso (2010: 2) claimed that “[m]ultilateralism is the right mechanism to build order and governance in a multipolar world, and the European Union is well-placed to make a decisive contribution”. Over the past decade, at least at the conceptual level, the European Union (EU) has indeed frequently underlined its commitment to institutionalised multilateral policy-making – as opposed to *ad hoc* unilateralism. For example, the European Security Strategy of 2003 embraced “effective multilateralism” (European Council 2003: 9) as one of the EU's three strategic goals in order to define and implement common solutions to international political problems. When the Lisbon Treaty entered into force on 1 December 2009, this general commitment has also been enshrined in the Union's primary law: “The Union shall [...] work for a high degree of cooperation in all fields of international relations in order to [...] promote an international system based on stronger multilateral cooperation [...]” (Art. 21(2,h) TEU)<sup>2</sup>. Previous EU Treaties – namely Maastricht (1993), Amsterdam (1999) and Nice (2003) – contained a variety of references to multilateral organisations such as the United Nations or the Organisation for Security and Co-operation in Europe. Thus, from the EU perspective, co-operation with and support of multilateral organisations represents a key contribution to prosperous international relations. Given the EU's own multilateral foundation, that is its “multilateral genes” (Jørgensen 2009b: 189), it is widely perceived as a “champion of multilateralism” (Lucarelli 2007: 12). Some scholars, however, have pointed to the fact that the EU's actual influence on multilateral policy-making – including its influence on the set-up of multilateral arrangements – varies significantly across different policy fields (see Laatikainen and Smith 2006b: 16-19).

This paper contrasts the multilateral aspirations enshrined so prominently in the new Lisbon Treaty with the institutional basis for the EU's (inter)action (with)in multilateral forums and organisations. Thus, this paper explores questions about whether and how far its institutional architecture enables the Union to live up to the ambition to contribute to (effective)

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<sup>2</sup> In the following, references to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) are based on Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of European Union. OJ C 83. 30.03.2010. References to the former Treaty of Nice are marked explicitly: Treaty on European Union (TEU-Nice) and Treaty of the European Communities (TEC).

multilateralism. While the institutional architecture of the EU alone cannot explain certain multilateral outcomes, it is nevertheless assumed that the institutional factor plays a central role for the assessment of EU multilateral action. In the next section, the concepts of “multilateralism” and “effectiveness” are defined in view of the EU’s external action. In the third and fourth section, the paper systematically takes stock of the recent development of the EU’s legal framework from the Treaty of Nice (2003) to the Treaty of Lisbon (2009). This analysis of the underlying legal provisions is complemented by an analysis of the “living framework”, or the actual use of selected treaty provisions.

Theoretically, the analysis is carried out from a rational institutionalist perspective. Thus, it is assumed that changes of the EU’s legal provisions result from a consensus among the EU member states, namely the shared conviction that a modified institutional set-up will allow them to pursue foreign policy goals in the EU framework more effectively. The effectiveness of the EU’s external action is seen as a function of the ability of the involved institutions to shape a common vision and policy and to represent the EU position vis-à-vis third actors (see Delcourt and Remacle 2009: 235-236).

Empirically, the paper focuses on two different cases: the EU’s common commercial policy (CCP) and its common foreign and security policy (CFSP). Trade<sup>3</sup> and CFSP represent two core policy fields in the area of external action. At the same time, the two cases are very distinct in terms of actors, competences and procedures – as illustrated also by their belonging to two different pillars in the pre-Lisbon set-up (trade: pillar I; CFSP: pillar II). While the post-Lisbon institutional architecture of the EU’s trade policy (see Balan 2008; Dimopoulos 2010) and its foreign and security policy (see Centre for European Policy Studies (CEPS) et al. 2010; Regelsberger 2008; Wessels and Bopp 2008; Whitman and Juncos 2009) has been examined intensively, the implications of the new treaty for *multilateral* EU action in particular has remained untouched thus far. The choice of cases – despite the limited number – allows analysis of variation in the effectiveness of EU multilateralism in relation to the different institutional characteristics. Thus, in the conclusion, the paper tentatively assesses the implications of the Union’s institutional architecture for its *ability* to perform in multilateral settings.

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<sup>3</sup> In the following, “common commercial policy” and “trade policy” are used synonymously.

## ***Conceptualising the EU as an (Effective) Actor in Multilateral Frameworks***

Notwithstanding different conceptions of the EU as a foreign policy actor,<sup>4</sup> the paper starts from the assumption that the Union does act in its own right at the international level and within multilateral settings. Thus, like state actors, the EU “has developed a dense web of relations with states, regions and international organizations” (Jørgensen 2006: 509; see also Keukeleire and MacNaughtan 2008; Marsh and Mackensteen 2005). For the purpose of this paper, the working definition of “multilateralism”, developed within the research project MERCURY is used:

Multilateralism is three or more actors engaging in voluntary and (essentially) institutionalised international cooperation governed by norms and principles, with rules that apply (by and large) equally to all. (Bouchard and Peterson, forthcoming)

Some elements of this definition, namely the capacity of (voluntary) decision-making and the interaction with other, more ‘unified’ (state) actors, point at structural difficulties with which the EU has to cope when acting multilaterally. To gauge the EU’s actorness in multilateral frameworks – understood as the EU’s capacity to pursue policy objectives in its own right – scholars have recently focused on the question of how to assess the EU’s actual “performance” (Jørgensen 2009a) or its “effectiveness” (Laatikainen and Smith 2006a).

When analysing the EU’s performance in international institutions, Jørgensen (2009a: 6; 2009b: 194-195) identifies five analytical dimensions. The first refers to the form of representation, which mainly depends on the division of competences between the EU institutions and the EU member states. The second dimension refers to domestic characteristics, which may provide the EU with a specific legitimacy when acting at the international level.<sup>5</sup> The third dimension concerns the EU’s negotiation style (reactive/proactive), and, closely linked to this, the actual outreach of the EU in multilateral diplomacy and its impact on multilateral negotiation processes (fourth dimension). Finally, the fifth dimension refers to the EU’s influence on institutional reform of contemporary multilateral institutions.

In turn, Laatikainen and Smith have developed a concept of effectiveness in the context of EU-United Nations (UN) relations (see Laatikainen and Smith 2006b: 9-10). According to their study, there are at least four different dimensions to be distinguished. The first

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<sup>4</sup> On the discussion of the EU’s actorness in the field of foreign policy, see for example Allen and Smith 1990, Tonra and Christiansen 2004, Bretherton and Vogler 2006.

<sup>5</sup> For example, Jørgensen (2009a:11) argues that “the human rights convention tradition and [...] the Charter on Fundamental Rights clearly empowers the EU in the process of projecting European values globally”.

dimension refers to the EU's *internal* effectiveness as an international actor. Thus, the focus is on how far the EU member states are willing to act collectively through the EU within multilateral frameworks – at the expense of national initiatives. The second dimension deals with the EU's *external* effectiveness in multilateral settings, understood as the actual achievement of objectives within a given organisation. Arguably, a certain level of internal effectiveness represents a necessary condition for external effectiveness of the EU. A third dimension can be distinguished as the EU's *contribution* to the effectiveness of a given multilateral setting. This criterion asks whether the capacity of a multilateral organisation to act and to exert influence is strengthened by the EU. In this context, the EU's leadership capacities as well as its influence on institutional reform of a given setting – the fifth dimension of Jørgensen's framework (see above) – have to be taken into account. Finally, Laatikainen and Smith define a fourth dimension which takes into account the effectiveness of a given multilateral setting *as such*, referring to the general influence of this institution in international relations.

Against this background, the analysis here concentrates on two main elements of the institutional architecture that are central to both analytical frameworks outlined above: (1) *the structural set-up for the internal co-ordination of a given EU position* and (2) *the EU's external representation*. The first element mainly depends on rules and procedures defining when and how an EU position is formulated and related decisions are taken. In other words, the capacity of decision-making depends on the EU's capacity to reach an internal agreement on what it will do within (and for) the respective multilateral organisation to muster the necessary resources to carry out an agreement, and then to carry through with the implementation. As Jørgensen has underlined, "the world of multilateral institutions is generally, perhaps contrary to expectations, far from an ideal environment for the EU, the prime reason being that multilateral diplomacy is strongly state-centric, invites [...] frequent tactical manoeuvring and requires profound co-ordination among EU member states" (Jørgensen 2009a: 2). Thus, compared to nation states, the EU faces specific co-ordination challenges when it pursues a multilateral approach because of its internal set-up.

As for the second element, various scholars have analysed how the fragmented external representation of the EU – often split at least between the EU Presidency and the European Commission – has interfered with the perception of the EU as a unitary actor (see White 2001; Ginsberg 2001; Peterson 1995). The inherent increase of transaction costs for third parties when dealing with a fragmented EU, starting from the most basic question of which telephone number(s) should be called, potentially circumscribes the effectiveness of the EU

as a multilateral partner. Crucially, the external representation of the EU also functions as a linchpin between the EU-internal co-ordination and communication with external actors.

To sum up, we argue that the question of whether the EU can be effective acting within, having influence on, and maybe leading larger multilateral institutions largely depends on its institutional set-up, or the way in which the Union has been equipped by the “masters of the Treaty” (German Constitutional Court 1993). Notwithstanding the relevance of other factors – such as the political will of the EU member states and the polarity structure of the international system – we claim that an effective institutional set-up is a necessary condition for the EU to make its voice heard in multilateral settings (see also Orbie 2008a: 20).

### **Assessing the Legal and the Living Framework: Methodological Considerations**

A comprehensive assessment of the EU’s external effectiveness includes analysing how the treaty provisions for EU external action are actually used. For example, the Nice Treaty extended the possibility of enhanced cooperation to the field of the common foreign and security policy (Art. 27a,b TEU-Nice). However, this much-debated provision was never used and has therefore had no impact on the Union’s external action. Given the fact that the Lisbon Treaty entered into force only some months ago at the time of writing, there is hardly any empirical data on the use of its new provisions. Nevertheless, we will outline our basic approach to such a longer-term analysis of the living framework or “living constitution” (Wessels 2001: 200), which can be used for a comprehensive comparative assessment as soon as sufficient empirical data is available.

In principle, the notion of a living framework refers to all EU action that is based on the EU treaty. This action comprises the legal output in the form of various treaty-defined legal instruments (secondary law) as well as the formal rules of procedure of EU institutions and, at the most informal level, established practices of EU policy-making. For the purpose of this paper, we will concentrate on the analysis of the legal output and present a first set of results regarding the legal output *before* the Lisbon Treaty. We have analysed samples of legal acts in the fields of trade policy and the CFSP with a view to their relevance for multilateral policy-making. In order to assess their impact on multilateralism, we have identified two main indicators: first, the legal basis of a given act (Indicator I) and second, the measures foreseen for its implementation (Indicator II). In investigating the legal basis, we have for example checked if the act explicitly referred to specific international agreements such as UN Security Council Resolutions, international conventions or internationally-brokered peace agreements.



As an indicator of multilateral implementation, we have for example checked whether and in how far the legal act stipulated co-operation with other international actors or international organisations. Crucially, we only considered an act to be multilateral in terms of its implementation if there was some kind of pre-defined division of labour between the EU and other (at least two) non-EU actors. In the field of external trade policy – in contrast to the foreign and security policy – the implementation of a given legal act is not defined on a case-by-case basis in the legal act. Therefore, in this paper, we have not applied our second indicator (Indicator II ‘multilateral implementation’), which requires a more complex analysis.<sup>6</sup>

As outlined below, the work focuses on core legal instruments for the respective policy field. In situations where the EU envisages operational CFSP action, the former instrument of “joint action” (Art. 14 TEU-Nice) – now replaced by the instrument of “decision” (Art. 28 TEU) – represents such a core legal instrument. In the common commercial policy, no single type of legal act stands out as prominently as the joint action (or decision) in CFSP. Therefore, our sample of legal acts in the field of trade includes all binding instruments: regulations, directives and decisions. What is crucial in both cases is to differentiate between substantial legal acts on the one hand, for example final decisions, and second-order legal acts such as proposals or limited amendments on the other hand. The selection of *substantial* legal acts helps avoid distortion of our findings as it excludes the misleading comparison of legal acts that are not of the same nature and relevance. Overall, while comprehensive lists of legal acts can be drawn from the EU’s online search engine EUR-Lex, the categorisation and assessment of legal acts in view of the level of multilateralism is a qualitative exercise. On this empirical basis, the Union’s basic legal capacity can be compared with its actual performance in the pursuit of foreign policy goals over time.

### ***Common Commercial Policy: From Nice to Lisbon***

External trade policy (or, in the treaty terminology, common commercial policy) is the classical area of supranational external action, introduced as early as 1957 in the Treaty establishing the European Economic Community (EEC) (Art. 110 ff.). The decisive factor behind the choice of a dominant role for the supranational level in external trade relations is the internal process of integration towards a single market. As a result, and following primary law as well as a number of European Court of Justice (ECJ) rulings, member states have largely relinquished their authority to conduct individual commercial policies vis-à-vis non-EU countries. While the exclusive community competence in trade is more or less uncontested,

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<sup>6</sup> At the time of writing, this is work in progress. For a detailed description of this methodological approach please see the “DATEX database” section on the MERCURY project website: <http://www.mercury-fp7.net/index.php?id=10075>.

the scope of trade policy is not. Consequently, while the EU (supposedly) acts as a bloc to further its trade agenda, both the definition and subsequent implementation of this agenda are subject to disagreement, complicated negotiations and internal co-ordination processes. In this context, the European Commission, disposing of a high level of autonomy in trade negotiations, has played a central role, which will be analysed in more detail below.

What is the EU's agenda in trade? There seems to be agreement in the literature that the EU evolved from a protectionist and regionalist actor to a proponent of international free trade (see Meunier and Nicolaïdis 2005: 259-261). While many different explanations for this posture are brought to the fore<sup>7</sup>, for the purpose of this paper it is sufficient to underline that liberalisation is at the ideological core of Europe's common commercial policy. Secondly, the common commercial policy also provides "a unique tool for forwarding policy priorities that extended beyond pure trade considerations" (Dimopoulos 2010: 153) such as development. Some scholars have even claimed that trade "serves partly as a substitute for a 'real' EU foreign policy" (Orbie 2008b: 54).

Notwithstanding different goals of trade policy (pure trade goals or goals going beyond trade), the EU disposes of three basic ways to pursue them: unilaterally, bilaterally or multilaterally. Two examples illustrate that a multilateral approach is by no means the standard option for EU trade policy. The first example refers to preferential trade agreements. Conconi (2009: 163) has stressed that "[the Union] has developed the most extensive network of preferential trade agreements (PTAs) of any GATT/WTO member." These agreements are by nature in contradiction to the rules of the World Trade Organisation, which aim at eliminating preferential treatment in international trade. The second example is the recent EU incentive arrangement for sustainable development and good governance (GSP+), which offers preferential access to EU markets for imports from developing countries that have ratified specific agreements on environmental protection, human rights and good governance. GSP+ can be characterised as a unilateral EU policy – developed after the failure to push through EU positions in WTO negotiation rounds. In the context of this paper, it is especially relevant that despite its unilateral character, GSP+ nevertheless refers to multilaterally agreed principles (see Young and Peterson 2006: 807; Orbie 2008b: 60). This standardised integration of multilateral references even in unilateral EU measures illustrates the strength of the EU's commitment to multilateralism, at least at the conceptual level. In the following, we focus on genuine multilateral approaches in the context of the EU's common commercial policy.

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<sup>7</sup> See, for example, Scharpf's analysis of positive and negative integration (Scharpf 2008), which illustrates how the process of regional integration in Europe entailed a systematic bias for market-making measures (or liberalisation) introduced by the Commission or the European Court of Justice.

Traditionally, external trade politics is about negotiating levels of market access (see Orbie 2008b: 36). Assessing the context of today's EU external trade policy, and in particular EU multilateralism in this policy field, many scholars highlight the debate on regulatory issues and the 'deep' trade agenda in the framework of the World Trade Organisation (WTO) (Young and Peterson 2006: 795-796; Conconi 2009: 156). Thus, over the past decade, the multilateral trade agenda has begun to address regulatory differences hampering international trade. Essentially, the focus has shifted from 'at-the-border' to 'behind-the-border' issues – a development which has been described as a core element of the "new trade politics" (see Young and Peterson 2006: 795-796). Based on its own experience with deep (regional) economic integration, the EU has championed the establishment of multilateral guidelines for domestic rules in areas such as competition and investment. In terms of policy goals, Baldwin et al. (2003: 36) have outlined how the EU "[learned] to love liberalisation": "For the EU, the pendulum swung in the direction of multilateralism, in a reflection of the Union's greater economic self-confidence and political cohesiveness following the completion of the Single Market in 1992".

The debate on whether *non-trade* policy objectives should also be pursued through trade is equally relevant for understanding EU trade policy and its multilateral dimension. Since the mid-1990s, the EU has increasingly pleaded for the inclusion of normative objectives such as environmental protection and workers' rights on the international trade agenda (see Conconi 2009: 172; Orbie 2008b: 47). The EU has argued that in the case of violated environmental or labour standards, trade sanctions should be applied. As such, the EU has tried to upload its own trade policy practice, which is characterised by more or less comprehensive good governance clauses in trade and co-operation agreements,<sup>8</sup> to the multilateral level. Most developing countries, though, remain sceptical about these EU initiatives, "considering them as hidden forms of protectionism" (Conconi 2009: 172). This argument will not be analysed in-depth here. However, for the purpose of this paper, it is important to keep in mind that the EU has pro-actively pursued certain initiatives and objectives in the field of trade policy even against the will of other actors. We thus are brought back to our basic research question: which institutional characteristics enable the Union to act multilaterally in its own right?

### **Internal Co-Ordination**

The European Commission has traditionally played a pivotal role in the formulation and

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<sup>8</sup> For example, since 1992 all EU trade and cooperation agreements have contained a clause on human rights; since 1995, trade preferences under Europe's Generalised System of Preferences have included labour conditionality (see Orbie 2008b: 54).

implementation of the common commercial policy. In line with the assignment of competences to the supranational level, the Commission disposes of an exclusive right of initiative in this policy field (Art. 133(2) TEC-Nice; 207(2) TFEU). Moreover, where agreements with third states or international organisations have to be negotiated, the Commission makes recommendations to the Council, which in turn authorises the Commission to open and conduct the necessary negotiations (Art. 133(3) TEC-Nice; Art. 207(3) TFEU). During the negotiations, the Commission is controlled via a special committee composed of EU member state representatives (Art. 133(3) TEC-Nice; Art. 207(3) TFEU). EU member state positions thus have to be co-ordinated and taken into account by the Commission after having received the initial negotiation mandate. In sum, though, “[...] the Commission disposes of unique advantages in terms of expertise and information. For example, the Commission may confront the Council members with a fait accompli and present a take-it-or-leave-it package deal” (Orbie 2008b: 40). Overall, trade policy represents a strongly centralised policy field with the supranational Commission as the core driving force.

Given the dominant rule of majority voting (instead of unanimity) in the Council, internal policy-making in the common commercial policy has been relatively smooth and bureaucratic – in a sense that decisions are not blocked by political manoeuvring. As a result, the Union can rather easily act as a unified (trade) actor at the international level even though “Europe’s decision-making machinery in trade is far from unitary” (Orbie 2008b: 46). This unified appearance was also caused by the minor involvement of the European Parliament which, until the coming into force of the Lisbon Treaty, was limited to information and consultation rights.

Over time, member states have reluctantly agreed to extend the scope of the EU trade policy. Most recently, commercial aspects of intellectual property, foreign direct investment and – subject to a number of special provisions – services have been also included (see Woolcock 2008: 2ff.). Thus, the EU can aim for a common position in more areas than before.

In conclusion, the division of competences between the European level and the member states together with a strong role for the Commission and qualified majority voting in the Council indicate a high degree of internal effectiveness. Consequently, the EU is well equipped to pursue its common commercial policy in a multilateral setting. Its legal framework has helped the EU to become “the most outspoken proponent of an ambitious round of multilateral trade negotiations from 1995 onwards” (Orbie 2008: 49).

In how far is this multilateral agenda reflected in the EU's day-to-day trade policy? Before turning to the analysis of the institutional innovations of the Lisbon Treaty, we will have a closer look at the living framework under the Nice Treaty. As outlined initially, the actual use of legal instruments in a given policy field can be taken as a general indicator for assessing the level of multilateralisation. In the field of trade, we specifically analyse references to a multilateral legal basis (Indicator I).<sup>9</sup>

External trade is the sector with the highest level of legal output in external relations (on average 130 binding legal acts per year over the past decade, not counting agreements). Our analysis therefore had to resort to sampling. The years 2000, 2003, 2006 and 2009 were selected for closer analysis in order to cover the most recent decade. Following our methodological approach, in order to avoid distortions from second-order legal acts such as proposals or limited amendments, on average 43% of legal acts in each year have been classified as non-substantial and therefore have been excluded from the analysis. When looking at the number of legal acts with a direct and/or indirect reference to multilateral institutions (Indicator I), we note a relatively high overall share but with marked differences between single years (see Table 1). In 2006, nine out of ten substantial acts include a multilateral reference. In 2003, this is the case for only about 6 out of 10, which is the lowest ratio observed in our sample.<sup>10</sup>

**Table 1 – The level of multilateralisation in the CCP: references to a multilateral legal basis (Indicator I)**

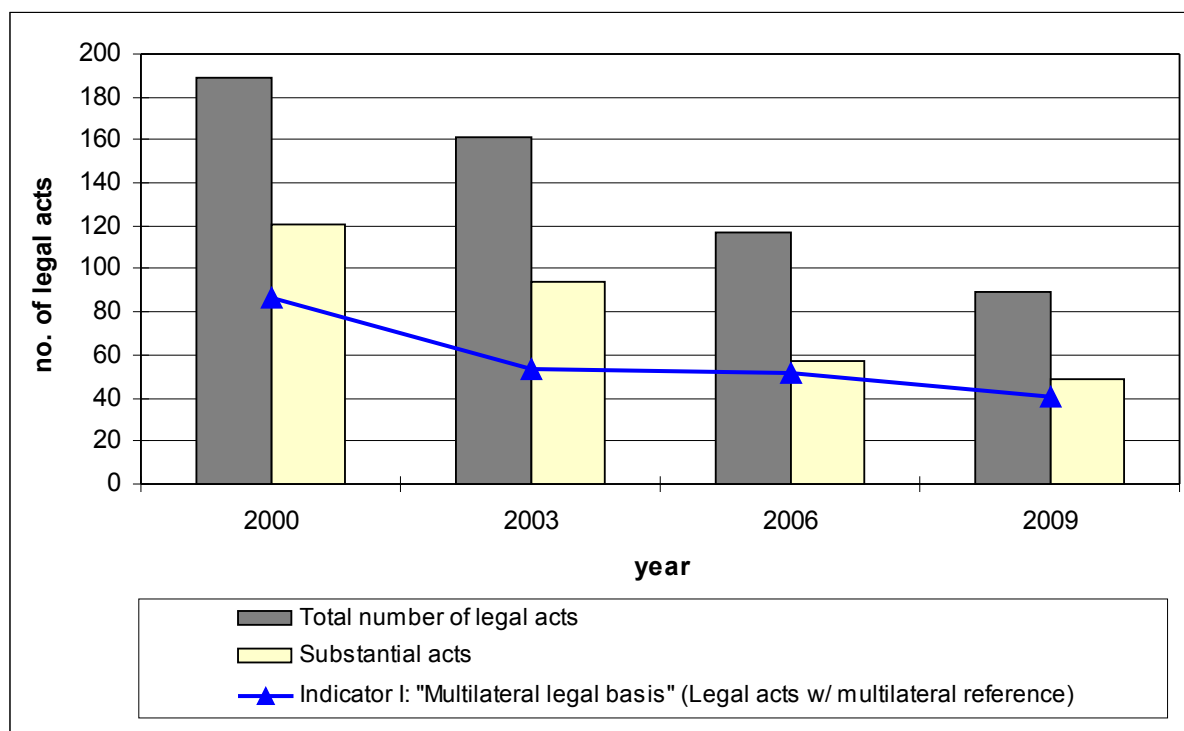
Year	Total no. of substantial acts	Indicator I : Multilateral legal basis?	Indicator I: share of substantial acts (%)
2000	121	87	72%
2003	94	53	57%
2006	57	52	91%
2009	49	41	84.00%

Source: Own calculation, based on EUR-Lex (January 2010).

<sup>9</sup> For the present focus on Indicator I in the field of trade policy see above.

<sup>10</sup> It should be noted that in a few cases, a legal act contained both a direct and an indirect reference. For this reason, the number of direct and indirect references do not always exactly sum up to the number of legal acts with (in)direct reference.

**Chart 1 – The level of multilateralisation in the CCP**



Source: own presentation

Legal acts with *direct* references to multilateral institutions (in the legal act itself) are relatively scarce. They appear in 7% to 21% of all substantial legal acts in the four-year sample (see Table 2). The topics of these legal acts vary considerably and concern many aspects of trade: procedures such as anti-dumping or anti-subsidy measures, but also trade in dangerous chemicals, textiles, agricultural products or fish. A similar variety can be observed in terms of which multilateral institution is referred to: World Trade Organisation agreements, the Generalised Agreement on Tariffs and Trade, conventions of the International Labour Organisation as well as the International Commission for the Conservation of Atlantic Tuna, to name only a few. *Indirect* references (in an underlying legal act) can be found in 50% to 70% of all substantial acts. Indirect references are mainly citations of three underlying legal acts, each describing a certain procedure in the realm of international trade:<sup>11</sup>

- Council Regulation (EC) No 384/96 (anti-dumping) is by far the most common indirect reference and refers to GATT (cited 132 times in the four years under observation).
- In 2000 and 2003, Council Regulation (EEC) No 3030/93 (textile quotas) is the second-most cited underlying act but does not appear in subsequent years. Its text refers to the GATT Textiles Committee and is cited 21 times in 2000 and 2003.

<sup>11</sup> Additionally, 14 other underlying legal acts with multilateral references were cited in our sample, but at most once or twice per year.

- Council Regulation 2026/1997 (anti-subsidy) is the last underlying act which has been referred to regularly (cited 19 times). Its text refers to the GATT Uruguay round and the framework of the World Trade Organisation.

**Table 2 – Indicator I subtypes: direct and indirect references to a multilateral legal basis**

Year	Total no. of substantial acts	Direct references	Direct/substantial (%)	Indirect references	Indirect/substantial I (%)
2000	121	18	15%	77	64%
2003	94	7	7%	47	50%
2006	57	12	21%	40	70%
2009	49	10	20%	34	69%

Source: Own calculation, based on EUR-Lex (January 2010).

Interestingly, protectionist anti-dumping duties (see Conconi 2009: 160) are the most frequently cited instrument with an (indirect) reference to a multilateral framework (GATT in this case). This finding seems to indicate that multilateralism in the common commercial policy is largely reflected in measures contradicting the notion of free trade.

The Lisbon Treaty, in force since December 2009, introduced a number of changes in the field of EU trade policy. For the first time, it has explicitly embedded the common commercial policy within the broader context of “The Union’s External Action” (Part V TFEU). Article 21 TEU, stipulating general provisions of the Union’s external action, includes multilateralism as an objective and therefore indicates that “the Union shall be committed to multilateral trade negotiations and participate actively in institutions such as the WTO and promote and contribute to their effective operation” (Dimopoulos 2010: 165). The link to general aims of EU external action is also strengthened in Art. 207(1) TFEU: “The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action”.

The Treaty of Lisbon extended the exclusive Union competence to all areas covered by the common commercial policy (Art. 3(1,e) TFEU). Given that “mixed agreements” in these areas are abolished, this means that national parliaments (albeit not very active in this area in the first place) do not play a role anymore in ratifying trade agreements (see Woolcock 2008: 5). In turn, the Lisbon Treaty has significantly enhanced the competences of the European Parliament by introducing the ordinary legislative procedure in the context of the common commercial policy (Art. 207(2) TFEU). As a result, the European Parliament not only becomes a co-legislator in this area (Dimopoulos 2010: 168), but its consent is also required for several types of international agreements with trade relevance. The latter requirement, more of a formality in the past, is expected to become more important after Lisbon (Woolcock

2008: 4f.). The increased involvement of the EP has led to a further politicisation of the common commercial policy. This trend has persisted since the 1990s and is characterised by the involvement of additional actors: besides the EP with regard to policy-making, non-governmental actors such as human rights activists, trade unions and industrial lobby groups also scrutinize trade policies (see Orbie 2008b: 42). Yet it is the inclusion of the European Parliament in particular which increases demands for co-ordination and makes it more difficult to reach agreement on a common EU position. Whether new actors in the area of external relations such as the High Representative or the permanent President of the European Council might be able to alter the Union's stance in trade issues (for example by linking it to other objectives) remains to be seen, but is deemed rather unlikely (see Woolcock 2008: 3; Dimopoulos 2010: 168).

While the Lisbon Treaty has extended the scope of action of the common commercial policy, many of the new trade-related competences remain subject to unanimous decision-making.<sup>12</sup>

[...] the issue of control over trade negotiations is much more contentious than the competence issue [...]. Even when the Community competences remain unquestioned, considerable disagreements between (and within) the Commission and the Council may emerge, weakening Europe's international negotiating power. [...] The question of inter-institutional divergences is all the more relevant because, under the Nice Treaty and the Treaty of Lisbon, many new trade-related competences are subject to unanimity voting instead of [qualified majority voting]. The increased unanimity requirements may well impede the establishment of a common position and thus hurt Europe's negotiation position in international trade. (Orbie 2008b: 39)

Thus, on one hand, the inclusion of new issues in the common commercial policy has increased the EU's relevance as a trade actor as such. On the other hand, the new legal framework has not enhanced its internal co-ordination capacity.

## **External Representation**

In its external representation generally, the EU has repeatedly underlined its commitment to multilateralism. In the common commercial policy specifically, the most important example is the World Trade Organisation, a multilateral institution “[...] in which the Union is itself a member and in which EU member countries are represented by the European Commission“ (Conconi 2009: 159). Because the EU speaks with one voice (or, put differently, has a single phone number) in the WTO framework, external effectiveness vis-à-vis third countries is

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<sup>12</sup> Unanimity applies for the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, where such agreements include provisions for which unanimity is required for the adoption of internal rules; trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them (see Art. 207(4) TFEU).



achieved. The dispute settlement mechanism in the WTO context represents a particularly interesting case of *unified* EU external representation in international trade policy.

The Union, through the Commission, will stand always on behalf of Member States both as complainant or defendant, even when only one Member State is directly affected by a measure of a third country [...] or when the challenged measure is a law of only one Member State (Balan 2008: 9-10).

In general, EU relations with rules-based international organisations such as the WTO can be considered, in the terminology of Peterson et al., as the strengthening of “*institutionalised* multilateralism” (Peterson et al. 2008: 9).

The Lisbon Treaty’s impact on the external representation of the EU in international trade relations is rather limited. From the perspective of third countries, introducing the European Parliament to the decision-making procedure (Art. 207 TFEU) may blur horizontal responsibilities. At the same time, a new source of legitimacy is introduced in EU trade relations. Still, the Commission alone speaks for the EU and its members (Art. 207 and 218 TFEU), so it is doubtful that parliamentary involvement in internal decision-making will impact on the EU’s external representation in trade. The same is true for the new actors, namely the permanent President and the High Representative. In the common foreign and security policy, both could indeed lay some claim to become “spokesperson of the EU” (see below). In trade, however, the technical nature of external trade relations puts them at a structural disadvantage compared to the Commission. Consequently, their leverage on the external representation of EU positions is probably even lower than on the internal decision-making process (see above).

The lasting role of the Commission in EU trade policy, including the representational tasks, was also underlined when the Council decided upon the set-up of the European External Action Service in July 2010. The Lisbon Treaty foresees that “Union delegations in third countries and at international organisations shall represent the Union” (Art. 221 TFEU). While the External Action Service and the upgraded Union delegations are placed under the general authority of the High Representative (Art. 1(3), Council of the European Union 2010), some areas of external action remain exempt from her strategic oversight. Thus, the Commission has been allowed to give directions to the Union delegations “[i]n areas where the Commission exercises the powers conferred upon it by the Treaties” (Art. 5(3), Council of the European Union 2010). Given the fact that external trade policy represents one of the core areas of Commission action throughout the European integration process, it can be expected that the Commission will aim keeping control over the external representation of the policy also at the level of Union delegations.<sup>13</sup>

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<sup>13</sup> For further details on the European External Action Service see below (section 4).

Overall, the Union's external representation in trade will remain relatively unified. As speaking with a single voice facilitates interaction with third parties in multilateral contexts, the second precondition for effective multilateralism – the capacity to represent an EU position externally – is largely met.

### ***Common Foreign and Security Policy: From Nice to Lisbon***

Since its creation in 1993 by the Maastricht Treaty, the common foreign and security policy has served as a prime example of the difficulties of co-ordinating and representing a common EU position at the international level. Thus, this intergovernmental field is characterised by a constant interplay between the EU and the member state level – both at the planning and at the implementation stage – and especially strong member state reservations. The latter point is illustrated by the dominance of unanimous decision-making.

At the same time, observers have witnessed various efforts on the part of the masters of the treaties to mitigate institutionally the basic dilemma between EU coherence and effectiveness on one hand, and the preservation of EU member state sovereignty on the other. For example, a High Representative for the common foreign and security policy was introduced by the Treaty of Amsterdam – a supranational figure, but with limited competences. Only few years later, the Treaty of Nice had introduced the Political and Security Committee as a permanent body in the EU's foreign policy structure. The main aim was to facilitate and to speed up the co-ordination of the different EU member state positions. Most recently, the Treaty of Lisbon fundamentally altered the institutional architecture of EU foreign and security policy, which will be outlined in the following sections along the dimensions internal co-ordination and external representation.

#### **Internal Co-Ordination**

From the beginning of European Political Cooperation, the forerunner of common foreign and security policy, the internal co-ordination of EU member state positions was a declared goal in order to strengthen the European Community's capacity to act at the international level (see Farrell 2006: 31). This commitment was enshrined in the provisions of the 1987 Single European Act and further enhanced by the Maastricht Treaty, which established the CFSP as

the second pillar of the Union in 1993. Despite the various examples of non-co-ordination throughout the history of EC/EU foreign policy (see Hill 2004), Farrell has stressed that “[b]y the time of the [...] Maastricht Treaty, there was virtually an injunction to cooperate within

international organizations, especially with respect to issues that the member states had already agreed on within CFSP” (see Farrell 2006: 31-32).

The Treaties of Amsterdam and Nice did not change the relevant provisions in substance. Following these provisions

Member States shall coordinate their action in international organisations and at international conferences. They shall uphold a common position in such forums. In international organisations and at international conferences where not all the member states participate, those which do take part shall uphold the common positions (Art. 19(1) TEU-Nice).

In fact, these formulations have posed an enormous demand for co-ordination and communication between the member states, which is supposed to take place within the Council structures. Until the Lisbon Treaty, this internal co-ordination was a major task of the rotating Council Presidency, held by an EU member state during the period of six months. The Presidency was assisted by the Permanent Representatives Committee (COREPER; Art. 207 TEC), the Political and Security Committee, which should “contribute to the definition of policies by delivering opinions to the Council” (Art. 25 TEU-Nice) and the High Representative for CFSP (Art. 26 TEU-Nice). In particular the Political and Security Committee, the “linchpin” (Duke 2005) of the CFSP, has always played a central role for the co-ordination of member state positions and the drafting of decision-making proposals for the Council. Created as a permanent body in 2001<sup>14</sup>, and composed of national representatives from the permanent EU member state representations in Brussels, it meets at least twice a week to discuss current and looming foreign policy crises and related EU action. According to the institutionalist literature, these ‘Brusselised’ foreign policy structures, and especially the high frequency of the meetings of the Political and Security Committee, have induced a significantly higher level of co-ordination among the member states compared to the times of the European Political Cooperation (see Allen 1998; Howorth 2001; Klein 2010; Wallace 2005).

Yet, as outlined above, the EU’s internal capacity to co-ordinate its external action not only depends on the possibility of discussing and formulating common positions, but also on the rules to take (binding) decisions. In the CFSP context, unanimity has always represented the general decision-making rule. Exceptions are limited to few issues and procedures, which can be characterised as subordinate or second-order decisions (see Art. 31 TEU).

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<sup>14</sup> The Treaty of Nice introduced the Political and Security Committee with its current set-up in the EU’s primary law. However, the PSC was already established before the Nice Treaty entered into force in 2003, based on a Council Decision of 22 January 2001 (Council of the European Union 2001).

Before turning to the analysis of the institutional innovations of the Lisbon Treaty, we will have a closer look at the *living* framework under the Nice Treaty. The joint action (since the Lisbon Treaty: “decision”, see above) represented a core legal instrument in the CFSP. Given the fact that the joint action was used in situations where the Union envisaged operational action, the year 2003 represented a milestone for the foreign and security policy as such and for the use of joint actions in particular. Thus, four years after its establishment by the European Council in 1999, the European Security and Defence Policy became operational in 2003. As shown in Table 3, for the period from 2003 to 2009, more than half of all substantial joint actions for a given year (only exception: 2005) contained references to a multilateral legal basis (Indicator I). Since 2006, no less than two thirds of all substantial joint actions contained respective references. Moreover, for roughly half of the substantial joint actions, a multilateral implementation (Indicator II) was foreseen.

**Table 3 – The level of multilateralisation in the CFSP: Analysing substantial<sup>15</sup> joint actions 2003-2009<sup>16</sup>**

Year	Total no. of substantial joint actions	Indicator I: Multilateral legal basis? <sup>17</sup>	Indicator I: share of substantial acts	Indicator II: Multilateral implementation? <sup>18</sup>	<b><i>Indicator II: share of substantial acts</i></b>
<b>2003</b>	12	7	58%	6	50%
<b>2004</b>	13	8	62%	6	46%
<b>2005</b>	16	7	44%	6	38%
<b>2006</b>	10	8	80%	8	80%
<b>2007</b>	21	16	76%	13	62%
<b>2008</b>	28	21	75%	14	50%
<b>2009</b>	14	10	71%	7	50%
<b>Total</b>	114	77	68%	60	53%

Source: Own calculation, multiple entries for Indicator I and II, based on EUR-Lex (January 2010).

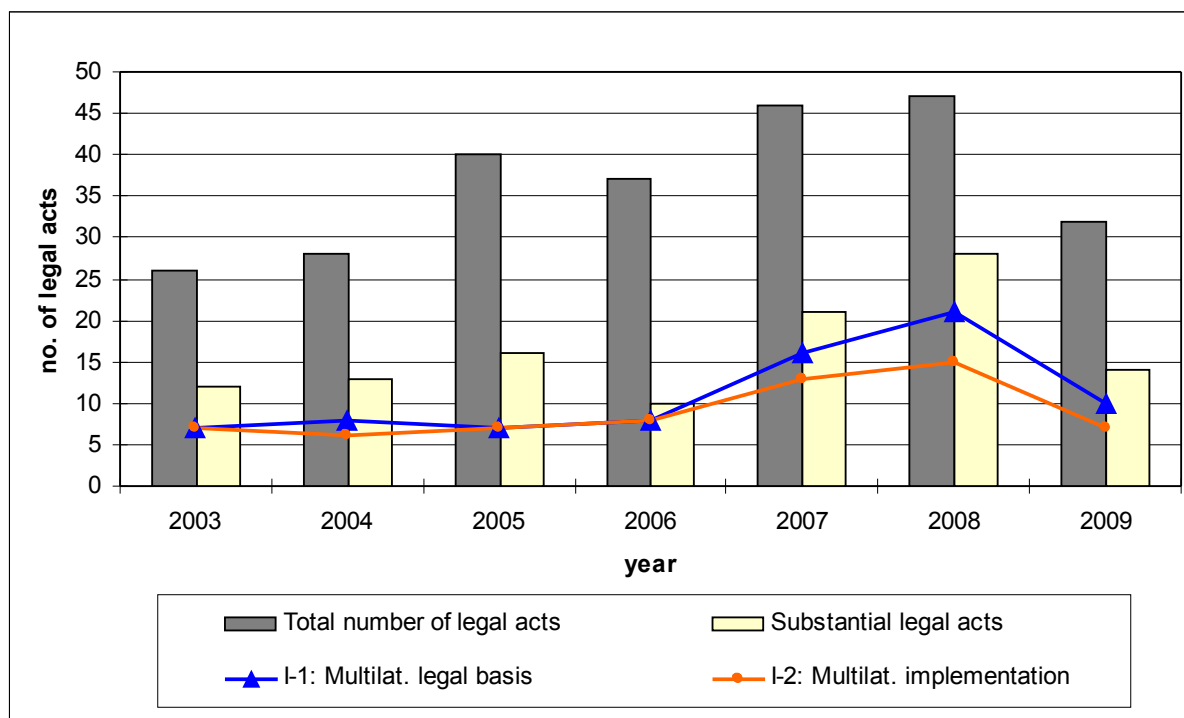
<sup>15</sup> Excludes limited amendments such as the prolongation of an existing joint action or amendments of selected articles regarding an existing joint action.

<sup>16</sup> Until 30.11.2009, before the Lisbon Treaty entered into force on 1 December 2009.

<sup>17</sup> Includes references to specific UN Resolutions, international conventions or internationally-brokered peace agreements.

<sup>18</sup> Includes a pre-defined division of labour with other international actors and the participation of third states.

**Chart 2 – The level of multilateralisation in the CFSP**



Source: own presentation

These findings suggest, overall, that the Union’s foreign policy has been characterised by a significant multilateral approach as reflected in the level of multilateralism of relevant joint actions from 2003 to 2009. At the same time, the number of substantial joint actions with a multilateral legal basis has always been significantly higher (only exception: 2006) than the number of substantial joint actions for which a multilateral implementation was foreseen. From these findings, the working thesis can be deduced that the EU is relatively stronger in taking into account and thereby strengthening international law than in pooling resources with other international actors. “Effective” multilateralism, though, would have to be based on both dimensions – the multilateral legal basis and the multilateral implementation.

**Lisbon Innovations**

In 2009, the Lisbon Treaty introduced major institutional innovations in the field of EU foreign and security policy, which are expected to have a major impact on the Union’s ability to perform in multilateral contexts. In this respect, two areas of reform are especially relevant for both the internal co-ordination and the external representation of the Union: (a) the High Representative of the Union for Foreign Affairs and Security Policy and the European External Action Service and (b) the permanent President of the European Council. Most of the relevant provisions are contained in Title V “General provisions on the Union’s external action and specific provisions on the Common Foreign and Security Policy” of the TEU. Given that there are still “specific provisions” on the CFSP, one might argue that despite the

official abolishment of the former pillar structure – illustrated by the introduction of the single legal personality of the Union (Art. 47 TEU) – *de facto*, there is still some kind of a second pillar in terms of institutions and procedures (see also Piris 2010: 260).

The High Representative of the Union for Foreign Affairs and Security Policy (Art. 18 TEU) represents the most prominent institutional novelty of the Lisbon Treaty in the area of CFSP. The incumbent Catherine Ashton has been provided with a “double hat”, which means that she is institutionally rooted both within the Council and within the Commission structure. As she is required to “conduct the Union’s common foreign and security policy” (Art. 18(2) TEU), it can be expected that the new office will shape significantly the agenda and the priorities of the CFSP and the Common Security and Defence Policy (CSDP). Crucially, the new High Representative now chairs the Foreign Affairs Council, for which the rotating presidency was abolished. Given her parallel position as a Vice-President of the Commission, Ashton has to promote a consensus, which takes into account (a) the different political interests of the EU member states and (b) the different departments of the Commission and the respective networks they form (Wessels and Bopp 2008: 21). Moreover, she has obtained a right of initiative – shared with the member states – for the EU foreign and security policy (Art. 30(1) and 42(4) TEU). Structurally, compared to other policy fields where the Commission is provided with a sole right of initiative, particularly in accordance with the ordinary legislative procedure (Art. 294 TFEU), foreign and security policy is less centralised. In the EU’s approach to multilateral settings, these rather decentralised structures represent an obstacle for formulating and negotiating a coherent position on behalf of the EU.

Furthermore, the High Representative shall ensure the implementation of the decisions taken in the field of CFSP (Art. 27(1) TEU). In this context, there is a certain overlapping of competences with the intergovernmental Political and Security Committee, which shall “monitor the implementation of agreed policies, without prejudice to the powers of the High Representative” (Art. 38 TEU). The position of the High Representative vis-à-vis the Political and Security Committee has been strengthened, though, by the appointment of a representative of the High Representative as chairperson of the Political and Security Committee (Art. 4(4), Council of the European Union 2010). In any case, the intense discussions on how actually to connect this pivotal institution for the common foreign and security policy with the new External Action Service led by Ashton illustrate the salience of the co-ordination issue in this policy field. As the European Parliament has to give a vote of consent to the entire Commission (Art. 17(7) TEU) and since the President of the Commission can request the withdrawal of single Commissioners, the High Representative is responsible to three bodies at the same time: the Commission, the Council and (to a lesser extent) to the Parliament. This mix of loyalties is expected to be difficult to balance, leading

analysts to the conclusion that the High Representative needs the characteristics of a “superhuman gymnast” (European Policy Centre (EPC) 2007: 20). Arguably, this configuration of many central and differentiated functions runs the risk of resulting in work overload.

Bearing in mind this institutional set-up, the co-ordination tasks of the High Representative for EU action within multilateral arrangements appear likewise challenging. She is responsible for the organisation of the co-ordination of the action of the member states in international organisations and at international conferences (Art. 34(1) TEU) as well as for the implementation of the co-operation of the EU with other international organisations such as the United Nations and the Council of Europe (Art. 220 TFEU). Moreover, the High Representative is also responsible for the Union delegations in third countries and at international organisations (Art. 221 TFEU), which have been integrated into the External Action Service.

The External Action Service, which should co-operate closely with the national diplomatic services, will be crucial for the functioning of the internal co-ordination processes for CFSP. However, given the job profile of the High Representative, she will have only limited own resources, at least compared to her colleagues in the Council and in the Commission, and will thus to a large extent be dependent on the power of persuasion within both institutions (see Wessels and Bopp 2008: 22; Lieb and Maurer 2008). Most importantly, in July 2010, the Council decided to leave the strategic oversight over core areas of EU external relations such as the European Neighbourhood Policy and development policy with the responsible Commissioners (Art. 9(4), Council of the European Union 2010). Thus, while the new External Action Service does provide the High Representative with new resources in terms of staff and competences, it has also introduced new co-ordination demands between the various areas of EU external action which in turn might weaken the capacity to co-ordinate EU positions in the CFSP.

The position of a full-time President of the European Council represents the second major institutional innovation, which will have an impact on for the internal co-ordination processes in the CFSP framework. As the Treaty of Lisbon specifies, the President is elected by qualified majority for 2½ years (renewable once) and shall “ensure the preparation and continuity of the work of the European Council in co-operation with the President of the Commission, and on the basis of the work of the General Affairs Council” (Art. 15(6) TEU). Thus, his main task is to promote consensus among the heads of state and government and to ensure member states’ compliance. In 2009, Herman Van Rompuy was elected as the first President of the European Council. Having been just as unknown (and inexperienced) in the

field of foreign and security policy as Catherine Ashton, it could have been expected that at least at the beginning, the two would rather moderate than steer EU internal discussion and co-ordination processes. Some observers, however, have recently stressed that in the case of Van Rompuy, he “has tried to articulate an autonomous and original analysis of the new international environment in which the Union operates” and “to spur the Member States to discussing openly and at the highest level the current state and the future of EU relations with the big global players” (Missiroli 2010: 4-5).

As for decision-making procedures, the Lisbon Treaty did not mark a breakthrough in terms of establishing more efficient decision-making procedures in the CFSP context: unanimity remains the standard for decision-making in this policy field (Art. 24(1), 31(1) TEU), including the possibility of constructive abstention. As it is up to the Council to “frame” the CFSP and to “take the decisions necessary for defining and implementing it” (Art. 26(2) TEU), the Council needs to take decisions unanimously on operational action by the Union “where the international situation requires” (Art. 28(1) TEU). In turn, member states “shall commit” to these decisions “in the positions they adopt and in the conduct of their activity” (Art. 28(2) TEU). One exception to the rule of unanimity, however, has been introduced by the Lisbon Treaty: a new provision allows a decision under qualified majority voting of the Council for the set-up of a start-up fund in order to establish rapid access to the Union budget in cases of “urgent financing of initiatives” (Art. 41(3) TEU).

In sum, the internal co-ordination in the common foreign and security policy has been slightly improved under the Lisbon Treaty, namely by the introduction of the double-hatted High Representative and the European External Action Service. This first assessment, though, may have to be revised in the light of the actual interplay between the new external action figures, including the President of the European Council. Given the overlapping of their competences, a competitive relationship may severely hamper internal co-ordination procedures.

## **External Representation**

As far as the EU (and not the former European Community) is concerned, the Nice Treaty did not provide for a single institution to represent the Union. In this context, the composition of the so-called “Troika”, representing the EU in the common foreign and security policy,<sup>19</sup> can serve as an illustrative example. While typically various actors have been involved with the

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<sup>19</sup> The “Troika” was composed of the foreign affairs minister of the member state holding the Presidency of the Council of the European Union, the High Representative for the Common Foreign and Security Policy, the European Commissioner in charge of external relations and European Neighbourhood Policy and, where necessary, the representatives of the future Presidency (see Art. 18 TEU-Nice).



external representation of the CFSP, the treaty nevertheless foresaw a leading role for the rotating presidency: it could speak on behalf of the Union in international organisations and international conferences (see Art. 18 TEU-Nice).

The question of “who speaks for the EU” is closely linked to the question “who signs for the EU” as well as to the issue of the EU’s membership in international organisations. The legal personality of the European Community was explicitly mentioned in the treaty (see Art. 281 TEC), which allowed the Community to conclude international agreements. The respective procedure – an interplay between the Commission, the Council and the European Parliament – was outlined in article 300 TEC (see also Sack 1995: 1230). Furthermore, the European Court of Justice acknowledged the possibility for the Community to participate in establishing a new international organisation as a founding member (see European Court of Justice 1977). In contrast, there was no explicit treaty provision regulating the accession of the Community to an already existing organisation.

Under the Nice Treaty, the European Union had no explicit legal personality. Yet, as Govaere et al. have pointed out, article 24 TEU-Nice could be interpreted as “an implicit confirmation of the EU’s functional legal personality” (Govaere et al. 2004: 161). This article provided for the Council the competence to conclude an agreement with one or more states or international organisations on CFSP-related issues such as crisis management missions. Crucially, international agreements concluded on the basis of article 24 TEU-Nice did not have to be ratified by the EU member states (see Govaere et al. 2004: 160-161). Thus, while the supranational Commission played only a marginal role (as part of the Troika) in the external representation of EU foreign policy issues, it was nevertheless a European institution, the Council, which functioned as a single contact body for external partners.

The Lisbon Treaty has changed substantially the external representation in the field of EU foreign and security policy by upgrading the High Representative for the CFSP – now called High Representative of the Union for Foreign Affairs and Security Policy – and by creating a permanent President of the European Council. Moreover, as mentioned above, it introduced for the first time a legal personality for the European Union as a whole (Art. 47 TEU). Crucially, the new double-hatted High Representative should improve the coherence of the Union’s external action. In this context, an important task is to provide the Union with a “single voice” and “face” (Wessels and Bopp 2008: 19). Thus, the Lisbon Treaty states that “the High Representative shall represent the Union for matters relating to the common foreign and security policy. [She] shall conduct political dialogue with third parties on the Union’s behalf and shall express the Union’s position in international organisations and at international conferences” (Art. 27(2) TEU). Additionally, she is granted the right to represent

the Union's position on a specific topic in the UN Security Council given that the Union has defined a position on one of the topics on the agenda and that she is requested to do so by the member states represented in the UN Security Council (Art. 34(2) TEU). This legal innovation reflects the current de facto practice (see Regelsberger 2008: 272). Crucially, also under the Lisbon Treaty, the High Representative is not entitled to speak on behalf of the Union in the UN Security Council on his own initiative.

As mentioned above, the External Action Service and the related Union delegations will shape the EU's external representation to a large extent. Legally, the Head of Delegation plays a special role: he "shall have the power to represent the Union in the country where the delegation is accredited, in particular for the conclusion of contracts, and as a party to legal proceedings" (Art. 5(8), Council of the European Union 2010). Politically, the new composition of the staff of the delegations – including Council officials and national diplomats in addition to Commission officials – leads to the expectation that the EU might pursue a more strategic approach on the ground, in contrast to the previous, mostly technical implementation work of the Community delegations. Thus, given their professional background, Council officials and national diplomats can be expected to put more emphasis on foreign and security policy issues. Arguably, such a strategic orientation of the External Action Service will raise the profile of the High Representative.

As for the external representation role of the European Council President, conflict between the new full time position and the High Representative can be expected. Thus, the new treaty states that "at his level and in that capacity, [the President of the European Council shall] ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative" (Art. 15(6) TEU). The formulation "without prejudice to" indicates that potential role conflicts are being recognised by the masters of the treaties but their resolution has been shifted to daily practice. A recent incident indicated that in the case of conflicting institutional interests, the President's powers outweigh those of the High Representative. Thus, in February 2010, Ashton missed an informal meeting of the EU defence ministers in Mallorca partly because Van Rompuy – apparently unwilling to go himself – had sent her to the investiture ceremony of the new Ukrainian President Viktor Yanukovich in Kiev (*Süddeutsche Zeitung*, 25.2.2010). According to the letters of the treaty, it would clearly have been Van Rompuy's task to represent the Union in Kiev – and it would have been Ashton's task to attend the defence ministers' meeting in order to discuss the integration of the Union's military structures into the External Action Service. In this particular case, the living practice actually overruled the newly agreed upon legal framework.

From a longer-term perspective, it is unclear how far the Union's external representation will be shared between these two institutions in day-to-day policy-making – it seems that the EU might have at least two telephone numbers. In this context, some scholars have stressed that “[g]iven the self-perception of the European Council being the representative of the EU, the full-time president could be regarded as the main “spokesperson” of the EU in all matters of international interest” (Wessels and Bopp 2008: 19). Obviously, a (new) split in the representation of EU foreign and security issues would reduce the EU's capacity to pursue its objectives in multilateral settings.

## ***Conclusion and Outlook***

This paper has explored the question of how far its institutional architecture enables the Union to live up to the ambition to contribute to (effective) multilateralism. It started from the assumption that the EU acts in its own right at the international level and within multilateral settings. In this context, an effective institutional set-up was considered as a necessary condition for the EU to influence multilateral policy-making according to its interests. Drawing on the literature on the EU's performance in international organisations, institutional effectiveness was defined with regard to two dimensions: (1) the structural set-up for the internal co-ordination of the EU position and (2) the EU's external representation.

The analysis of two different cases – the common commercial policy and the common foreign and security policy – has generated varying results. In the area of trade, the structural set-up has significantly facilitated the internal co-ordination of a common EU position within a multilateral forum such as the World Trade Organisation. Most importantly, the exclusive right of initiative of the European Commission, its expertise and its leading role during the negotiation process with third actors account for a centralised policy-making. The dominant majority voting further enhances the possibility of forging a common EU position – even if this position is not supported by all EU member states.

The innovations introduced by the Lisbon Treaty in 2009 are expected to have partly contradictory effects on the EU as a multilateral actor in the field of trade. On one hand, the scope of EU trade policy has been significantly extended. This extension of EU competences accounts for a *general* increase of the EU's weight as a trade actor in multilateral forums, at the expense of EU member states' competences. On the other hand, the legal provisions of the Lisbon Treaty introduce new obstacles in terms of an effective internal co-ordination process: first, by introducing the ordinary legislative procedure (co-decision) for EU trade policy, the European Parliament has become a full actor in this area. Especially in view of the

general politicisation of trade issues since the 1990s, it can be expected that the involvement of the European Parliament and its various political factions will make it more difficult to reach agreement on a common position.<sup>20</sup> Second, many of the new trade-related competences are subject to unanimity voting – which hinders internal co-ordination processes in the case of a conflict of interests. Third, last but not least, the Lisbon Treaty for the first time explicitly embedded the common commercial policy within the broader context of the Union’s external action. While there are important strategic reasons for the EU to further integrate its range of external policies, this increase of interconnected EU policy-making is not necessarily matched at the level of (disconnected) multilateral negotiations. Consequently, when it comes to more complex EU initiatives, it can be expected that the future effectiveness of the EU as a multilateral trade actor will remain limited.

As for the external representation of the Union in the field of trade, however, the institutional set-up has remained highly effective due to the central role of the European Commission. The fact that the European Commission is also responsible for carrying out dispute settlement actions on behalf of single EU member states in the framework of the World Trade Organisation further underlines the extraordinary level of coherence and effectiveness in the external representation of trade policy.

Overall, comparing the legal provisions of EU trade policy with EU foreign and security policy, trade represents a policy field where the EU is institutionally much better equipped to act multilaterally compared to the CFSP. The common foreign and security policy has only complemented, but not substituted for the national foreign policies of the EU member states. Thus, this policy field has been characterised by a particularly pressing need for co-ordination between the EU institutions on the one hand and EU member state positions and actions on the other. Until the Lisbon Treaty entered into force, the rotating EU Council Presidency played a central role in co-ordinating EU member state interests and forging a common EU position with regard to foreign policy questions. Since 2001, ‘Brusselised’ foreign policy structures such as the permanent Political and Security Committee have induced a significantly higher level of co-ordination compared to times when the respective meetings had to be organised *ad hoc* between the EU capitals. Yet, given the dominant mode of unanimous decision-making – before and after the Lisbon Treaty – the internal co-ordination capacity can be described as severely restricted. This means that the institutional architecture of the EU provides the EU member states with the possibility to veto any EU position in the field of foreign and security policy.

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<sup>20</sup> Nota bene: This assessment is based on the analysis of the two core elements for EU effectiveness at the international level as initially defined. Questions of the *legitimacy* of EU multilateral action and the relevance of parliamentary oversight do not represent the focus of this paper.

Within these structural limits, two institutional innovations of the Lisbon Treaty might nevertheless have a major impact both on the internal co-ordination and on the external representation of the EU's foreign and security policy. First, the High Representative of the Union for Foreign Affairs and Security Policy, supported by the European External Action Service, not only brings together the formerly separated Council and Commission structures ("double hat"), but she also chairs the Foreign Affairs Council. By abolishing the chair of the rotating EU Presidency in the field of foreign affairs, the set-up for a continuous and smooth co-ordination of EU member state positions has been clearly improved. In how far this improvement can be translated into effective multilateral policy-making depends not least on the second main institutional innovation of the Lisbon Treaty, which is the permanent President of the European Council. His main task is to promote consensus among the heads of state or government with regard to the Union's general political directions. While the definition of political guidelines does not necessarily interfere with the daily policy-making business as carried out within the Council of the EU and the External Action Service, the representative role of the European Council President might well lead to institutional conflicts with the High Representative. The vague treaty formulations in this respect leave much room for interpretation and possible power struggles, which would limit the effectiveness in the EU's multilateral approach to foreign and security policy. Thus, institutionally, the mere existence of two major spokespersons for EU foreign and security policy is expected to cause some (new) confusion among third actors regarding the right contact address (or telephone number) for foreign and security issues.

This paper aimed not only at the analysis of the legal framework for EU multilateral action, but also at an assessment of its living framework that is the actual use of the legal provisions. While it is still too early to refer to the use of the Lisbon provisions over time, empirical data on the use of the Nice provisions from 2003 onwards revealed a strong EU commitment to multilateralism at the conceptual level. Our samples of legal acts in the fields of trade and foreign and security policy have shown that in more than half of the cases – most of the time even in more than two thirds of the cases – at least one reference to a multilateral legal basis (Indicator I) such as UN resolutions or international conventions was included. Comparing the two policy fields, from 2006 onwards, trade policy appears to be slightly more multilateralised than foreign and security policy: while more than 80% of trade legal acts in the years 2006 and 2009 refer to a multilateral legal basis, the share of Indicator I for CFSP acts ranges between 71% (2009) and 80% (2006) (see Tables 1 and 3). These findings basically confirm the relevance of the institutional factor for EU multilateralism: under the Nice Treaty, compared to the CFSP, the legal framework of EU trade policy provided a higher capacity to act multilaterally in this field. Consequently, this capacity was also illustrated by a

higher level of actual multilateral output or a more multilateralised *living* framework in the area of trade policy.

At the same time, our methodological approach allowed for further differentiation, namely between the reference to a multilateral *legal basis* (Indicator I) and a multilateral *implementation* (Indicator II). In the framework of the common foreign and security policy, our findings indicate that the EU is relatively stronger in supporting international law by referring explicitly to it than in pooling resources with other international actors such as the North Atlantic Treaty Organisation. Thus, from 2003 to 2009, multilateral implementation is foreseen in only half of the substantial joint actions (with some slight deviations from this average, see Table 3). In the area of trade, it is interesting to note that protectionist anti-dumping duties are the most frequently cited instrument with a reference to a multilateral framework, which is the General Agreement on Tariffs and Trade (GATT) in this case. Thus, paradoxically, multilateralism in EU trade policy has been largely reflected in measures contradicting the notion of free trade – the notion that lies at the heart of the GATT framework.

Overall, the qualitative analysis of the legal output of the EU seems to be a promising tool in order to assess actual (varying) levels of multilateralism in EU external action. In particular, it allows differentiation between different policy fields and also between different categories of multilateralism (legal basis; implementation). In the future project work, more detailed case studies as well as the analysis of the legal output under the Lisbon Treaty will help to further substantiate the relevance of the Union's institutional architecture for its multilateral policy-making.

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