Chapter 1
The Value of the EU International Values

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Abstract This chapter focuses on the nature and effect of the values and principles enshrined in Articles 3(5) and 21 TEU, which set out the objectives and limits of the EU's external action. It begins with some introductory remarks highlighting the constitutional significance of international values aimed at giving guidance to the conduct of the EU foreign relations power. The second part explores the tendency of the CJEU to use these values and principles as a means of enlarging the functional scope of the EU competences. The problematic issues flowing from this approach, in particular the relation between general objectives of the EU's external action and particular objectives assigned to single areas are discussed in the third part. The chapter concludes with a brief enquiry on the impact of general values and objectives on the principle of conferral.

Keywords objectives and values · external action · EU system of competences · principle of conferral · CFSP · holistic approach

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1.1 Introductory Remarks: Values, Principles, Objectives or Interests?

The Treaty on the European Union introduced provisions that were directly or indirectly borrowed from the Constitutional Treaty; a project which had never attained, as is well known, normative character. Two of them, in particular, Articles 3(5) and 21, express the international dimension of Europe's Constitutional setting. They are aimed at determining the model of relations the Union wishes to entertain with the "wider world" and to give guidance to the Union's Institutions accordingly. They set out a comprehensive and sophisticated frame of reference for the new external action of the Union, namely for the external aspects of all the policies and actions of the Union.[1]

A very superficial analysis of these provisions reveals the existence of two broad categories of directives. On the one hand, those aiming to ensure compliance with international law; namely respecting international law as it presently is. On the other hand, those that—albeit with changing tones and a varying phraseology—call upon the EU Institutions to contribute to the development of international law towards a model consistent with these fundamental values and principles of the EU.

The symbolic impact of these provisions can be hardly overstated. Articles 3(5) and 21 express the sentiment of the founding treaties towards the "wider world". Not only do they conceive international law as the indispensable tool for realizing the external dimension of the European integration, they also express a new ethical vision of international law and put the formidable power of the EU at the service of such a model: A new international Constitutionalism which takes shape through the EU's founding Treaties.[2]

Beyond their theoretical significance, however, the technical analysis of the two provisions is fraught with problematic issues. Articles 3(5) and 21 TEU do not clarify the nature and effect of the normative notions they lay down. Nor do they clarify the impact of these notions on the EU's competence system and, in particular, on the new external action of the Union. How do they relate to the principle of conferral? Do they blur the line between the diverse areas of the EU's external action? Or are they simply guidelines deprived of any normative effect?

These questions cannot be easily answered by referring to the mere terms of Articles 3(5) and 21. Quite the contrary, it is difficult to determine a coherent normative framework integrating these two provisions in the complex system of the EU's external action. The following sections will attempt to demonstrate how thorny it may be to reconcile the existence of general rules laying down objectives, principles and values, with a system of competences based on the principle of conferral. In doing so, this chapter aims to set the stage for the following chapters, most of which are—either explicitly or implicitly—based on the central notions in Articles 3(5) and 21 TEU.

[1] See Consolidated Version of the Treaty on the European Union, 2012, OJ C326 (TEU), Article 21(3).

[2] See Neframi 2013; Cremona 2016; Larik 2016.

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54 ## 1.2 Some Thoughts on the Nature and Effect of the EU
55 International Values

56 The analysis starts from a terminological issue. The legal notions formulated by
57 Articles 3(5) and 21 seem to sprout from a common root; the desire to construe an
58 ethical framework able to give guidance to the exercise of the EU's foreign power.[3]
59 However, the terminology used in the Treaty is highly heterogeneous. Article 3(5)
60 talks about "values and interests; Article 21 uses the term "objectives". Other Treaty
61 provisions refer to the notions as "objectives and principles".[4] This uncertain termi-
62 nology should warn against any attempt to draw conclusions on their definite legal
63 nature.

64 The effect of these legal notions appears even more indeterminate. It is not clear
65 whether they constitute mere guidelines for the exercise of the EU's external policies
66 and actions or, rather, whether they have a normative effect, in general terms and, in
67 particular, on the system of EU competence attribution.

68 Having stated the main controversial questions which surround the interpreta-
69 tion of these two provisions, one must admit that the Treaties do not provide many
70 elements to answer them. An extensive reading is suggested by Article 21(3): "The
71 Union shall respect the principles and pursue the objectives set out in paras 1 and 2
72 in the development and implementation of the different areas of the Union's external
73 action covered by this Title and by Part Five of the Treaty on the Functioning of the
74 European Union, and of the external aspects of its other policies". This statement is
75 twofold. First, it suggests that the normative notions formulated under the previous
76 paragraphs contribute *qua* principles to the standard of review for acts adopted under
77 the EU's external action. Second, it entails that Articles 21 (1) and 21(2) provide
78 general objectives, which add up to the specific objectives assigned to the single
79 areas which compose the EU's external action. Article 21(3) seems thus to uphold
80 the idea that the general objectives enshrined in Articles 21(1) and 21(2) integrate the
81 set of objectives specifically assigned to the single policies which together form the
82 external action, even though it remains unclear what happens in case of inconsistency
83 between general and specific objectives.[5]

84 Article 3(6) strikes a different tone. It states that the objectives of the Union—
85 which arguably include also the normative notions listed under Article 3(5), although
86 labelled as values—must be pursued by appropriate means commensurate with the
87 competences which are conferred upon it in the Treaties. Here the problem is the
88 interpretation of the term "commensurate". This term implies some type of corre-
89 spondence between the competences and the means to be employed to implement
90 them; a correspondence in size, importance or quality. The most logical deduction is
91 that Article 3(5), in conjunction with Article 3(6), does not extend the scope of the
92 EU's competences but simply provides the general principles which must be pursued

[3]See de Witte 2008, pp. 3–15; Leino 2016, pp. 259–289.

[4]See Consolidated Version of the Treaty on the Functioning of the European Union, 2012, OJ C 326 (TFEU), Articles 2017(1), 208(1), 212(1), 214(1).

[5]Kube 2016.

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through the use of ~~other~~ competences of the Union. These, in turn, must conform to the objectives specifically assigned to them.

A third option is provided by the specific provisions included in each single area of the EU's external action,[6] which directs these policies to be exercised in the context of or in the framework of the principles and objectives of Article 21.[7] The interpretation of notions such as "context" and "framework" appears to be particularly controversial. On the basis of a textual interpretation, reference to the context and framework entails that these principles and objectives should restrict, rather than enlarge, the scope of the policies and actions included in the EU's external action. This means that each single measure must be specifically grounded on the legal basis provided by one of these policies or action, and at the same time, respect the principles and objectives of Article 21. In other words, the principles and objectives of Article 21 cannot be invoked with a view to circumventing the objectives of the individual policy or action under which a measure is enacted.

We are therefore confronted with various ~~interpretative~~ options, each implying a different effect of the function of Articles 3(5) and 21: extending the scope of the policies which come within the external action, leaving it untouched, or restricting it. Behind this confusion, a major dilemma looms for the European order. Whereas an overtly restrictive interpretation can undermine the integration approach that is mirrored in the current Treaties, an expansive interpretation—providing for new and autonomous objectives for measures having external effect—may disrupt the basic foundations of the principle of conferral.

These three are not the only available interpretive options. In a more radical view, one could be tempted to accept that the establishment of an integrated external action has definitively merged together the general principles, values and objective enshrined in Articles 3(5) and 21, with the more specific objectives assigned to each single policy or action and thus instituted a holistic regime in which all these normative entities can be used interchangeably as a legal basis for measures implementing them.

In addition, all these options must be tested in the light of the legal conundrum represented by Article 40 TEU. Although this provision concerns the different issue of the choice of the legal basis for measures which, in the terminology predating the Lisbon Treaty, would have been defined as cross-pillar, it constituted a demanding test for every attempt to determine the functional scope of the various areas of the external action. The bi-lateralisation of the barrier separating the CFSP—a purely functional competence—from the TFEU ~~substantive~~ policies—generally defined by reference to their substance matter—makes it equally hard for either one to expand its scope to the detriment of the scope of the other.[8]

[6]With the exception of Article 215 TFEU, concerning the restrictive measures, which, however, proceeds on the basis of a CFSP decision, subject, under Article 23 TEU, to the respect of the principles and objectives of the External Action; see TFEU, above n. 4.

[7]See, again, TFEU, above n. 4, Articles 207(1), 208(1), 212(1) and 214(1).

[8]Articles 40 also prevents a coordinated exercise of powers of actions respectively conferred upon each of these two dimensions of the European integration, either based on a combination of their

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On the basis of these remarks, I will now proceed to see how Articles 3(5) and 21 have been treated in the case law of the CJEU. It is submitted that these have been treated in different ways: as a key to open up the principle of conferral, albeit in the limited field of external relations; as a mere rhetorical tool, to reinforce the persuasiveness of the decision; or, finally, as something intermediate between these two. This analysis may be useful for research projects aimed to determine the nature of effect of these quite mysterious provisions; a task, however, which largely remains outside the scope of the present chapter.

1.3 Rhetorical Device or Interpretive Effect?

Articles 3(5) and 21 have often been used in case law in their less engaging dimension, as a rhetorical tool, to confirm solutions based on different arguments or to reinforce the persuasiveness of an argument. Most commonly, by referring to these two provisions, the Court of Justice simply used them as an abbreviated way to refer to the obligation to respect international law. From ~~their inception,~~ this obligation flows from Article 216(2) TFEU, under which international agreements that are binding on the EU must be complied with by the EU's Institutions. Moreover, according to settled case law, every international law rule binding on the EU is an integral part of the European legal order and constitutes a standard of review for EU domestic legislation.

Interestingly, the conception of Articles 3(5) and 21 as an abbreviated reference to the obligations imposed on the EU Institutions to comply with international law is adopted also by the referring judges. In *Western Sahara Campaign UK*,[9] for example, the referring Court submitted the following question:

> Is the Fisheries Partnership Agreement valid, having regard to the requirement under Article 3(5) TEU to contribute to the observance of any relevant principle of international law and respect for the principles of the Charter of the United Nations and the extent to which the Fisheries Agreement was concluded for the benefit of the Saharawi people, on their behalf, in accordance with their wishes, and/or in consultation with their recognised representatives?

Obviously, the validity of the Fisheries Partnership Agreement could have been challenged against a standard of review composed by the rules and principles of international law that were allegedly breached, namely the principle of self-determination

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respective legal basis or on a sequence of measures, each grounded on its own legal basis. A sequential exercise of CFSP acts and of EU substantive policies acts is, notoriously, established only by Article 315 TFEU in the area of restrictive measures and, consequently, appears as a *lex specialis*, unlikely to be replicated in situations which fall outside its scope. For a more in-depth analysis of the exceptional status of Article 315, I refer to Cannizzaro 2017, pp. 531–546.

[9]Court of Justice, *Western Sahara Campaign UK,* Judgment of the Court (Grand Chamber), 27 February 2018, Case C-266/16, ECLI:EU:C:2018:118.

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162 and the rule prohibiting to enter into agreements with a State administering non self-
163 governing territories unless the agreement was concluded for the benefit of the non-
164 self-governing people, on its behalf and in accordance with its wishes. The same ratio-
165 nale applies to the obligation to respect the Charter of the United Nations,[10] which
166 is arguably binding on the Union, although the Union is not among it signatories.[11]
167 In *Rosneft*[12] the Court used Article 21 to interpret an international agreement in
168 light of the mandatory principles of the Charter of the United Nations. Asked to
169 determine whether restrictive measures taken against that company were compatible
170 with some provisions of the EU-Russia Partnership agreement, the Court observed
171 that the conflict between the restrictive measures adopted by the EU and the EU-
172 Russia agreement was only apparent, as that agreement contained a standard excep-
173 tion clause. Under this clause, each party was entitled to adopt "measures that it
174 considers necessary for the protection of its essential security interests, particularly
175 in time of war or serious international tension constituting a threat of war or in order
176 to carry out obligations it has accepted for the purpose of maintaining peace and
177 international security". Reference to the classic self-judging clause would have been
178 sufficient to reject the claim. However, the Court went on to interpret that clause to
179 the effect that it by no means requires the 'war' or the 'serious international tension
180 constituting a threat of war' to take place in the territory of the invoking party.[13] In
181 the light of this quite obvious remark, the Court felt safe to say that the contested
182 measures had been enacted for the purpose of maintaining international peace and
183 security and that purpose was "in accordance with the specified objective, under
184 the first subparagraph of Articles 21(1) and 21(2)(c) TEU, of the Union's external
185 action, with due regard to the principles and purposes of the Charter of the United
186 Nations". In this way, the Court established a link between the two first paragraphs
187 of Article 21 and the principles of the Charter, which were used to interpret exten-
188 sively the EU-Russia agreement and, in particular, to bring within its scope a threat
189 to international peace and security which did not concern *stricto sensu*, the relations
190 between the two parties. Thus, reference to Articles 3(5) and 21 helped deal with
191 complex situations where the scope of international values and principles of the EU
192 overlapped with that of the Charter of fundamental rights: a rare but not impossible
193 situation.

[10]See Hilpold 2009, pp. 141–182.

[11]Kokott and Sobotta 2012, pp. 1015–1024. This impression emerges from Court of Justice, *Kadi and Al Barakaat International Foundation v Council and Commission,* Judgment, 03 September 2008, Joined Cases C-402/05 and C-415/05, ECLI:EU:C:2008:461, paras 290–292, which, however, does not unveil the argument leading to this solution. A perspective based on the idea that the EU succeeded to the MS in the rights and duties flowing from the Charter, which fall within its competences, was set out by the GC (CFI) in Court of Justice, *Kadi v Council and Commission,* Judgment, 21 September 2005, Case T-315/01, ECLI:EU:T:2005:332, paras 193–195.

[12]Court of Justice, *Rosneft,* Judgment, 28 March 2017, Case C-72/15, ECLI:EU:C:2017:236.

[13]Ibid., para 111ff.

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In Opinion 1/17,[14] concerning the consistency of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA) with the EU Treaties, the Court was asked to determine whether the considerable financial risk which claimants had to bear to bring a claim to the CETA Tribunal was consistent with Article 47 of the Charter. Among the arguments which led to a positive answer, the Court recalled that the right of access to justice is inherent in the principle of free and fair trade, enshrined in Article 3(5).[15] Paradoxically, in Opinion 1/17 the Court abstained from using Articles 3(5) and 21 for what may have appeared their most logical and natural use, namely imposing a limit to the principle of autonomy of the European legal order. In this perspective, Articles 3(5), or 21 could be used to compose the standard of review of EU acts, including acts concluding or implementing international agreements, alleged to be invalid in light of superior EU rules or principles, among which, the principle of autonomy holds a prominent place.[16]

There are elements in Opinion 1/17 which seem to demonstrate that the Court considered this line of reason, without expressly accepting it. This impression emerges from the passage where the Court, after referring to its settled case law on the compatibility with the founding Treaties of provisions of international agreements which establish judicial organs to settle disputes under that agreement, added:

> It is, moreover, precisely because of the reciprocal nature of international agreements and the need to maintain the powers of the Union in international relations that it is open to the Union … to enter into an agreement that confers on an international court or tribunal the jurisdiction to interpret that agreement without that court or tribunal being subject to the interpretations of that agreement given by the courts or tribunal of the Parties.[17]

Coherently unfolded, this line of reasoning could have led the CJEU to the conclusion that autonomy is not the (only) overarching principle governing the conduct of the EU external relations, but that it must be balanced against other Constitutional values and principles, among which those laid down by Articles 3(5) and 21 TEU, which, moreover, relate specifically to the EU's foreign affairs power.

[14] Court of Justice, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)*, Opinion of the Court, 30 April 2019, Opinion 1/17, ECLI:EU:C:2019:341.

[15] Ibid., para 200.

[16] This use of the general values and principles of Articles 3(5) and 21 emerges from the Opinion of AG Bot; see Court of Justice, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)*, Opinion of AG Bot of 29 January 2019, Opinion 1/17, ECLI:EU:C:2019:72, paras 73–78: "It is my view that examination of the compatibility of Section F of Chap. 8 of the CETA with the principle of the autonomy of EU law must be carried out taking due account of the need to preserve the European Union's capacity to contribute to achieving the principles and the objectives of its external action. … the Court should interpret the principle of the autonomy of EU law not only in such a way as to maintain the specific characteristics of EU law but also to ensure the European Union's involvement in the development of international law and of a rules-based international legal order.".

[17] Opinion 1/17 (*CETA*), above n. 14, para 117.

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1.4 The Impact of International Principles and Values on the System of Competences

1.4.1 The No-Effect Approach

The rhetoric use of Articles 3(5) and 21 TEU leaves unaltered the impact of these provisions on the system of the EU's competences. In this regard, the most conservative view was expressed by Sharpston AG. In her opinion pertaining to the Opinion procedure 2/15,[18] the Advocate General held, in quite clear-cut terms, that these provisions do not affect, even minimally, the system of competences. This view was expressed in response to the exclusivity claim advanced by the Commission and the Parliament. The Commission and the Parliament argued that Chap. 13 of the EU-Singapore FTA, although having as its main purpose to promote labour and environmental protection, nonetheless fell within the scope of the Common Commercial Policy by virtue of its effect of regulation of trade.

In response to these arguments, the AG followed the classic line of argumentation based on the directness and immediacy of the link between the measures of the agreements and their effect on trade. The enquiry gave negative results and the AG drew the conclusion that, on the basis of the classic criteria, Chap. 13 did not fall within the scope of the CCP.[19] To test the robustness of this analysis, the AG went on to examine whether this result could change in light of the objectives relating to sustainable development and labour protection in the EU external action, enshrined in Articles 3(5) and 21. In other words, the AG raised the issue of whether international obligations which do not pursue the objectives specifically assigned to the CCP, could nonetheless come within the exclusive purview of the EU as they pursue general objectives of external action. The answer was emphatically in the negative:

> In my opinion, Articles 3(5) and 21 TEU and Articles 9 and 11 TFEU, to which the Commission refers, are not relevant to resolving the issue of competence. The purpose of those provisions is to require the European Union to contribute to certain objectives in its policies and activities. They cannot affect the scope of the common commercial policy laid down in Article 207 TFEU.[20]

The idea that Articles 3(5) and 21 are irrelevant in the context of determining the scope of the EU's competence does not appear persuasive. Under Article 5 TEU, a competence has two components: the powers of action conferred by the Treaties and the objective which must be attained thereby. If Articles 3(5) and 32 set out the general objectives of the EU's external action, they can well provide the functional part of the single policies which compose it.

As said above, the text of these provisions does not help determine whether they intend to set out objectives or values, interests or principles. However, Article 207

[18] Court of Justice, *Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion of AG Sharpston, 21 December 2016, Opinion 2/15, ECLI:EU:C:2016:992.
[19] Ibid., paras 489–494.
[20] Ibid., para 495.

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TFEU, as well as its twin provisions concerning the other policies included in the external action, expressly use the term "objectives", thus making clear that there are general objectives laid down by Articles 3(5) and 21, which can be attained through the means of action conferred to the EU by these provisions.

Even from a more general perspective, the sweeping assertion of the AG appears to be dismissive. Under the doctrine of competence, rules, principles and other undetermined legal notions can interfere in a variety of manners with a competence assigned to the EU. Under Article 6, for example, principles protecting fundamental rights do not extend the competence of the EU. However, this does not entail that they do not produce effect on the competence of the EU. They interfere with the issue of competence in many ways, the most obvious being that they restrict the scope of the competences of the Union. Thus, even if the notions enshrined Articles 3(5) and 21 TEU are not full-fledged objectives for the purposes of Article 5 TEU, this would not rule out the possibility that they are, nonetheless, relevant to determining the scope of the EU's competence.

1.4.2 The Holistic Approach

In Opinion 2/15 of 16 May 2017,[21] the Court of Justice did not follow the no-effect doctrine embraced by AG Sharpston and, rather, adopted a doctrine which may appear as its logical opposite. In particular, in the section concerning the consistence of the commitments on sustainable development formulated by Chap. 13 of the Agreement, the Court departed from the conclusions suggested by the Advocate General and relied on a different approach. According to the Court, Article 207 TFEU modifies the functional scope of the CCP by integrating the general objectives and principles of the EU's external action in the conduct of that policy.

> The obligation on the European Union to integrate those objectives and principles into the conduct of its common commercial policy is apparent from the second sentence of Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU. Indeed, as provided in Article 21(3) TEU, the European Union is to 'pursue the objectives set out in paras 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the [FEU Treaty] …'. Part Five of the FEU Treaty includes, inter alia, the common commercial policy.[22]

The Court went on to draw the inevitable conclusion that, although the Union has no exclusive competence to conclude an international agreement aimed to regulate the levels of social and environmental protection in the respective territories of its parties, it has the competence to regulate trade between the European Union and a

[21] Court of Justice, *Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion of the Court, 16 May 2017, Opinion 2/15, ECLI:EU:C:2017:376.
[22] Ibid., paras 143–144.

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third State by making this regulation conditional upon the compliance of international obligations concerning labour and environment protection.[23]

Although the Court did not unveil all the details of its reasoning, one could hardly doubt that, under that case law, Articles 3(5) and 21 are part of the system of the EU's competence. If the objectives and values set out by these provisions are incorporated in the set of objectives assigned to the common commercial policy the most logical inference is that they can be attained by using the means of action conferred by the treaty under this policy. Since the process of incorporation is common for all the other policies of the Union, the same conclusion must be drawn for them all.

By no way does this finding exhaust all the problematic issues about the role of Articles 3(5) and 21. The first and most obvious is to determine the meaning of the term "integrate". Opinion 2/15 seems to conceive the process of integration as a sort of addition of a common set of objectives to those specifically assigned to each area of external relations. Should one then conclude that acts implementing the single areas of the external action could pursue the general objectives set out by Articles 3(5) and 21 insofar as they are not inconsistent with the specific objectives of each single policy or action? If this were the case, rather than enlarging the scope of the Union's competence, the process of integration ~~rather~~ restricts it.

This counterintuitive conclusion requires an explanation. The Court did not say that the means of action of the CCP policy can be used to attain the common objectives laid down by Articles 3(5) and 21. For example, the EU is not allowed to use the common commercial policy to attain the objective of social or environmental protection. This would have been a real extension of the functional scope of that policy. Rather, the Court held that the use of the classical instruments of the commercial policy, consistent with both the substantive and the functional scope of that policy, can be made conditional upon certain standards of social or environmental protection. In this context, the word "integration" is interpreted in the sense that Articles 3(5) and 21 TEU simply ~~to~~ add certain objectives to the existing functional standard against which the lawfulness of a measure adopted under the CCP must be assessed.

For these reasons, the claim made in Opinion 1/15 is less revolutionary than it may appear. The Court did not restrict the CCP, as well as the other areas of the external policy, from pursuing the specific objectives assigned to it. Nor did it not uphold a one-fits-all effect. It simply found that the notions enshrined in Articles 3(5) and 21 extend the set of objectives assigned to each of these areas without get rid of the more specific objectives assigned to the single areas by the founding Treaties. One may be tempted to say that, in Opinion 1/15, the Court upheld a holistic effect. This approach would then require to determine the functional link between a measure and the competence to which it pertains on the basis of all the objectives: the general objectives of the external action and the more specific objectives assigned to its single areas.[24]

[23]Ibid., para 166.

[24]This conclusion was suggested by AG Bot in the *Mauritius*, who proclaimed his intention "to define the boundaries between the CFSP and the Union's other policies" and concluded that "(i)n so far as Article 21(2) TEU sets out the common objectives of the Union's external action, that

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335 The relevance of Opinion 2/15, therefore, lies in the finding that the general
336 objectives of the external action matter when determining whether a certain measure
337 falls within the functional scope of the competence on the basis of which it was
338 adopted. However, it did not clarify the relations between the general and the specific
339 objectives. In particular, in case of a conflict between these two sub-set of objectives,
340 further clarification would be needed.

341 1.5 The Role of Article 40 TEU

342 The difficulty to determine the effect of the values and principles of Articles 3(5) and
343 21 increases if one adds to the picture one of the most mysterious and less explored
344 provisions of the Treaties, namely Article 40 TEU. This provision contains in its two
345 paragraphs, two symmetrical non-affectation clauses. The first aims to protect the
346 procedure of the EU policies in the TFEU from CFSP measures having a substantive
347 content. The second, conversely, aims to protect the procedure of the CFSP from
348 politically motivated measures taken under one of the substantive TFEU policies of
349 the EU.
350 This provision probably constitutes the most rigorous application of the principle
351 of conferral and establishes a regime of separation, or even segregation, between the
352 CFSP on the one and, the other substantive policies and action of the EU on the other.
353 At its core, it prevents the CFSP to enter into matters entrusted to the substantive
354 policies of the EU and, *vice versa*, these policies from intruding into the realm of the
355 CFSP.
356 This model of relation between CFSP and TFEU EU policies is, under many
357 respects, antithetical to the intent underlying the EU's external action. Whereas the
358 latter integrates, the former segregates. More particularly, whereas the latter tends
359 to consider the various areas of the external action of the Union as a harmonious
360 set of legal bases for measures aimed to attain common objectives, the former tends
361 to conceive them as monads, self-contained and devoid of any interaction, with the
362 only exception provided for by Article 315 TFEU on restrictive measures.
363 The impact of Article 40 TEU on the integration of the EU's external action is far
364 from clear. If taken at face value, this provision would, indeed, prevent any attempt to
365 harmoniously use the various policies of the external action as a unitary tool designed
366 to promote the common values and to attain the common objectives laid down by
367 Articles 3(5) and 21. Yet, as seen above, this is not what emerges from the recent
368 case law, which seems to have attenuated the strict regime of separation between
369 the CFSP and the policies in the TFEU. The idea underlying this case law is that
370 Articles 3(5) and 21 carve out an exception to the prohibition to pursue objectives,

provision should be read in conjunction with the more specific provisions applicable to each policy in order to determine the Union policy to which a certain objective is more specifically related"; see Court of Justice, *Parliament v Council (Mauritius)*, Opinion of AG Bot, 30 January 2014, Case C-658/11, ECLI:EU:C:2014:41, paras 87–88.

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which were formerly assigned to the CFSP only, through measures taken under other EU substantive policies. However, this new judicial doctrine must still reckon with Article 40 and with its articulations described above.

Some of these issues have been considered in case C-244/17, concerning the procedure to be followed by the Council in determining the position of the EU with regard to decisions establishing the procedural rules of the cooperation council, a body set up by the Partnership and Cooperation Agreement between the EU and its MS with the Republic of Kazakhstan. It is worthwhile noticing that this agreement was concluded in mixed form and grounded, for what concerns the competence of the EU, on a combination of legal bases including the CFSP. The Council thus took the view that the position of the EU ought to be based on Article 218(9) TFEU, in conjunction with Article 31(1) TEU and, therefore, it needed to be adopted by a unanimous vote. This view was opposed by the Commission, which argued that the agreement mainly pertained to the non-CFSP areas of the external action and, therefore, the procedure had to be only determined by Article 218(9).

The AG and the Court agreed that the issue, by virtue of its instrumental character, needed to be decided on the basis of the contents and objectives of the Partnership agreement. They further agreed that the agreement contained obligations falling within the CFSP and obligations falling within the non-CFSP areas of the EU external action. Lastly, they agreed on the insufficiency of this link for the purpose of including the CFSP among the legal basis for such a decision.

This conclusion was based by the Court on the incidentality doctrine.[25] Although converging on this conclusion, the AG offered a more articulated reasoning, which also took into account Article 40 TEU. After recalling that "to comply with the spirit of Article 40 TEU, the unanimity principle of the CFSP must not be allowed to be undermined by the procedural rules of the communitised policies, nor must this unanimity principle of the CFSP be permitted to 'infect' the communitised policies", the AG turned her attention to the centre of gravity doctrine and concluded, as the Court did, that the references to the CFSP in the Partnership agreement ought to be considered as incidental vis-à-vis the provisions falling within the substantive competences of the EU. At the end of this reasoning, the AG felt the need to assess the soundness of the conclusions based on incidentality against the normative background of Article 40:

> A waiver of the reference to legal bases resulting from the area of the CFSP moreover does not lead to any weakening of the foreign and security policy component of the Partnership Agreement. This is because the aims and content of the Partnership Agreement with references to the foreign and security policy, as identified above, may not only be implemented by the conventional means of the CFSP. Rather, the commitment to democracy and the rule of law, respect for human rights, peaceful settlement of disputes and observance of international law belong to the fundamental values of the European Union, guiding it in all of its action on the international scene in accordance with the cross-cutting clause of Article 21(1)

[25] Ibid., para 46: The provisions falling within the scope of the CFSP "are not therefore of a scope enabling them to be regarded as a distinct component of that agreement. On the contrary, they are incidental to that agreement's two components constituted by the common commercial policy and development cooperation".

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> TEU, that is to say not only in the context of the CFSP, but also for example in the context of the common commercial policy (Article 207 TFEU) and development cooperation (Article 208(1) and Article 209(2) TFEU).[26]

Although formulated in the specific context of the incidentality effect, this passage may have a broader scope and unveil some still hidden aspects of this troubled relation. One obvious inference is that measures taken under a TFEU competence in pursuing the objectives laid down in Articles 3(5) and 21 TEU, are perfectly consistent with Article 40, and not only incidentally.

This holding has far-reaching implications. First, it seems to entail that the Partnership agreement could, and perhaps should, have been concluded on a legal basis which excluded the CFSP. Second, and more important for our purposes, it seems to sensibly weaken the first sentence of Article 40 and to definitively pave the way for a system where the substantive policies of the Union under the TFEU can also autonomously operate to protect the values and attain the objectives of Articles 3(5) and 21 TEU. In such a system, these substantive EU policies become instrumental to the implementation of the internal values and principles of Articles 3(5) and 21, without the need of the intermediation of acts of foreign policy.

1.6 Conclusions: Beyond the Holistic Approach

Recent case law seems to establish a legal regime of EU external action dominated by the holistic approach, albeit in the restricted sense shaped in the previous section of this chapter. According to this case law, the effect of Articles 3(5) and 21 is tangible albeit limited. Far from constituting mere political or ethical directives, these provisions do have normative effect and, in particular, they enlarge the functional scope of the substantive competences of the EU's external action. The substantive policies of the EU—those expressly included in the external action and the external aspects of all the other EU policies—are now enabled to pursue the objectives laid down by these provisions. Moreover, the values, principles and objectives flowing from these provisions enter into a dynamic interrelation with the various doctrines of competences developed by the case law. The most blatant example is the incidentality doctrine, which presumably will be massively applied throughout the full spectrum of the relations between CFSP and other EU policies,[27] and may further integrate the various external policies.

It is noteworthy that this impact is not bidirectional. Articles 3(5) and 21 only extended the functional scope of the external aspects of the EU substantive competences, thus prompting a process of erosion of the monopoly of the CFSP. They do not correspondingly enlarge the substantive scope of the CFSP, which remains,

[26] Ibid., para 77.

[27] See Court of Justice, *Commission v Council,* Judgment of the Court, 20 May 2008, Case C-91/05, ECLI:EU:C:2008:288; see Hillion and Wessel 2009, pp. 551–86.

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448 at least theoretically, a purely functional, de-materialised competence. Presumably,
449 this asymmetrical upheaval of the system of compartimentalisation between TEU
450 and TFEU competence of the EU foreign power will intensify the role of the CFSP
451 as an instrument giving guidance to the exercise of the TFEU substantive policies.[28]

452 Not all the issues arising as a consequence of this abrupt change in the traditional
453 system of the EU competences are automatically solved. In particular, the simple
454 addition of new general objectives to the specific objectives of the substantive EU
455 competences raises the problem to determine, in case of inconsistency, the relations
456 among heterogeneous objectives pertaining to the same competence.

457 On the basis of logical considerations, a number of options are available, none of
458 them, however, clearly superior to the others. A hierarchical order giving priority to
459 the general objectives over those specifically assigned to the single EU's substantive
460 policies could match the fundamental character of the general principles and values
461 of the European legal order. The problem with this view is that it may incentivise the
462 development of independent lines of foreign policy through the procedures pertaining
463 to the substantive competences of the EU. One may wonder how far the relative
464 autonomy acquired by the EU substantive policies can go in view of the recent case
465 law without altering the institutional and normative balance reflected in the Treaties
466 and, in particular, in Article 40 TEU.

467 A second option advocates the prevalence of the more specific objectives assigned
468 to the single EU substantive policies in the TFEU. Arguably, this option is less disrup-
469 tive of the classic principle of conferral, which still remains the philosophical corner
470 stone of the process of integration. By confining the pursuance of the values and
471 objectives of Articles 3(5) and 21 to the substantive scope of each single compe-
472 tence, this solution may be politically acceptable as it would maintain a role of
473 supervision for the CFSP and avoid the development of independent lines of foreign
474 policy through the different methods of EU decision-making.

475 A third, and perhaps more audacious, option is to apply the crucible approach
476 used by international law to determine the relations between the diverse methods of
477 interpretation of international treaties. The popularity of this approach in international
478 law is basically due to its indeterminacy. It consists in putting together a number of
479 methods of treaty interpretation, potentially conflicting with each other, and leaving
480 to the interpreter the task of choosing the proper method, or a combination among
481 some or all methods, on the basis of the contingencies of each particular case.

482 If applied to the objectives of the Unions' action, this option would appear to be
483 highly innovative. The political Institutions would have great discretion to choose
484 the objectives more appropriate for each specific measure falling within the scope of
485 the external action. The various objectives—those generally assigned to the external
486 action and those specifically assigned to the single policy—could be used inter-
487 changeably. However, the cost to be paid would be significantly high. The principle
488 of conferral, and more generally the entire system of the EU's competences, would
489 be fatally disrupted. If this system applied to the external aspects of the all the EU's
490 policies, the magnitude of this upheaval would correspondingly increase.

[28] On that role, in the light of the pre-Lisbon institutional practice, see Cannizzaro 2007, pp. 193–234.

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The quite disappointing conclusion is that the recent case law is still incapable to choose among the many ways following from the decision by the Treaty drafters to include general objectives, principles and values in the EU's external action. In turn, this inability seems to depend from the still controversial relationship between the political aspiration of the EU as a global actor, capable to use all the means at its disposal to pursue these objectives, principles, and values, and the restraints flowing from the principle of conferral. It is this untied knot which stays as an insurmountable obstacle in the way of every attempt to compose in a clear and coherent frame the diverse components of the EU foreign relations power.[29]

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[29] See Wessel 2020; Lonardo 2018, pp. 584–608; Larik 2013, pp. 7–22.

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