

OPEN ACCESS

Research article

The CFSP as an aspect of conducting foreign relations by the United Kingdom: With special reference to the Treaty of Amity & Cooperation in Southeast Asia

Daniel Seah*

Faculty of Laws, University College
London, United Kingdom

*Email: daniel.seah.11@ucl.ac.uk

ABSTRACT

Since the Lisbon Treaty's entry into force in 2009, the Common & Foreign Security Policy (CFSP) retains its intergovernmental character, although its legal status is no longer separate from but part of a single European Union (EU) framework. With particular focus on the United Kingdom's practice as a EU member state, this article examines the potential pressures which bear on the interplay between: (i) the CFSP's intergovernmental character; and (ii) the CFSP's current legal status within a single EU framework that established a semblance of institutional coherence; and (iii) the implications for conducting the UK's foreign relations, a consequence of its status at international law as an independent sovereign state. The article argues that pressures arise for the UK because of its legal obligations under UK law, EU law and international law, which potentially interlock, as distinct sources of law, with consequences for the flexible conduct of British foreign relations. This argument is illustrated through the case study of accession by the UK and EU (of which the UK is a member state), two separate legal persons at international law, to the Treaty of Amity and Cooperation in Southeast Asia.

Keywords: ASEAN, EU law, international law, CFSP, treaty, UK foreign relations

[http://dx.doi.org/
10.5339/irl.2015.1](http://dx.doi.org/10.5339/irl.2015.1)

Submitted: 3 June 2014
Accepted: 16 October 2014
© 2015 Seah, Licensee
Bloomsbury Qatar Foundation
Journals. This is an open access
article distributed under the terms
of the Creative Commons
Attribution license CC BY 4.0
which permits unrestricted use,
distribution and reproduction in
any medium, provided the original
work is properly cited.

I. INTRODUCTION

As a matter of international law, one conclusive criterion of an entity's statehood (i.e., the legal status of being a state) is defined by its independent ability to conduct foreign relations with other subjects of international law.¹ That a common and not single European foreign policy exists, in an intergovernmental form of the Common Foreign and Security Policy (CFSP),² is a reflection of two realities.³ The one is that member states of the European Union (EU) intend, as independent sovereign states, to conduct their own foreign relations. The other is that a single European foreign policy is an unrealistic prospect,⁴ despite and because of institutional tinkering in the Treaty of Lisbon⁵ to give a semblance of coherence to the CFSP. It is only the fusion of sovereign states and dissolution of their separate embassies, armies, treaty relations with other subjects of international law and memberships of the United Nations to form a single (federal) state, which give substance to a single European foreign policy.⁶

The CFSP had developed innovatively and pragmatically since its modest start as the European Political Cooperation (EPC) in 1970.⁷ As the European Community's (EC) common commercial policy matured, so the need for a coherent negotiating approach on related matters such as foreign policy grew.⁸ Thus began the EPC as a political process, outside the EC framework, although its discreteness gradually became less evident, as member states drew upon EC competences to address the foreign policy pursuits in EC policies.⁹ Then, in the Treaty of Maastricht (on which the CFSP was created to replace the EPC)¹⁰ and Treaty of Amsterdam,¹¹ the Council¹² and European Council¹³ were granted particular competences in incremental fashion to act in CFSP matters.¹⁴

Previously the CFSP formed one of three pillars that constituted the EU.¹⁵ With the Lisbon Treaty's entry into force,¹⁶ its pillar structure was abandoned. The EU emerged as a single framework with express legal personality¹⁷ and competence to implement a common foreign and security policy.¹⁸ EU member states are bound by a general duty of cooperation to implement all tasks consequent to the TEU and TFEU.¹⁹ This duty is two-fold. First, it calls for loyalty from

¹Art. 1 of the Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 193, which reflects customary international law.

²This article does not focus on the Common Security & Defence Policy (CSDP), which supports the EU's capacity to draw on member states' civilian and military assets for peacekeeping or conflict prevention.

³See EILEEN DENZA, INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION 33–34 (2002).

⁴In this respect, see Declarations 13 and 14 concerning the CFSP. *Consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union*, at 434–35, 6655/1/08, REV 1 (the Final Act of the Intergovernmental Conference which adopted the Lisbon Treaty). Both non-binding declarations, which seemed to have been obtained at the insistence of the British Government, state that the CFSP does not affect member states' exercise of their national foreign policies. See FOREIGN AFFAIRS COMMITTEE, FOREIGN POLICY ASPECTS OF THE LISBON TREATY (THIRD REPORT), 2007-8, H.C. 120-i, paras. 20-38 (UK).

⁵*Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities*, Dec. 13, 2007, 2007 O.J. (C 306) [*Treaty of Lisbon*].

⁶Memorandum of Eileen Denza in HL European Union Committee, The Draft Constitutional Treaty for the European Union (Session 2002–2003) (on file with author). In this article, the term “independent conduct of foreign policy” refers to the continued independence of the UK to establish its own army, embassies, and to participate in a common but intergovernmental European foreign policy via its membership of the EU.

⁷See generally DENZA, *supra* note 3, at 33.

⁸DENZA, *supra* note 3, at 35.

⁹For example, sanctions against the USSR's suppression of Poland by using art. 113 of the European Economic Community Treaty (1957), *supra* note 3, at 41–42.

¹⁰I.e., second pillar under Title V. *Treaty on European Union*, Feb. 7, 1992, 1992 O.J. (C191) [*TEU*].

¹¹*Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, Oct. 2, 1997, 1997 O.J. (C340) [*Treaty of Amsterdam*].

¹²I.e., Council of Ministers. Art. 16(2) TEU.

¹³I.e., Heads of state or government. Art. 15 TEU.

¹⁴The Council was empowered to adopt legally binding CFSP decisions under, for example, art. J.2(2) TEU. The Treaty of Amsterdam allowed the European Council to adopt legally binding CFSP acts. *Treaty of Amsterdam*, *supra* note 11, at art. 13(2).

¹⁵The EC formed the first pillar, which was “supranational” and crucially subject to the jurisdiction of the European Court of Justice. The CFSP was the second pillar. The third pillar was Cooperation in Justice & Internal Affairs.

¹⁶*Treaty of Lisbon*, *supra* note 5.

¹⁷Art. 47 TEU.

¹⁸Art. 2(4) TFEU, *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, Oct. 26, 2012, 2012 O.J. (C326).

¹⁹Art. 4(3) TEU.

member states to refrain from unilateral acts which are deleterious to the international actions of the EU.²⁰ Second, it requires cooperation from member states to ensure unity in the international representation of the EU on the international plane.²¹ A specific duty of cooperation concerning CFSP matters now exists in Article 24(3) TEU, enjoining its member states to develop political solidarity whose actions shall not impair EU effectiveness as a “cohesive force in international relations.”

These developments reflect a semblance but are not conclusive of institutional coherence concerning the CFSP’s position within a single EU framework. This is because the CFSP’s intergovernmental character is still evident, in at least three ways. First, both constituent instruments, the TEU or TFEU, conspicuously and explicitly omitted mention of the supremacy of EU law²² concerning CFSP matters. Second, compared to other EU competences, the CFSP’s competence within this single EU framework is not expressly enumerated in the TFEU as exclusive, shared or complementary.²³ Indeed, under Article 40 TEU, all EU competences are protected from CFSP competence and vice versa.²⁴ Third, the exclusion of the Court of Justice of the European Union’s (CJEU) jurisdiction in CFSP matters further underscores its structural distinctiveness as an intergovernmental activity.²⁵ In short, CFSP matters involve “high policy” and are conducted through cooperation between governments of EU member states, i.e., an intergovernmental act conducted within a single EU framework but whose legal status in relation to the supremacy of EU law is left unresolved.

To complicate matters, there is a wider perspective to consider in the form of EU external action.²⁶ The CFSP forms a part of²⁷ and operates within a wider legal framework of EU external action on the international plane.²⁸ The overarching objectives of EU external action and the CFSP are distinct yet related²⁹ and subject to Part Five of the TFEU.³⁰ This statement requires some explanation. Because EU external action and the CFSP are conceptually distinct but in reality related, we must look to the overarching objectives in the TEU to ascertain their meaning. Article 21(2) TEU contains a set of overarching objectives for EU external action; these clearly include areas such as development cooperation and humanitarian aid.³¹ Yet, some overarching objectives of EU external action are specifically at the heart of CFSP matters (preservation of peace, for example).³² Other overarching objectives of EU external action, for instance the promotion of human rights, overlap with CFSP matters in a cross-sectoral manner.³³

Finally all these objectives are subject to Part Five TFEU that contains provisions on specific areas of EU external action such as a common commercial policy, for which the EU has exclusive

²⁰Ruling 1/78, *re Convention on the Physical Protection of Nuclear Weapons, Facilities and Transports*, 1978 E.C.R. 2151.

²¹See Opinion 2/91, *re Convention No 170 of the ILO*, 1993 E.C.R. I-1061, paras. 36–38.

²²I.e., EU law is supranational and neither determined nor confined by national laws of member states. See Case 26/62, *Van Gend en Loos*, 1963 E.C.R. 1.

²³Arts. 3, 4 TFEU. Although it has been argued to be a “shared” competence, see Ramses A. Wessel & Leonard Den Hertog, *EU Foreign, Security and Defence Policy: A Competence-Responsibility Gap?*, in *THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION* 339, 344 (EUROPEAN AND INTERNATIONAL PERSPECTIVES) (Malcolm Evans & Panos Koutrakos eds., 2013).

²⁴The CFSP’s implementation “shall not affect the application of the procedures and extent of the powers of the institutions” in the exercise of the EU’s competences. Arts. 3–6 TFEU.

²⁵Art. 275 TFEU. See *infra* Sections II and V for discussion of potential exceptions.

²⁶As defined under the heading of Tit. V TEU, which states: “*general provisions* on the Union’s external action and *specific provisions* on the common foreign and security policy” [emphasis mine].

²⁷Ch. 2, tit. V TEU. It appeared that the UK had insisted on this structural separation of the CFSP from EU law in the Lisbon Treaty. See FOREIGN AFFAIRS COMMITTEE, FOREIGN POLICY ASPECTS OF THE LISBON TREATY (THIRD REPORT), 2007-8, H.C. 120-II, at Q 616 (UK) (statement of Javier Solana); FOREIGN AFFAIRS COMMITTEE, FOREIGN POLICY ASPECTS OF THE LISBON TREATY (THIRD REPORT), 2007-8, H.C. 120-II, at Q 215 (UK) (statement of Jim Murphy MP); FOREIGN AFFAIRS COMMITTEE, *supra* note 4, para. 94; and non-binding Declarations 13 and 14, i.e., CFSP does not affect the member states’ exercise of their national foreign policy, obtained by the British Government.

²⁸See ch. 2 tit. V TEU. It appeared that the UK had insisted on this structural separation of the CFSP from EU law in the Lisbon Treaty. See FOREIGN AFFAIRS COMMITTEE, *supra* note 27, at Q 616 (statement of Javier Solana); FOREIGN AFFAIRS COMMITTEE, *supra* note 27, at Q 215 (statement of Jim Murphy MP).

²⁹Arts. 21(1)-(2) TEU.

³⁰Art. 21(3) TEU.

³¹Arts. 21(2)(d)-(g) TEU.

³²Art. 21(2)(c) TEU.

³³Arts. 21(2)(a), (b), (h) TEU (on safeguarding values, support human rights and promote global governance). See generally PIET ECKOUT, *EU EXTERNAL RELATIONS LAW* 167–72 (2d ed. 2012).

competence to act.³⁴ Since the objectives of EU external action and the CFSP can overlap in a cross-sectoral manner, few subjects are likely to be purely CFSP matters. In short, CFSP matters can potentially be subject to EU law, despite its structural distinctiveness as an intergovernmental activity.³⁵

The CFSP's current form in the Lisbon Treaty is a result of diplomatic negotiations, more an afterthought and much less an outcome of deliberate planning. We now know, for instance, that the British Government received the Lisbon Treaty's proposed terms on June 19, 2007, prepared by the EU Presidency under Germany.³⁶ Four days later, EU member states reached an agreement on June 23, 2007.³⁷ It was political resolve that was obtained. By agreeing an Intergovernmental Conference (IGC) mandate on June 23, 2007, which formed the exclusive basis for the Lisbon Treaty's draft text to be published on July 23, EU member states evinced determination to complete the vexed process of constitutional reform.³⁸ It was at this stage that the IGC made explicit its aim of improving the coherence of the EU's external action,³⁹ implying that further institutional tinkering was required.⁴⁰

Against this background, this article draws attention to the potential pressures which bear on the interplay between: (i) the CFSP's intergovernmental character; (ii) the CFSP's current legal status within a single EU framework that established a semblance of institutional coherence; and (iii) the implications for EU member states when they conduct their foreign relations, as a consequence of their legal status at international law as independent sovereign states. To this extent, this article particularly examines the recent actions of one member state: the United Kingdom. Long a reluctant European since its accession to the EC, the UK entered late but is a member state of some importance.⁴¹ Of late, it has appeared increasingly disaffected with the EU.⁴² The British Government has promised the prospect of a "new settlement" for the UK's membership in the EU through a referendum by 2017, subject to significant qualifications.⁴³ The government's recent actions illustrate its national response as a EU member state to the pressures brought about by enmeshing the CFSP's intergovernmental character, which is still conducted as an aspect of the UK's independent foreign policy, with stronger expectations of the CFSP being conducted within the (apparent) institutional coherence of a single EU structure.

Accordingly, the article examines these pressures through three distinct – but related – questions, with special reference to the practice both of the EU and UK concerning its accession to the Treaty of Amity and Cooperation in Southeast Asia (TAC):⁴⁴

1. Despite a semblance of institutional coherence, how does the intergovernmental character of the CFSP manifest itself as an aspect of the UK's independent conduct of its foreign relations?
2. Because there is a semblance of institutional coherence, what is the nature of the CFSP in normative terms when it is applied to Southeast Asia, a geographical zone which is far away from the EU?
3. What are the implications for the UK's conduct of foreign relations as an independent sovereign state with Southeast Asia because the CFSP's intergovernmental character is now enmeshed with requirements of (apparent) institutional coherence within the EU?

³⁴Arts. 3(1)(e), 4(4) TFEU.

³⁵Art. 24(1) TEU (which provides for the CFSP's "specific rules and procedures" which are agreed by the European Council and Council on the basis of unanimity).

³⁶FOREIGN AFFAIRS COMMITTEE, *supra* note 28, at Q 317 (Evidence of Foreign Secretary); FOREIGN AFFAIRS COMMITTEE, *supra* note 28, at Q 217 (Minister for Europe).

³⁷FOREIGN AFFAIRS COMMITTEE, *supra* note 4, paras. 20–38.

³⁸FOREIGN AFFAIRS COMMITTEE, *supra* note 4, para. 23.

³⁹COUNCIL OF THE EUROPEAN UNION, IGC 2007 MANDATE para. 1 (2007), SG/11218.07, POLGEN74.

⁴⁰It is true that EU member states had indicated since the Laeken Declaration (2001) that the CFSP could be conducted more coherently with the community pillar. But this concern formed part of a larger debate about "competence creep" within the EU, which required clarification. See generally Aurel Sari, *Between Legalization and Organization Development: Explaining the Evolution of EU Competence in the Field of Foreign Policy*, in EU EXTERNAL RELATIONS LAW AND POLICY IN THE POST-LISBON ERA (Paul James Cardwell ed., 2011).

⁴¹*Treaty of Accession of the United Kingdom, Ireland and Denmark*, Jan. 1, 1973, 1973 O.J. (L 73).

⁴²Hold' em: Labour's Leader has made it less likely that Britain will leave the EU, *ECONOMIST*, Mar. 15, 2014.

⁴³For an overview, see Michael Emerson, *Cameron's Reality Check on Europe* (European Policy Institutes Network, Paper No. 38, 2014), available at <http://www.epin.org/new/node/63>.

⁴⁴1025 UNTS 15063 Therefore, accession to the TAC by the UK was exercised in parallel by the British Government, both as a sovereign state and an EU member state. For convenience, I shall call this "parallel accession" throughout the article.

The academic approach in this article is largely doctrinal. Therefore, it identifies primary sources of national (i.e., UK) EU and international law, explains the connection in the rules and principles between these apparently disparate sources of law, analyses the areas of difficulties, and predicts future developments.

Section II explains the CFSP's intergovernmental character in UK law. Two case studies are instanced here to show how the CFSP's intergovernmental character is manifested as an aspect of British foreign policy, nearly five years after the Lisbon Treaty's entry into force. As a matter of national (UK) law, British foreign relations are conducted by the government as the executive organ of state. The government's actions in these areas are considered matters of "high policy," a "forbidden territory," which is generally non-justiciable before the UK courts.⁴⁵ This is the context to understand the CFSP's legal status (as a matter of EU law) within UK laws. Because the CFSP is still an intergovernmental activity, it is properly the British government which continues to dominate the implementation of a common European foreign policy. Pressures arise because of EU's plans to improve its international effectiveness as a cohesive force in CFSP matters, which are more ambitious but also more ambiguous. More ambitious because EU member states are legally obliged in the constituent instruments to promote EU actions on the international plane, but which would normally involve areas belonging to a "forbidden territory" under UK law. More ambiguous because the CFSP, despite the EU's ambitions within this single framework which has a semblance of institutional coherence, is still an intergovernmental act that recognises the independence of EU member states, like the UK, to conduct its own foreign relations as sovereign states. Despite the convergence of ambition and ambiguity, within the UK the CFSP is still conducted as an aspect of British foreign relations and dominated by the British Government, at the increasing expense of Parliament and the courts. The two case studies in this section aim to demonstrate the general and somewhat conceptual approach by the government towards the CFSP.

In contrast, Section III uses as a case study the parallel accession to the TAC by the UK and EU, two legal persons as separate parties to this treaty, to illustrate the specific approach of the British Government in conducting the CFSP as an aspect of the UK's foreign relations. The British Government views the CFSP as a diplomatic multiplier of and not constraint to conducting British foreign relations with Southeast Asia and the Association of Southeast Asian Nations (ASEAN) more effectively.⁴⁶ The parallel accession is a particular example of how the government addressed the pressures of balancing the CFSP's intergovernmental character with the added demands of conducting CFSP coherently within a single institutional framework of the EU. This case study further exemplified the government's dominance of the process, in contrast to Parliament's participation, which culminated in the UK's accession to the TAC, at the bilateral (with Southeast Asia as a region) and multilateral (EU) level.

Section IV explores the potential interlocking of UK law, EU law and international law which results from the parallel accession by the UK (as an EU member state and sovereign state) and predicts potential areas of difficulties for the UK's independent exercise of its foreign relations. It uses the EU restrictive measure against Myanmar as a case study to demonstrate the connection between the three sources of law. Additionally, I also argue that the CFSP, as applied to geographical zones afar such as Southeast Asia, is principally a normative exercise aimed at projecting "liberal-meliorist,"⁴⁷ European values that reflect a particular view of international relations, which it encourages in other states outside the EU as worthy of wider application.

II. THE CFSP'S INTERGOVERNMENTAL CHARACTER WITHIN THE UK

A. Legal status of the CFSP within UK law

As an intergovernmental activity, the conduct of the CFSP is firmly confided to the government under its prerogative of foreign relations⁴⁸ – a collection of residual, undefined and discretionary monarchical powers that had over time passed to the executive branch.⁴⁹ But it is first necessary

⁴⁵R (*Abassi*) v. *Secretary of State for Foreign and Commonwealth Affairs*, [2003] UKHR 76 [106(iii)].

⁴⁶I.e., Association of Southeast Asian Nations (ASEAN).

⁴⁷See Christopher Hill, *Closing the Capabilities-Expectations Gap*, in *A COMMON FOREIGN POLICY FOR EUROPE (COMPETING VISIONS OF THE CFSP)* 19, 38 (John Peterson & Helen Sjursen eds., 1998).

⁴⁸R v. *Secretary of State for Foreign and Commonwealth Affairs*, ex p *Rees-Mogg*, [1994] Q.B. 552 [570G].

⁴⁹See generally PUBLIC ADMINISTRATION SELECT COMMITTEE, *TAMING THE PREROGATIVE: STRENGTHENING MINISTERIAL ACCOUNTABILITY TO PARLIAMENT*, 2003-4, H.C. 4 (UK).

to state the legal status of EU law in UK law. The general position is that EU law is supreme in the UK and prevails over UK laws that are inconsistent with it – a statement which it is necessary to clarify. This constraint on the sovereignty of the UK as an independent state was accepted by Parliament through implementing legislation, the European Communities Act 1972 (1972 Act).⁵⁰ EU law is not entrenched in UK law because it is supreme.⁵¹ It is supreme because of incorporation, dependent on the continuing statutory basis of the 1972 Act.⁵²

In contrast, any provision that is related or can be applied to CFSP matters in the Lisbon Treaty are expressly excluded in Section 1(2)(s) of the 1972 Act. Qualitatively, CFSP matters are insulated from the supremacy of EU law, lack a domestic foothold in UK law and consequently are not directly enforceable.⁵³ The UK's legal obligations in CFSP matters exist “out there,” on the international plane. In short, these are international legal obligations, for which the UK is bound by the government's actions under the prerogative of foreign relations.

Successive British governments have scrupulously preserved the CFSP's intergovernmental character by carving it out from EU law – where its supremacy as a doctrine bites - at least within UK law in the 1972 Act. It is on this basis that CFSP matters formed an aspect of the government's prerogative in foreign relations. It is because of this basis that CFSP matters are still recognised by Parliament and the courts as broadly part of a “forbidden territory” and therefore non-justiciable. This view still obtains after the Lisbon Treaty's institutional attempts to integrate CFSP matters more coherently within a single EU framework. And it is this change at the EU level, which throws into relief the relative inability (and willingness) of Parliament and the courts, to induce its government to account for potential implications of the pressures being exerted on the CFSP, as an intergovernmental activity within a single and (apparently more) institutionally coherent EU framework.

B. Case Study 1: Review of the balance of competences between the UK and EU 2012 (2012 Review)⁵⁴

The Government's recent actions laid bare its institutional advantage in conducting foreign relations at the expense of Parliament and the courts. These were calibrated concessions to improve public accountability of its actions. Some correlation between form and emphasis are apparent in the Government's actions under examination in this section: just as it emphasised the CFSP's potential for competence creep in UK law, so the legal form on which it bore emphasis is weaker.

In its 2012 Review, the government: (i) defined “competence” as “everything deriving from EU law that affects what happens in the UK”;⁵⁵ (ii) acknowledged the CFSP's potential competences as “wide-ranging”;⁵⁶ and (iii) intimated that in CFSP matters the balance of competences would be actively influenced by the CJEU.⁵⁷ But this Review was only an analytical exercise. At the time of writing this is an ongoing – and comprehensive – assignment to appraise the consequences of UK membership since its admission to the EC in 1973.⁵⁸ The government stressed that policy recommendations or alternative models of British relations with the EU are not expected to ensue from this Review.⁵⁹ The collected evidence (certainly in Foreign Policy) was scrupulously presented as “signposts,” without prejudice to future actions that the government might adopt.

⁵⁰*Factortame Ltd v. Secretary of State for Transport (No 2)*, [1991] 1 A.C. 603 at 658; *Thoburn v. Sunderland City Council*, [2003] Q.B. 151 at 158–59.

⁵¹Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

⁵²Section 18, European Union Act 2011 (UK), available at <http://www.legislation.gov.uk/>.

⁵³*JH Rayner (Mincing Lane) Ltd v. Department of Trade and Industry*, [1990] 2 A.C. 418 at 500B-D.

⁵⁴SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND EUROPEAN UNION 2012 [2012 REVIEW], available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35431/eu-balance-of-competences-review.pdf. See generally Michael Emerson & Steven Blockmans, *British Balance of Competence Reviews, Part I: ‘Competences about right, so far’* (EPIN, Working Paper No. 35, 2013), available at <http://www.epin.org/new/node/63>.

⁵⁵2012 REVIEW, *supra* note 54, at 13.

⁵⁶Annex 2, 11, Foreign & Commonwealth Office, *Call for Evidence: Foreign Policy Report*, Gov. UK, Nov. 28, 2012, <https://www.gov.uk/government/consultations/foreign-policy-report-review-of-the-balance-of-competences>.

⁵⁷SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND EUROPEAN UNION 38, PARA. 3.19 (2013) [REVIEW 2013].

⁵⁸Many areas of EU law are covered in this broad review, see foreword by Foreign Secretary, 2012 REVIEW, *supra* note 54.

⁵⁹2012 REVIEW, *supra* note 54, at 12.

The government wanted to determine in the 2012 Review whether cooperation in the CFSP added value to British interests, compared to unilateral action or engagement at other international fora.⁶⁰ It said: “... the global context challenges us to look afresh at the boundaries between what the EU does and what the UK does and whether current arrangements are in the UK’s national interest.”⁶¹

In other words, the CFSP is regarded as one of various diplomatic tools at the UK’s disposal to facilitate the conduct of British foreign relations. It is a multiplier of but not substitute for British interests. This concern was preponderant in the evidence that was collected for the Foreign Policy⁶² and Development Reports of July 2013.⁶³ Both Reports emphasised the political and diplomatic outcome, for the UK, of conducting its foreign relations within the institutional framework of the CFSP and EU external action.⁶⁴ Where CFSP matters overlapped with EU external action – for instance, restrictive measures against Myanmar and Iran - unanimity at the European Council was required.⁶⁵ Against both states, the UK’s foreign relations carried greater (moral) authority through association with the EU than bilateral engagement.⁶⁶ Another example concerned EU-USA relations.⁶⁷ On matters of strategic dialogue with the US, the UK benefitted from the EU’s collective diplomatic weight to assert its foreign policy positions on - for instance - the desirability of a code of conduct between ASEAN and China over the South China Sea.⁶⁸

The CFSP’s structural distinctiveness received little attention. That no bright line separated CFSP matters from external action was hailed as indicating comprehensiveness of EU action on the international plane.⁶⁹ The government exerted a creditable attempt in the 2012 Review to review the balance between an independent conduct of British foreign relations and CFSP cooperation – only if we accept its characterisation in political terms of the CFSP as a multiplier for British interests. But in legal terms, at least on foreign relations, the Reports did not assess how far, nearly five years after the Lisbon Treaty’s entry into force, the CFSP within a single EU framework is still subject to international legal methods.⁷⁰

The European Commission has insisted that the EU’s “internal order” is separate from international law and the relationship between EU and its member states are governed by EU law, a “distinct source of law.”⁷¹ This observation about the supremacy of EU law is not new but the claim about its separateness from international law is another – and more controvertible – matter. This is because now the EU also has “important law-based foreign relations powers that have a tendency to develop over time,”⁷² which a previous British Government claimed to have safeguarded when it ratified the Lisbon Treaty for the UK.⁷³ Against this background, it is clear that the Reports did not (want to) address implications for the UK’s independent conduct of foreign relations when the CFSP’s intergovernmental character is increasingly enmeshed into the requirements for greater (and apparent) institutional coherence of a single EU framework.

⁶⁰2012 REVIEW, *supra* note 54, at 5.

⁶¹*Call for Evidence: Foreign Policy Report*, *supra* note 56.

⁶²REVIEW 2013, *supra* note 57.

⁶³DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, DEVELOPMENT COOPERATION AND HUMANITARIAN AID REPORT: REVIEW OF THE BALANCE OF COMPETENCES (2013), available at <https://www.gov.uk/government/consultations/development-cooperation-and-humanitarian-aid-report-review-of-the-balance-of-competences>.

⁶⁴See also the government’s list of indicative questions to facilitate consultation. *Call for Evidence: Foreign Policy Report*, *supra* note 56, at 5.

⁶⁵On the importance of unanimity, see FOREIGN AFFAIRS COMMITTEE, *supra* note 28, at Q 575, 577 (evidence of FCO legal adviser Paul Bergman).

⁶⁶On Myanmar and Iran, see REVIEW 2013, *supra* note 57, at 41–42, 47–49.

⁶⁷REVIEW 2013, *supra* note 57, at 57, 52–55.

⁶⁸REVIEW 2013, *supra* note 57, at 52. See also US-EU Statement on the Asia-Pacific Region (July 12, 2012), <http://www.state.gov/r/pa/prs/ps/2012/07/194896.htm>.

⁶⁹REVIEW 2013, *supra* note 57, paras. 6.5, 57, 89; DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, *supra* note 63, 37–38.

⁷⁰REVIEW 2013 noted that “few competence issues were raised at this stage with regard to mixed or largely exclusive TFEU areas of external action” although evidence would be collected for specific areas such as energy and trade.” *Supra* note 57, para. 6.4, 88.

⁷¹See comments of the European Commission to the International Law Commission in *Responsibility of International Organizations (Comments and Observations Received from International Organizations)*, para. 106 at 20–21, UN Doc. A/CN.4/637 (Feb. 14, 2011).

⁷²*Id.* at para 1, 7.

⁷³FOREIGN AFFAIRS COMMITTEE, *supra* note 28, paras. 20–38.

Recall that “competence” was broadly defined by the government as “everything of EU law” that affected the UK. It also acknowledged as “wide-ranging” the EU’s potential competence to act in foreign affairs⁷⁴ but except a concise account of the complex connection between TEU and TFEU provisions, there was scant analysis of its legal consequences for the UK.⁷⁵ Still more strikingly, the CJEU’s increasingly crucial - and politicised - role in defining the boundaries of competences between the EU and member states were recognised, though tersely, and without elucidation.⁷⁶

C. Case Study 2: European Union Act 2011 (2011 Act)

A complex and technical statute,⁷⁷ the 2011 Act appeared to address the same matter of reviewing the CFSP’s intergovernmental character as an aspect of British conduct of its independent foreign relations. The government adopted a different approach, in a “harder” form of primary legislation. Through a hierarchy of referenda “locks,” the government aimed in this Act to improve accountability by changing the way it agreed, on behalf of the UK, to EU Treaty changes or decisions.⁷⁸ “Extensions” of CFSP competences through treaty changes or decisions may not be agreed by the government, without some degree of parliamentary scrutiny or even public approval in a plebiscite. Despite the form, its emphasis on (an “extension” of) competence is circumscribed. A narrow meaning of an “extension” in CFSP competence was adopted in the 2011 Act, occurring only upon an express amendment of the TFEU, which triggers the referendum requirement under Section 2(1).⁷⁹ Because (the government argued) competences were expressly granted by member states to the EU in the TFEU, and since EU bodies could only act within those areas of competences, an “extension” only occurs when there are express amendments to those already conferred by member states in the TFEU.⁸⁰ We must also be mindful that the 2011 Act is inapplicable if the government, exercising its prerogative, were to reject such Treaty changes at the outset.⁸¹

The government insisted that an “extension” within the 2011 Act did not include the CJEU’s role in interpreting CFSP competences, and dismissed concerns about its ability for activism in bolstering the EU’s role as an international legal person.⁸² In this respect, Section 4(f)(ii) is a curious provision, which states:

- 4 Cases where treaty or Article 48(6)⁸³ decision attracts a referendum
 (f) the extension of the competence of the EU in relation to—
 (ii) common foreign and security policy;

Because the TFEU only determined the *fact* and not *type* of competence for the CFSP, it is not easy to see how Section 4(f)(ii) would be applied to trigger a referendum. Article 40 TEU preserved the CFSP’s competence from other competences, namely Articles 3 to 6 TFEU. Any consequent attempt to protect CFSP competences, under Article 40 TEU, must necessarily entail an articulation of what it is in relation to other EU competences, which have been defined in the TFEU - ineluctably a task for the CJEU. How does one assess within the 2011 Act whether an “extension”

⁷⁴Call for Evidence: Foreign Policy Report, *supra* note 56.

⁷⁵See REVIEW 2013, *supra* note 57, at Appendices A & B.

⁷⁶The most direct discussion of the CJEU’s role is contained in REVIEW 2013, *supra* note 57, paras. 3.19, 6.6, 38, 39.

⁷⁷This Article only addresses the issues that implicate CFSP competences and the government’s prerogative of foreign relations. For comments on this Act’s broader impact on EU law and UK constitutional law, see Paul Craig, *The European Union Act 2011: Locks, limits and legality*, 48 CML Rev. 1915 (2011); Jo Murkens, *The European Union Act 2011: A Failed Statute* (Law Society Economy, Working Paper No. 3/2013), available at http://www.lse.ac.uk/collecti ons/law/wps/WPS2013-03_Murkens.pdf.

⁷⁸HM GOVERNMENT, THE COALITION: OUR PROGRAMME FOR GOVERNMENT 19 (2010).

⁷⁹TFEU, *supra* note 18, para. 20. All section numbers here refer to the 2011 Act.

⁸⁰TFEU, *supra* note 18, paras. 23–24.

⁸¹Para. 21 TFEU.

⁸²HC EUROPEAN SCRUTINY COMMITTEE, THE EU BILL: RESTRICTIONS ON TREATIES AND DECISIONS RELATING TO THE EU (FIFTEENTH REPORT) para. 50 (2010-11); *id.* at paras. 37–38 (FCO written evidence in this report).

⁸³Art. 48(6) TEU allows for revision to Part 3 of the TFEU, which relates to EU internal policies action. These decisions are “simplified revision procedures” because it does not require an intergovernmental conference and are regarded as “greasing the wheels of EU integration” procedures. HL SELECT COMMITTEE ON THE CONSTITUTION; (13TH REPORT), EUROPEAN UNION BILL 6 (2010–11).

of a CFSP competence had occurred, when its competence had not been defined in the TFEU, and that any prospective meaning ascribed to it by the CJEU is excluded?

A silver lining exists in Section 5(3). The executive must make a “required statement” whether in the “Minister’s opinion,” the treaty change falls under Section 4.⁸⁴ The “extension” of CFSP competence under the 2011 Act (if at all) is one matter; but perhaps Section 5(3) might offer more parliamentary scrutiny over the government’s conduct of foreign relations in the CFSP. A government is presumed to be fallible and therefore accountable.⁸⁵ When necessary, Parliament can plausibly invoke Section 5(3) to elicit a formal legal position on the CFSP’s (evolving) competence from the government. To the extent that the CFSP is subject to international legal methods, the government’s statement under Section 5(3) will form the UK’s interpretation of CFSP competence, which might be relevant as supplementary means of interpretation on the international plane.⁸⁶

The 2011 Act is an exemplar of the government’s considerable institutional advantage in conducting foreign relations, compared to the coordinate organs of state. Under Section 4(4)(a) referenda is averted if a treaty change or decision merely involves the codification of practice in the TEU or TFEU, which relates to the previous exercise of an existing competence.⁸⁷ Obviously, in matters of foreign relations it would be the government that is well-placed, with its vital access to diplomatic resources and legal advice, to determine any such codification.

To assure Parliament that Section 4(4)(a) would be applied in good faith, the government introduced the words “genuine” and “simple” to differentiate the type of codifications. “Genuine” codifications are not “extensions” under the 2011 Act, and therefore exempt from a referendum.⁸⁸

Article 189 TFEU was used as an example.⁸⁹ This provision formed the legal basis for a European space policy, “not a simple codification,” and would trigger a referendum because the previous competence⁹⁰ for the Galileo programme was based on a general provision on research and technological development.⁹¹ Contrarily, provision of macro-financial assistance to Albania was a “simple” (i.e., “genuine”) example of codification under the 2011 Act.⁹² Funds were first dispersed in 2004 under Article 352 TFEU. This enabling clause was used a further seven times to provide similar assistance to other states. Consequently, the Lisbon Treaty codified this practice in Articles 212 and 213 TFEU to cover economic, financial and technical cooperation with third states.⁹³ Parliament perceptively observed that it is more likely that competing interpretations of “codifications” under Section 4(4)(a) would be resolved in favour of EU institutions.⁹⁴

To recapitulate: both case studies, the 2012 Review and 2011 Act, represented efforts by the government to review, since the Lisbon Treaty’s entry into force, the CFSP’s intergovernmental character as an aspect of its continued but independent conduct of British foreign relations. To ensure maximum flexibility for the exercise of its prerogative in foreign relations, these actions were calibrated in terms of form and emphasis. Unless Parliament is resolved to obtain independent legal advice for the purposes in the 2011 Act, the government would remain most able to monitor any codification of practice. It is the executive branch’s assessment (i.e., the required statement, of whether they are genuine or simple codifications) on which Parliament generally depend. On the other hand, the 2012 Review is a governmental document that collected selective facts about the nature of CFSP competences and its political advantages for British foreign policy. Though the evidence might constitute a vital aid to foreign policy-making, this is neither an inevitable outcome nor realistic possibility, at least after the General Election in 2015.

⁸⁴I.e., includes sec. 4(f)(ii).

⁸⁵HALSBURY’S LAWS OF ENGLAND para. 414 (4th ed. 2000).

⁸⁶*Vienna Convention on the Law of Treaties* art. 32, 1155 U.N.T.S. 331 [*Vienna Convention*].

⁸⁷Para. 62 TFEU.

⁸⁸HC EUROPEAN SCRUTINY COMMITTEE, THE EU BILL: RESTRICTIONS ON TREATIES AND DECISIONS RELATING TO THE EU: GOVERNMENT RESPONSE TO THE COMMITTEE’S FIFTEENTH REPORT OF SESSION 2010–11 (SECOND SPECIAL REPORT) para. 27 (2010–11).

⁸⁹*Id.* at para. 24.

⁹⁰I.e., Title XVIII of the Treaty Establishing the European Community (TEC).

⁹¹HC EUROPEAN SCRUTINY COMMITTEE, *supra* note 88, paras. 24–25.

⁹²HC EUROPEAN SCRUTINY COMMITTEE, *supra* note 88, para. 26.

⁹³HC EUROPEAN SCRUTINY COMMITTEE, *supra* note 88, para. 26.

⁹⁴HC EUROPEAN SCRUTINY COMMITTEE, *supra* note 82, para. 49.

III. BALANCING THE CFSP'S INTERGOVERNMENTAL CHARACTER WITHIN A SINGLE EU FRAMEWORK

A. Current UK foreign policy concerning Southeast Asia

There has been a recrudescence of British diplomatic interest in Southeast Asia under the government of Prime Minister David Cameron.⁹⁵ The government's energetic conduct of foreign relations with the region of Southeast Asia sought to advance its *national* interests,⁹⁶ with a focus on generating prosperity for the UK.⁹⁷ There is recognition that an economic balance of power had shifted in favour of the emerging powers in Southeast Asia. Diplomatic engagement with the region must be meaningful and substantive and go beyond the characteristic impulse to balance the influence of Japan and China as regional powers.⁹⁸ Its accession to the TAC must be understood in this context.

The Foreign Secretary disavowed any prospect of "outsourcing" its foreign policy to the European External Action Service.⁹⁹ British interests would not be advanced on its behalf by others.¹⁰⁰ Where there are common goals, however, the CFSP is regarded by the government as exerting a multiplier effect to benefit British interests.¹⁰¹ This is why it agreed to a parallel accession (i.e., both as EU member state and sovereign state) to the TAC. As evidenced in the 2012 Review, the UK is confident of its latitude to enter alliances (with the EU, or not) to sustain its diplomatic objectives.¹⁰² On this basis, its exercise of the prerogative is still unconstrained even if a conflict arises between the UK's specific foreign relations goals and CFSP cooperation within the (apparent) institutional coherence of a single EU framework. This is possibly less the unassailable position than it once was because of the potential interlocking of UK law, EU law and international law, which the rest of this section explains.

B. The TAC as *lex specialis* and its potential interlocking with UK and EU law

The TAC is a foundational treaty of ASEAN.¹⁰³ It established a binding – and regional – code of conduct in treaty form to govern inter-state relations in Southeast Asia.¹⁰⁴ During the Cold War, this marked an indigenous attempt by non-communist ASEAN member states to develop friendly relations with communist non-ASEAN states (particularly Vietnam), and to fashion a minimum legal standard of peaceful coexistence in Southeast Asia. Quite possibly, the code of conduct first found expression in an early document¹⁰⁵ related to the ASEAN Declaration of a Zone of Peace and Neutrality (ZOPFAN) in 1971, which preceded the conclusion of the TAC.¹⁰⁶ More pertinently, it was in this document that the prohibition against intervention in the internal affairs of a state ("non-intervention principle"¹⁰⁷) featured prominently as an ingredient of an ASEAN code of conduct.¹⁰⁸

⁹⁵The FCO has reopened its embassy in Laos after 27 years and also increased its diplomatic strength in Myanmar, Cambodia, Malaysia, Indonesia, Vietnam and the Philippines. See William Hague, *The Role of the Foreign Office* (Sept. 2011) (transcript available at <http://www.politics.co.uk/comment-analysis/2011/09/08/william-hague-foreign-office-speech-in-full>).

⁹⁶*Looking East: UK-ASEAN Relations in the 21st Century*, FOREIGN SECRETARY WILLIAM HAGUE Annex 1 (Dec. 2011), <http://www.parliament.uk/briefing-papers/SNo6543.pdf> (last visited Dec. 1, 2014).

⁹⁷For a range of the trade activities, see statements by Foreign Secretary, *Strengthening UK relationships in Asia, Latin America and Africa to support UK prosperity and security* (Apr. 2012); Minister of State for Foreign Office, *The UK and Southeast Asia* Annex 2, n.96 (July 2012); Minister for Europe, *HC Deb* vol. 549, col. 20 (Sept. 2012).

⁹⁸Foreign & Commonwealth Office & Jeremy Browne MP, *British Competitiveness: Responding to the Rise of the Emerging Powers*, Apr. 24, 2012, <https://www.gov.uk/government/speeches/british-competitiveness-responding-to-the-rise-of-the-emerging-powers>.

⁹⁹Art. 27(3) TEU. See also *Council Decision 2010/427/EU*, July 26, 2010, 2010 O.J. (L 201/30).

¹⁰⁰Hague, *supra* note 95.

¹⁰¹REVIEW 2013, *supra* note 57, paras. 1.4–1.6, 13–14.

¹⁰²REVIEW 2013, *supra* note 57, para. 1.4.

¹⁰³Daniel Seah, *The Treaty of Amity and Cooperation in Southeast Asia: The Issue of Non-Intervention and its Accession by Australia and the USA* 11 CHINESE J. INT'L L. 785 (2012).

¹⁰⁴At international law, a "code of conduct" might be associated with non-binding agreements and thus anomalous in the context of the TAC, which is binding. But the word "code" (Penal Code, for example) is not itself conclusive of its binding quality. *Id.* at 790.

¹⁰⁵"Guidelines that would constitute a code of conduct covering relations among States within the Zone and with States outside the Zone." These 14 guidelines formed the basis of an embargoed ASEAN Senior Officials Report on developing ZOPFAN, which eventually led to the TAC: Seah, *id.* at 792–793.

¹⁰⁶Reproduced in HEINER HANGGI, *ASEAN AND THE ZOPFAN CONCEPT* 25 (1991).

¹⁰⁷This principle only potentially proscribes non-forcible activities; intervention that involved the use of force would be addressed by art. 2(4) of the UN Charter, which is not the focus of this article.

¹⁰⁸Especially Guidelines 4 & 5. HANGGI, *supra* note 106.

Most importantly, its adoption as Articles 2 and 10 TAC,¹⁰⁹ reflected consent in *treaty form* by ASEAN member states to a specific aim of proscribing non-intervention in their internal affairs, forged during the Cold War, but derived validity from general international law. Subject to what would be written shortly, this is a form of regional *lex specialis*: a legal technique of resolving apparent conflicts between differing but potentially applicable rules or principles.¹¹⁰ ASEAN member states had consistently endorsed the TAC as a code of conduct for peaceful inter-state relations,¹¹¹ an expression which it is argued here constitutes subsequent practice under the General Rule of the Vienna Convention.¹¹²

The significance of the code of conduct is also supported by ASEAN's practice of accession to the TAC, a precondition of admission as a member state to the organisation.¹¹³ A regional pattern of acceptable inter-state conduct had been established to proscribe intervention in each other's internal affairs, opposable to states in Southeast Asia.¹¹⁴ Canonical principles of international law are embedded in this code of conduct: the sovereign equality of states;¹¹⁵ territorial integrity of states;¹¹⁶ and pacific settlement of disputes.¹¹⁷ The TAC as a code of conduct, of which the non-intervention principle is a component, supports international law by facilitating stable, friendly relations in Southeast Asia on a multilateral basis with sovereign states.

For these reasons, accession to the TAC by *non-ASEAN* states¹¹⁸ had long been urged by ASEAN member states. It would reflect in treaty form firm commitment to "ASEAN values" (i.e., its code of conduct in inter-state relations) and engagement with Southeast Asia. It is unlikely to constitute subsequent practice¹¹⁹ in the absence of consistent acceptance¹²⁰ by the UK and EU, as non-ASEAN parties.

As supplementary means, however, accession by the UK and EU to the TAC suggests that there is legal recourse to the code of conduct as confirmation¹²¹ of the non-intervention principle's meaning. The principle of effectiveness in treaty interpretation also requires that the ASEAN code of conduct be given meaning, by taking into account the object and purpose¹²² of the TAC in maintaining peaceful inter-state relations within Southeast Asia. In short, there exists the potential for derogation from general international law or EU law because the TAC has normative priority as a form of regional *lex specialis*.¹²³

Different (though also related) consequences potentially arise for the UK, with implications for its independent conduct of British foreign policy. Through its parallel accession, the UK has to balance this independence preserved by the CFSP's intergovernmental character, with its obligations under EU law to conduct the CFSP under the (semblance of) institutional coherence within a single EU structure. And it is the normative, liberal-meliorist values of EU external action as contained in the TEU and TFEU, potentially in conflict with the TAC's code of conduct as *lex specialis*, on which we assess the enmeshing of the CFSP within a single EU structure and the

¹⁰⁹Respectively, art. 2(c) and art. 10 state: "Non-interference in the internal affairs of one another" and "Each High Contracting Party shall not in any manner or form participate in any activity which shall constitute a threat to the political and economic stability, sovereignty or territorial integrity of another High Contracting Party" [emphasis added].

¹¹⁰I.e., *lex specialis derogat legi generalis*. See generally Arnold Pronto & Michael Wood, *Fragmentation of International Law*, in THE INTERNATIONAL LAW COMMISSION (1999–2009) (VOLUME IV: TREATIES, FINAL DRAFT ARTICLES, AND OTHER MATERIALS) 653 para. 66 (2010).

¹¹¹For evidence of practice at ASEAN Summits and the ASEAN Regional Forum, see Seah, *supra* notes 43, 85, 103.

¹¹²I.e., *Vienna Convention*, *supra* note 86, at art. 31(3)(b).

¹¹³For dates of accession to the TAC before admission as ASEAN member states, see Seah, *supra* note 103, at n.42.

¹¹⁴See *infra* Section V for elucidation of the content of "internal affairs," which is proscribed by the non-intervention principle.

¹¹⁵Art. 2(a) TAC.

¹¹⁶Art. 2(a) TAC.

¹¹⁷Ch. IV TAC.

¹¹⁸This has also included accession by other subjects of international law such as the EU, as an international organisation.

¹¹⁹*Vienna Convention*, *supra* note 86, at art. 31(3)(b).

¹²⁰On consistency of acts to establish agreement of subsequent practice, see *Japan-Taxes on Alcoholic Beverages*, AB-1996-2, 12–13.

¹²¹*Vienna Convention*, *supra* note 86, at art. 32.

¹²²*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Merits, 1994 I.C.J. 6, paras. 51–52.

¹²³As a source of law, treaties ordinarily prevail because it is more specific. See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission)*, UN Doc. A/CN.4/L.682, at para. 105 (Apr. 13, 2006); JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 22 (8th ed. 2012).

UK's independent conduct of its foreign relations. This is the background to the legal issues that emerge from accession by the UK and EU to the TAC, to which we now turn.

C. Parallel accession by the UK to the TAC: Dominance of the British Government in the conduct of UK's foreign relations with Southeast Asia

To begin with, the TAC had already been laid before Parliament in 2007 by a previous government.¹²⁴ That was intended to be an accession by the UK but the Labour Government decided against it, then partly influenced by less than handsome relations with Myanmar.¹²⁵ In 2012, the TAC was again laid before Parliament, under a separate command paper.¹²⁶ There was no scrutiny of the TAC for the UK's interests before its Foreign Affairs Committee. Instead, Parliament was indirectly apprised of the government's motivations for accession to the TAC for the UK,¹²⁷ through scrutiny of the EU's accession to the same treaty.¹²⁸ Finiteness of parliamentary time was undoubtedly a practical constraint. Inevitably salient questions that particularly bear upon the UK's accession were not raised before the European Scrutiny Committee.¹²⁹ It was not clear, for example, whether the government made interpretative declarations to the TAC on behalf of the UK. Other non-ASEAN states such as Australia and the United States had expressly excluded their legal obligations connected to the non-intervention principle in the TAC.¹³⁰ Though the present government did not directly address the matter of interpretative declarations, the explanatory memorandum (EM) of 2007 suggested that, upon accession, formal understandings would be communicated to ASEAN to clarify the UK's interpretation of the TAC.¹³¹

The government's invocation of a scrutiny override underscored its institutional advantage in conducting foreign relations. Before Parliament formally considered this accession, the government had already agreed to the EU's accession to the TAC, as befitting its entitlement under the prerogative. Consequently the EU acceded on July 12, 2012; whereas Parliament only debated the accession on September 4, 2012. The FCO Minister explained that the government had deemed an override necessary because if the EU accession were delayed (by the UK Parliament), that would be inimical to British interests bilaterally with ASEAN and multilaterally within the EU.¹³²

The matter of CFSP competences exercised Parliament. It sought clarifications from the government whether – and to what extent – the UK had retained its “competences” under the prerogative of foreign relations: that is to say, the bundle of broadly undefined powers related to conducting foreign relations, for which the EU might also exercise as a competence under Title V of TEU, i.e., CFSP.¹³³ Parliamentary scrutiny was lackadaisical. Either because Parliament was unable or unwilling, it did not frame the debate usefully by raising the “technical” legal questions. For instance, the Council Decision of April 2012 that approved TAC accession by the EU was not purely a CFSP act.¹³⁴ Articles 37¹³⁵ and 31¹³⁶ TEU were applied together, which contained the CFSP component in this decision. But external action was invoked: Article 209(2) TFEU¹³⁷ enabled the Union to conclude “any agreement” (i.e., TAC) to achieve the objectives in Article 21 TEU¹³⁸ and Article 208 TFEU.¹³⁹ Here the government was not meaningfully pressed to explain the legal

¹²⁴2007, Cm. 7196.

¹²⁵HC Deb, *supra* note 97.

¹²⁶2012, Cm. 8294.

¹²⁷UKTS 043/2012.

¹²⁸*i.e.*, before the European Scrutiny Committee, HC Deb, *supra* note 97.

¹²⁹HC Deb, *supra* note 97, at cols. 11–12.

¹³⁰Seah, *supra* note 103, at 800–12.

¹³¹Under “reservations and declarations” of the 2007 EM, the UK would upon accession record the following “understandings” that the TAC: (i) does not affect the UK's rights and obligations in other bilateral or multilateral agreements; (ii) must be interpreted in conformity with the UN Charter; (iii) will not apply to or affect the UK's relations with states outside Southeast Asia. 2007, Cm. 7196, *supra* note 124.

¹³²HC Deb, *supra* note 97, at col. 9.

¹³³HC Deb, *supra* note 97, at cols. 3–19.

¹³⁴Council Decision 2012/308/CFSP of 26 April 2012 on the accession of the European Union to the Treaty of Amity and Cooperation in Southeast Asia, Apr. 26, 2012, 2012 O.J. (L 154/1).

¹³⁵The EU can conclude CFSP-related treaties under ch. 2 TEU.

¹³⁶Unanimity provision within the Council.

¹³⁷This broadly covers development cooperation under Title III: “Cooperation with third countries and humanitarian aid.” Development cooperation is a shared competence under art. 4(4) TFEU.

¹³⁸Includes the overarching principles and objectives that drive EU external action.

¹³⁹Art. 208(1) provides that development cooperation shall be conducted within the framework of external action's principles and objectives.

consequences, which arise upon the UK's parallel accession to the TAC. Simply put: how well did the government protect British interests in this instance by striking a defensible balance between CFSP cooperation and its independent conduct of foreign relations?

When Parliament did raise “technical” queries, it was not always on point. It asked the government whether the EU had competences to act in trade or development cooperation,¹⁴⁰ under Chapter III of the TAC.¹⁴¹ Now these activities do potentially engage the shared or exclusive competences under external action,¹⁴² but such cooperation between ASEAN member states and the EU was already conducted bilaterally and – significantly - outside the TAC framework.¹⁴³ Non-ASEAN signatories outside Southeast Asia acceded to the TAC to demonstrate their political commitment to accept in treaty form a binding code of conduct, an “ASEAN value” of inter-state relations.

Of course, the government was not obliged to steer Parliament's questions to a more useful frame of reference. It responded that for mixed agreements such as the TAC it was not standard practice to delimit the competences of the EU and member states.¹⁴⁴ It reiterated that the EU could only act within the expressly defined spheres of competences in the TEU and TFEU,¹⁴⁵ the same justification used to exclude the CJEU's role in “extending” competences under the 2011 Act. It replied that EU accession under the CFSP did not preclude accession to the TAC by member states in their own right.¹⁴⁶ It reassured Parliament that the government would be vigilant in “policing” the competence boundaries between the EU and UK by pushing for timely discussion in the Council, should the need arise.¹⁴⁷

In one sense, it was difficult for the government to be more forthcoming. Competences related to EU development or trade cooperation, for instance, which also implicated the government's exercise of the prerogative, could only be assessed on a case-by-case basis when (and if) they were conducted pursuant to the TAC.¹⁴⁸ The Minister cited an example of cooperation under Article 9 TAC (i.e., the promotion of peace and stability in Southeast Asia)¹⁴⁹ a paradigmatic CFSP matter but also belonging to the government's prerogative to conduct foreign relations. Any discussion under Article 9 TAC, the government averred, would engage Articles 21–46 of TEU.¹⁵⁰ This actually covers Title V TEU in its entirety, effectively and prospectively involving the competences of CFSP and external action.

As indicated in the Foreign Policy Report, if operating under CFSP's framework, the EU is able to support member states' foreign policy interests - in human rights protection to promote regional stability, for instance - then participation within the Union is an advantage. This is a multiplier for *British* interests.¹⁵¹ Yet this Report also conceded that the amorphousness of CFSP competences, (probably) advantageous in political terms, created practical problems of representation either by EU or its member states.¹⁵² Hence the government explained that if Article 9 TAC were discussed at an EU-ASEAN meeting, then the executive branch would determine whether the UK would participate in its own right or be content to allow the EU to speak on its behalf.¹⁵³ Another question arises: does this example of CFSP development under the TAC constitute “genuine” codification of practice and never “extensions” under Section 4f(ii) of the 2011 Act?

¹⁴⁰HC Deb, *supra* note 97, at cols. 4 & 9; EUROPEAN SCRUTINY COMMITTEE (61ST REPORT), FCO 33748: COOPERATION WITH SOUTHEAST ASIA paras. 2.9–2.10, 2.16–2.17 (2012).

¹⁴¹*I.e.*, art. 4 TAC (cooperation in economic, social and technical fields under).

¹⁴²In any event, Council Decision 2012/308/CFSP explicitly affirmed these competences on the basis of art. 212 TFEU.

¹⁴³*See* Bilateral Partnership Cooperation Agreements (PCAs) were agreed with Indonesia, COM (2013) 0230 final, Philippines, 2012 O.J. (L 134/3), and Vietnam, 2012 O.J. (L 137/1). A Cooperation Agreement (CA) was concluded with Brunei, 1985 O.J. (L 81), Laos, 1997 O.J. (L 334), Cambodia, 1999 O.J. (L 269).

¹⁴⁴HC Deb, *supra* note 97, at cols. 11–12.

¹⁴⁵HC Deb, *supra* note 97, at col. 12; EUROPEAN SCRUTINY COMMITTEE, *supra* note 140, para. 2.13.

¹⁴⁶HC Deb, *supra* note 97, at col. 6.

¹⁴⁷HC Deb, *supra* note 97, at cols. 7 & 11.

¹⁴⁸HC Deb, *supra* note 97, at cols. 12–13.

¹⁴⁹HC Deb, *supra* note 97, at cols. 6–7.

¹⁵⁰HC Deb, *supra* note 97, at col. 6.

¹⁵¹REVIEW 2013, *supra* note 57, para. 6.1.

¹⁵²REVIEW 2013, *supra* note 57, para. 2.44.

¹⁵³HC Deb, *supra* note 97, at cols. 6–7.

IV. THE POTENTIAL INTERLOCKING OF UK LAW, EU LAW & INTERNATIONAL LAW: RESTRICTIVE MEASURES AGAINST MYANMAR

A. EU engagement with Southeast Asia & ASEAN through normative values

Since 1977 the EU had engaged Southeast Asia as a dialogue partner through ASEAN.¹⁵⁴ Perhaps because of the geographical distance between the EU and Southeast Asia, the scope of EU actions is limited. First, to make good its non-existent political role in Southeast Asia,¹⁵⁵ the EU has been providing technical assistance to ASEAN.¹⁵⁶ This supplied the basis to deepen trade links and thus balance the regional influence of Japan and China.¹⁵⁷ Second, EU actions are innately normative as befits the CFSP's objectives of promoting a set of EU values which it is encouraged as worthy of wider application by less democratic states in the Third World (human rights, for instance).¹⁵⁸

It is against this background that we examine the apparent rapprochement between the EU and Myanmar.¹⁵⁹ Previously the EU had registered its opprobrium against an absence of democracy in Myanmar and serious breaches of human rights by its government through restrictive measures.¹⁶⁰ These were punitive though mainly ineffective¹⁶¹ sanctions that targeted members of the military government or its affiliates.¹⁶² Though ineffective in reality, there was no doubting its normative high-mindedness as expressed through the CFSP, which said: "... the restrictive measures ... are instrumental in promoting respect for fundamental human rights and thus serve the purpose of protecting public morals."¹⁶³

No foreign policy can be entirely devoid of normativity. That the common European policy as it exists in the CFSP articulates an understanding of democratic participation to contain particular requirements of inclusivity, an implication that it is ultimately desirable for regional and international relations, is reflected in the 2010 restrictive measure: "... the absence of substantive progress towards an *inclusive democratisation process*, notwithstanding the promulgation of a new electoral law and the announcement of the Government of Burma/Myanmar of multi-party elections to be held in 2010 ..."¹⁶⁴

As for EU member states, they may not act contrary to the restrictive measures which are "... incompatible with the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, which are common to the Member States."¹⁶⁵

Since 2012, the EU suspended all restrictive measures against Myanmar, retaining only an arms and equipment embargo to prevent internal repression by the Myanmar Government.¹⁶⁶ In 2013 the restrictive measure was lifted, again retaining the arms and equipment embargo.¹⁶⁷ Despite the improved relations between the EU and Myanmar, the CFSP objective as expressed in the recent

¹⁵⁴See generally Chien-Huei Wu, *The Evolution of EU-ASEAN Relations: Legal Framework and Policy Change*, 8 NAT'L TAIWAN U. L. REV. 329 (2013).

¹⁵⁵I.e., the EU has a limited role in the ongoing South China Seas dispute. See generally Anja Jetschke & Carla Portela, *ASEAN-EU Relations: From Regional Assistance to Security Significance*, EU-ASIA CENTRE, APR. 1, 2013, http://eu-asiacentre.eu/pub_details.php?pub_id=93.

¹⁵⁶One example is the €15 million ARISE project (ASEAN Regional Integration Support from the EU), which would include technical assistance to the ASEAN Secretariat, economic integration policy and customs matters. See *Overview of ASEAN-EU Dialogue Relations*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS, <http://www.asean.org/news/item/overview-of-asean-eu-dialogue-relations> (last visited Nov. 29, 2014).

¹⁵⁷*Regional strategy for Asia 2007–2013*, European Commission Communication, at 5, COM (2008), available at http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/asia/r15016_en.htm.

¹⁵⁸*Id.* at 4, 11. See especially *A New Partnership with Southeast Asia*, European Commission Communication, at 9, COM (2003) 399/4, available at http://trade.ec.europa.eu/doclib/docs/2004/july/tradoc_116277.pdf.

¹⁵⁹*The EU and Myanmar: A New Chapter in Bilateral Relations*, European Union Fact Sheet, COM (2013) 131021/02, available at http://eeas.europa.eu/statements/docs/2013/131021_02_en.pdf.

¹⁶⁰See *Council Regulation (EC) No 194/2008*, Feb. 25, 2008, 2008 O.J. (L 66/1).

¹⁶¹See generally Robert Howse & Jared Genser, *Are EU Trade Sanctions on Burma Compatible with WTO Law?*, 29 MICH. J. INT'L L. 165 (2008). Cf. REVIEW 2013, *supra* note 57, at 42–44 (which rated the sanctions more favourably).

¹⁶²*Council Regulation (EC) No 194/2008*, *supra* note 160.

¹⁶³*Council Regulation (EC) No 194/2008*, *supra* note 160, at Recital (6).

¹⁶⁴*Council Decision 2010/232/CFSP of 26 April 2010 renewing restrictive measures against Burma/Myanmar*, Apr. 26, 2010, 2010 O.J. (L 105/22) Recital (3) [emphasis added].

¹⁶⁵*Council Regulation (EC) No 194/2008*, *supra* note 160, at Recital (8).

¹⁶⁶*Council Decision 2012/225/CFSP of 26 April 2012 amending Decision 2010/232/CFSP renewing restrictive measures against Burma/Myanmar*, Apr. 26, 2012, 2012 O.J. (L 115/25); *Council Regulation (EU) No 409/2012 of 14 May 2012 suspending certain restrictive measures laid down in Regulation (EC) No 194/2008 renewing and strengthening the restrictive measures in respect of Burma/Myanmar*, May 14, 2012, 2012 O.J. (L 126/1).

¹⁶⁷*Council Decision 2013/184/CFSP of 22 April 2013 concerning restrictive measures against Myanmar/Burma and repealing Decision 2010/232/CFSP*, Apr. 22, 2013, 2013 O.J. (L 111/75); *Council Regulation (EU) No 401/2013 of 2 May 2013 concerning restrictive measures in respect of Myanmar/Burma and repealing Regulation (EC) No 194/2008*, May 2, 2013, 2013 O.J. (L 121/1) art. 3.

restrictive measures are still normative in nature: to disable the Myanmar Government's capacity to carry out "internal repression" by prohibiting technical or financial assistance related to military activities and equipment, save for uses concerning humanitarian purposes.¹⁶⁸

Because these democratic principles underpin the single EU framework, the CFSP's normativity has some legal basis which potentially involves the CJEU through judicial review under Article 275 TFEU. Therefore, this section uses the restrictive measure against Myanmar as a case study to illustrate potential areas of difficulties for the independent exercise of foreign relations (and the CFSP as an aspect of its prerogative) by the British Government, through the interlocking of EU law, UK law and international law.

B. The involvement of the CJEU in CFSP matters through judicial review of restrictive measures

The legality of restrictive measures against natural or legal persons is subject to review by the CJEU - one of two (new) exceptions, after the Lisbon Treaty's entry into force, to its lack of jurisdiction in CFSP matters.¹⁶⁹ Restrictive measures, such as those against Myanmar, are adopted pursuant to a CFSP measure by the Council; followed by the Council agreeing a regulation, acting by qualified majority, on a joint proposal of the High Representative of the EU and Commission.¹⁷⁰ This two-step system highlighted the CFSP's intergovernmental character by preserving member states' capacity to conduct foreign relations on their own terms, if they wished.

Now this is potentially being eroded by Article 275 TFEU. That the EU has "important law-based foreign relations powers," as the European Commission had commented, which have a "tendency to develop over time" is an observation of some salience.¹⁷¹ Article 275 TFEU *directly* empowers the CJEU to review an annulment action against a restrictive measure for illegality.¹⁷² It assigns to the CJEU the task of monitoring boundaries between CFSP and other EU competences, under Article 40 TEU. Its procedural status as a direct action prompts another question: is there a concomitant jurisdiction in Article 267 TFEU, an "implied" conferral of competence, on the CJEU to give preliminary rulings on the validity of restrictive measures?¹⁷³ A key question, not conclusively decided despite the CFSP's structural distinctiveness, is the issues of high policy which are putatively justiciable before the CJEU. These issues bear upon the conferral of competences to EU bodies (i.e., CJEU) which legitimately constitute "everything deriving from EU law that affects what happens in the UK."¹⁷⁴ They deserved careful attention but were omitted in the 2012 Review and 2011 Act.

As a legal person, a sanctioned state like Myanmar¹⁷⁵ is able to challenge the legality of the 2013 restrictive measures,¹⁷⁶ on grounds of proportionality. Whether the condition of standing is satisfied under Article 263(4) TFEU is a matter of legal submission before the CJEU - a formidable hurdle,¹⁷⁷ but not the key point here. It is the availability of legal avenues for legal persons to challenge matters of high policy that is in point, much less the outcome or political reality of seeking judicial review.

Not only is proportionality a general principle of EU law, it is also an established ground of judicial review.¹⁷⁸ By lifting its previous restrictive measures, the 2013 sanction intended as an objective to encourage the Myanmar Government to continue its policies, which in the EU's

¹⁶⁸Now see the renewal of the 2013 restrictive measure in *Council Decision 2014/214/CFSP of 14 April 2014 amending Decision 2013/184/CFSP concerning restrictive measures against Myanmar/Burma*, Apr. 14, 2014, 2014 O.J. (L 111/84).

¹⁶⁹Art. 275 TFEU.

¹⁷⁰See *Council Decision 2012/225/CFSP*, *supra* note 166, at Recital (3); *Council Decision 2013/184/CFSP*, *supra* note 167, at Recital (2); *Council Decision 2014/214/CFSP*, *supra* note 168, at Recital (2), which renewed *Council Decision 2013/184/CFSP*.

¹⁷¹UN Doc. A/CN.4/637, *supra* note 71.

¹⁷²For recent case law by CJEU concerning annulment on the basis of democratic scrutiny, see *infra* note.

¹⁷³Recall all CFSP matters are excluded under Section 1(2)(s), 1972 Act, *supra* note 52. On preliminary hearing, see Maja Brkan, *The Role of the ECJ in the Field of CFSP after the Treaty of Lisbon, New Challenges for the Future*, in *EU EXTERNAL RELATIONS LAW AND POLICY IN THE POST-LISBON ERA* 97, 111 (Paul James Cardwell ed., 2011).

¹⁷⁴2012 REVIEW, *supra* note 54.

¹⁷⁵On this point, see *infra* note.

¹⁷⁶Art. 275, second paragraph TFEU.

¹⁷⁷For requirement of legal or natural persons to demonstrate the restrictive measure is of "direct concern" and does not entail implementing measures (i.e., regulation), see *Case 25/62, Plaumann v. Commission*, 1963 E.C.R. 95.

¹⁷⁸Art. 5(4) TEU; TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 136 (2d ed., 2006).

assessment had produced positive changes.¹⁷⁹ So it is arguable that the *type* of prohibitions left in the 2013 sanction is disproportionate to its objective. Crucially and pertinently, the content of these prohibitions form the legal toehold on which to apply the TAC as a code of conduct – a relevant factor in evaluating proportionality.

C. Interlocking of the TAC as regional *lex specialis* under international law with judicial review under EU law: Human rights considerations

The EU had on accession accepted the obligations in the TAC,¹⁸⁰ now an integral part of the Union's legal order.¹⁸¹ Interpretation by the CJEU of the laws in this legal order has an "internal" quality.¹⁸² There exists in EU law an internal hierarchy such as primacy, direct applicability and effect, although it is unclear whether CFSP acts are now appropriately interpreted under the supremacy of EU law, or still subject to international legal methods and, therefore, structurally distinct in this single legal order. Rather than coexistence within this legal order, it is appropriate to characterise the TAC as subject to the Union's primary laws, its constituent treaties.¹⁸³ The Union's conduct of external action is driven by an overarching set of principles in the TEU - such as the indivisibility of human rights¹⁸⁴ and fundamental freedoms.¹⁸⁵ The EU exacts a duty of cooperation from EU member states for CFSP matters.¹⁸⁶

The TAC does not contain similar principles although it is – certainly - arguable that this is a living international instrument, for the following reasons. Qualitatively the TAC as a code of conduct had changed since the adoption in 2012 by ASEAN member states of the ASEAN Declaration of Human Rights (ADHR).¹⁸⁷ The ADHR is not binding. This is a regional framework for the protection of human rights.¹⁸⁸ Despite its form, ASEAN member states made commitments that are binding under international law: on slavery,¹⁸⁹ torture,¹⁹⁰ and international human rights instruments, to which they are parties.¹⁹¹ Protection of human rights within this regional framework is subject to two vital qualifications: the different political and cultural backgrounds of all member states;¹⁹² and ASEAN member states bear *primary responsibility* in protecting human rights and fundamental freedoms.¹⁹³

One salient question that Parliament did ask of the government during the TAC scrutiny debate touched on the implications of Article 10 TAC.¹⁹⁴ Recall that this provision (potentially) proscribed all activities, which threatened the political and economic stability of ASEAN member states.¹⁹⁵ The government argued that Article 10 was not a legal constraint on the UK or EU.¹⁹⁶ Commentaries on political conditions that occurred in any ASEAN member state, even if these fell within their internal affairs, would not breach an acceding state's obligations under Article 10.¹⁹⁷ This argument has

¹⁷⁹Council Decision 2013/184/CFSP, *supra* note 167, at Recital 2.

¹⁸⁰Art. 216(2) TFEU.

¹⁸¹Case 181/73, *Haegeman*, 1974 E.C.R. 449.

¹⁸²Allan Rosas, *International Responsibility of the EU and European Court of Justice*, in *THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION (EUROPEAN AND INTERNATIONAL PERSPECTIVES)* 139 (Malcolm Evans & Panos Koutrakos eds., 2013).

¹⁸³*I.e.*, TEU and TFEU.

¹⁸⁴Art. 21(1) TEU.

¹⁸⁵See especially art. 6(1) TEU on the Charter of Fundamental Rights of the EU, which states that the Charter carries the same weight as the constituent TEU and TFEU. Art. 6(3) TEU further states that the Charter reflects the constitutional traditions of EU member states.

¹⁸⁶Arts. 4(3), 24(3) TEU.

¹⁸⁷The ADHR is an outcome of the ASEAN Intergovernmental Commission on Human Rights, which in turn was formed pursuant to Article 14 of the ASEAN Charter (a constituent treaty), for which the Charter endorsed the TAC in art. 2, available at <http://aichr.org/documents/>.

¹⁸⁸*Id.* (*Phnom Penh Statement on the adoption of the ADHR*).

¹⁸⁹ADHR at art. 13.

¹⁹⁰ADHR at art. 14.

¹⁹¹ADHR at Preamble, art. 40.

¹⁹²ADHR at art. 7.

¹⁹³ADHR at art. 6 [emphasis added]. The word "responsibility" in art 6 ADHR is a duty, which should be distinguished from the responsibility of states for internationally wrongful acts. The term "primary responsibility" is retained throughout this article because it is the ADHR's language, but this distinction between a duty and responsibility as a secondary rule of international law must be kept in mind.

¹⁹⁴HC Deb, *supra* note 97, at cols. 14–15.

¹⁹⁵*Supra* note 109.

¹⁹⁶HC Deb, *supra* note 194, at cols. 7 & 19.

¹⁹⁷*Cf.* HC Deb, *supra* note 194, at cols. 14–15 (Martin Horwood MP's statement).

particular force in UK law. It is much easier to state that the non-intervention principle reflects customary international law,¹⁹⁸ but much harder to pin down the content of “internal affairs,” to which this principle applies. And if we accept that the TAC had established a regional *lex specialis*, then, does the non-intervention principle in Article 10 offer stronger protection against encroachments to the internal affairs of ASEAN member states, compared to customary international law? It is fortunate that we might avoid these considerations in UK law. As an unincorporated treaty and thus devoid of a domestic foothold in UK law,¹⁹⁹ accession to the TAC, which does not confer rights on individuals,²⁰⁰ was only intended to be politically meaningful for enhancing relations between the EU, UK and ASEAN.²⁰¹ To emphasise this point, the government cited as an example the suspension of EU “smart sanctions”²⁰² against Myanmar in April 2012, explaining that during the decision making Article 10 TAC “did not feature in any way.”²⁰³ Furthermore, UK relations with Myanmar – whether bilaterally or within the EU - plausibly fall within the strategic fields of foreign policy, for which UK courts acknowledge the government’s special responsibility²⁰⁴ and on these matters strive to speak with the same voice as the executive branch.²⁰⁵

On the other hand, the EU’s legal position with respect to the TAC is different. The 2013 restrictive measure expressly stated as an objective, the lifting of past sanctions to encourage the Myanmar Government to continue its positive policies.²⁰⁶ If so, are the prohibitions against technical or financial assistance on equipment proportionate to this objective?²⁰⁷ Technical assistance was defined and proscribed very broadly.²⁰⁸ The Union’s “encouragement” could have gone all the way, by suspending these residual prohibitions. It is at least arguable in law, though perhaps pushed to its acceptable limits, that fundamental freedoms and human rights in Myanmar are not constructively protected by EU fiat, through a sanction, but by the Myanmar Government, for which it bears primary responsibility.²⁰⁹ International human rights are not only the institutional concerns of the EU but, since the ADHR, also for ASEAN. A principal issue is regional differentiation. Because the EU’s competence in CFSP matters covers all areas of foreign policy,²¹⁰ the CJEU is not likely to resile from ensuring that international agreements (i.e., TAC) are compatible with EU law – a role it performs seriously and justifies, in Article 275 TFEU, the basis for its rigorous review of EU restrictive measures. Its compatibility (or not) between the two systems is a matter of legal and judicial assessment, but matters related to human rights are also acts of high policy in the conduct of foreign relations between states or international organisations.²¹¹

¹⁹⁸*Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res 2625 (XXV), (Oct. 24, 1970); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, 1986 I.C.J. 14, paras. 202 & 245.

¹⁹⁹*Attorney Gen. v. Nissan*, [1970] AC 179 at 216F-G; *JH Rayner (Mincing Lane) Ltd v. Department of Trade and Industry*, *supra* note 53.

²⁰⁰*Cf.* unincorporated treaties can be interpreted by UK courts when they are relevant for determining rights and obligations of parties under UK statutes or common law. *R (CND) v. The Prime Minister*, [2002] All E.R. (D) 245, [36].

²⁰¹HC Deb, *supra* note 97, at col. 5.

²⁰²*I.e.*, *Council Decision 2012/225/CFSP*, *supra* note 166.

²⁰³HC Deb, *supra* note 97, at col. 19.

²⁰⁴*R (Al Rawi and others) v. Secretary of State for Foreign and Commonwealth Affairs*, [2006] EWCA (Civ) 1279, [147].

²⁰⁵*British Airways v. Laker Airways*, [1984] Q.B. 142, C.A., [193D]; *Lonrho Exports Ltd v. Export Credits Guarantee Department*, [1999] Ch. 158, [179D-E].

²⁰⁶*See* Recitals in *Council Decision 2013/184/CFSP*, *supra* note 167; *Council Regulation (EU) No 401/2013*, *supra* note 167.

²⁰⁷*Council Regulation (EU) No 401/2013*, *supra* note 167, at arts. 3(2)(a) & (b) prohibited technical or financial assistance on military-related equipment to any *legal or natural persons, entity or body* in Myanmar. Given the nature of the prohibited equipment (listed in Annex 1), it is clear that this 2013 restrictive measure targeted the Myanmar Government, a legal person, and the only effective authority within Myanmar capable of deploying the prohibited equipment on a large scale. For this reason, as indicated before, it is arguable that the *Plaumann* test of direct concern was fulfilled because the restrictive measure was directed at the Myanmar State, acting through and represented by the government, which was differentiated and could not be carried out by any person at any time. *Case 25/62*, *supra* note 177.

²⁰⁸*Council Regulation (EU) No 401/2013*, *supra* note 167, at art. 1(4) includes obvious operational support in assembly and maintenance, but also includes consultancy and even *verbal* forms of assistance.

²⁰⁹ADHR at art. 6. The UN Security Council had also not adopted sanctions against Myanmar.

²¹⁰Art. 24(1) TEU; *European Parliament v. Council of the European Union*, [2012] Case 130-10 para. 62.

²¹¹*I.e.*, statement in November 2012 by US State Department on compatibility of the ADHR with universal human rights, available at <http://www.state.gov/r/pa/prs/ps/2012/11/200915.htm>.

The Council had attempted the argument that its broad discretion in determining political facts for restrictive measures could not readily be substituted by the CJEU.²¹² It failed. Where treaties do not appear to establish a sufficiently progressive standard, EU law seemed to prevail over established international agreements, such as the Chicago Convention.²¹³ Even the maintenance of international peace and security had to be balanced with an individual's fundamental rights protected under EU law,²¹⁴ though the CJEU did not elucidate in high policy what - if any - manageable legal standards exist on which to strike this balance.

Given this lack of diffidence by the CJEU to review acts of high policy, the TAC could be assessed for compatibility with general principles of EU law. As indicated already, the ADHR is part of an ASEAN code of conduct, for which the latter, in turn, constitutes for the EU supplementary means²¹⁵ of interpreting TAC provisions. We might instance the content of "internal affairs" under Articles 2(c) and 10 TAC as an example. The prohibitions in the 2013 restrictive measure, which proscribed even verbal forms of assistance, targeted possibilities of internal repression by Myanmar's Government. Whether this constitutes an intervention in Myanmar's "internal affairs" under the TAC as a code of conduct could require—as supplementary means of *confirming* its meaning—recourse to the ADHR. Already the ADHR had assigned the primary responsibility of protecting fundamental freedoms to ASEAN member states (Myanmar).²¹⁶ Its realisation is subject to political and cultural particularities in Southeast Asia;²¹⁷ and the process that facilitates its realisation must avoid double standards and politicisation, but instead embrace non-confrontation and accountability.²¹⁸ In its entirety, all these elements clarify as subsequent practice²¹⁹ the agreement of ASEAN member states to the content of "internal affairs" as contained in the non-intervention principle, which is left open-textured under Articles 2(c) and 10 TAC. Pertinently for the EU, these elements are specific and conterminous with the TAC as a code of conduct - a regional *lex specialis* - on which the Union's obligations owed to the TAC might be evaluated.

If they were so inclined at a political level, the EU and UK could fashion a position of studied ambivalence about the AHDR, to maintain strategic engagement with Southeast Asia. After all, human rights are only declaratory EU priorities with non-neighbourhood entities such as ASEAN.²²⁰ Without a domestic foothold in the UK, TAC matters (including the ADHR), which could be connected to British relations with Myanmar and ASEAN, fall within the government's prerogative of foreign relations - most likely a "forbidden territory." The UK Supreme Court did not overrule the settled law that UK courts cannot enter the "forbidden territory" by interfering with executive decisions that implicate foreign policy,²²¹ even when it concerned the extraterritorial reach of *habeas corpus*, a profoundly important constitutional matter.²²²

Now when we compare the CJEU's role in assessing the restrictive measure for proportionality, the differences are manifest. The legal instrument that supported EU accession to the TAC is based on the TEU and TFEU. So in assessing whether the sanction's objectives are proportionate to its prohibitions, the court has to finesse the conundrum of Article 40 TEU - to ensure that the implementation of CFSP acts and external action do not affect their respective competences within the context of a single legal order. Despite this delimitation of boundaries in competences, the CJEU lately ruled in Case C658/11 that because the EU is founded on democratic principles, so its external action (and CFSP matters) on the international plane must bear democratic scrutiny by the relevant institutions.²²³ In this case, the CJEU held that in concluding an agreement between the EU and Mauritius on conditions of transfer of suspected pirates, the Council failed to inform

²¹²*Pye Phyo Tay Za v. Council of the EU*, [2012] Case C-376/10 P paras. 38–39.

²¹³*Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, [2011] Case C-366/10; case note by B. Mayer, 49 CML Rev. 1113 (2012).

²¹⁴*European Commission and Others v. Yassin Abdullah Kadi*, [2013] Grand Chamber para. 87.

²¹⁵*Vienna Convention*, *supra* note 86, at art. 32.

²¹⁶ADHR at art. 6.

²¹⁷ADHR at art. 7.

²¹⁸ADHR at art. 9.

²¹⁹*Vienna Convention*, *supra* note 86, at art. 31(3)(b).

²²⁰REVIEW 2013, *supra* note 57, para. 3.48.

²²¹*R (Abassi) v. Secretary of State for Foreign and Commonwealth Affairs*, *supra* note 45. But the scope of judicial review in this area has grown. Dominic McGoldrick, *The Boundaries of Justiciability*, 59 INT'L & COMP. L.Q. 981, 1015 (2012).

²²²*Rahmatullah v. Secretary of State for Foreign Affairs and Commonwealth Affairs*, [2012] U.K.S.C. 48 [65–70].

²²³*European Parliament v. Council*, [2014] Case C-658/11 paras. 79 & 81.

the European Parliament about the process of concluding this agreement under Article 218(10) TFEU. Therefore, Council Decision 2011/640/CFSP was annulled for breaching the procedural requirement under Article 218(10) TFEU, which reflected the “fundamental democratic principle” that the decision-making process concerning EU external action must be scrutinised by the European population through Parliament as its representative intermediary.²²⁴

Thus there exists awkward prospects for EU-ASEAN (and UK-ASEAN) political relations if judicial determinations yield a finding of incompatibility between the ADHR and general principles of EU law, especially its Charter of Fundamental Freedoms. Consider this alternative scenario. If the restrictive measure were ruled disproportionate by the CJEU because the prohibitions do not respect Myanmar’s primary responsibility in protecting fundamental freedoms, is it incompatible with the EU’s normative (and possibly differing) standard of protecting similar rights under international law in a non-restrictive and adverse manner?²²⁵ Therefore, how extensive is a court’s role as decision maker in high policy concerning CFSP matters within a single EU framework, though still an aspect of the independent conduct of British foreign relations?²²⁶ On this matter, both the CJEU and UK courts have been similarly engaged but they are not similarly disposed in terms of ascertaining the “legal edge” between executive and judicial functions.²²⁷

V. CONCLUSION

Some years ago, in 1999, Eileen Denza observed how the Maastricht and Amsterdam Treaties tried to contain the CFSP’s intergovernmental character by drawing “a clear line in the sand” to preserve the competence of member states, as independent sovereign states, in their conduct of foreign relations.²²⁸ When Denza reappraised this matter again in 2004, the attempts by member states to provide for the CFSP’s intergovernmental character were no longer described as drawing “a clear line in the sand” but instead “*lines* in the sand”.²²⁹

To this extent, this article has provided an account of how one EU member state in particular - the UK - has attempted to make sense of and enforce these “lines in the sand,” as an aspect of their independent conduct of foreign relations. It instanced two case studies (the 2011 Act and 2012 Review) to illustrate the general and somewhat conceptual approach of the British Government in preserving the CFSP’s intergovernmental nature. Next, the UK’s parallel accession to the TAC aimed, as another case study, to show a specific approach of the government to address the pressures of balancing the CFSP’s intergovernmental character with the added demands of conducting CFSP coherently within a single EU framework. Finally, this article attempted to predict potential difficulties of drawing these “lines in the sand” by exploring how UK law, EU law and international law can potentially interlock, which results from the parallel accession by the UK. The normativity of CFSP actions in faraway geographical zones, such as Southeast Asia, and its prospective basis for judicial review by the CJEU are also considered, with implications for the flexibility with which a British Government might wish to conduct its own foreign relations (perhaps deviating from CFSP values) with this region.

If we accept the general presumption that a government is fallible and should be held to account (these days it seems increasingly anomalous to presume otherwise),²³⁰ then it is remarkable how the conduct of the CFSP as an intergovernmental act within the single EU framework continues to be dominated by the British Government and largely on its own terms within the UK. Equally, for all its normative high-mindedness, a union that is meaningfully founded on particular values²³¹ of equality²³² and the rule of law²³³ could not base its CFSP on these amorphous “lines in the sand,” leaving open an avenue for the CJEU to review EU acts for legality,

²²⁴*Id.* at para. 81.

²²⁵Art. 53 (level of protection), EU Charter of Fundamental Freedoms, *supra* note 185.

²²⁶*R (Al Rawi and others) v. Secretary of State for Foreign and Commonwealth Affairs*, *supra* note 204.

²²⁷*R (Al Rawi and others) v. Secretary of State for Foreign and Commonwealth Affairs*, *supra* note 204, at [148].

²²⁸Eileen Denza, *Two Legal Orders: Divergent or Convergent*, 48 *INT’L & COMP. L.Q.* 257, 283 (1999).

²²⁹Eileen Denza, *Lines in the Sand: Between Common Foreign Policy and Single Foreign Policy*, in *EUROPEAN UNION LAW FOR THE TWENTY-FIRST CENTURY: RETHINKING THE NEW LEGAL ORDER* 259 (Takis Tridimas & Paolisa Nebbia eds., 2004) [emphasis added].

²³⁰HALSBURY’S LAWS OF ENGLAND, *supra* note 85.

²³¹Art. 3 TEU.

²³²Art. 2 TEU.

²³³Art. 2 TEU.

whereas the UK courts are more diffident and less likely to enter areas encroaching on a “forbidden territory.” If accountability in the conduct of British foreign relations improves because of the CJEU’s involvement at its base in Luxembourg, a consequence of the UK’s legal obligations under the CFSP, it follows that we should reflect on the state of democratic governance in the UK.

Acknowledgements

I am grateful to both anonymous reviewers for their constructive feedback. The errors and omissions that remain are mine.