

The Foreign Affairs' Power of the European Union: All Hat and No Cattle?

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I. INTRODUCTION

Historians frequently portray transition over time as proceeding in an orderly, almost linear, fashion. Perhaps the most widely known evolutionary model of legal transmogrification is the one constructed by Sir Henry Maine in the nineteenth century: his description of the progress of Western law from status to contract.¹ Change over time is therein portrayed as a ceaseless, inevitable march of progress from less to more desirable forms of legal order. While the narrative may have certain kernels of truth imbedded within, it is as much art as it is science. While the existing state at the onset of the Western legal order can be hypothesized and the outcome discerned, the very pace of change is often nuanced and therefore difficult to chart. The trajectory may be upward, but there are undulations, rather like the stock market index over a bull run. In both instances, we may have some idea from whence we came

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1. SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 138-41 (Dorset Press 1986) (1861).

and where we arrived, but how exactly we got there is frequently a very different matter.

Similarly, the astonishing European journey from the post-Second World War period to the present has not been linear. While the success of the European Union (EU) in creating a “common market” for goods, services, and workers cannot be doubted (including avoiding the reoccurrence of armed conflict), there were moments in its history in which even the stout of heart might have despaired for the level of European integration that today exists. The blanket rejection of the voters of two of the founding nations (France and the Netherlands) to approve the so-called Constitutional Treaty in referenda in 2005 is perhaps the starkest example, but it does not stand alone as a discrete epoch in the journey in which the experiment may have been thought to have gone astray.² Indeed, the decade between 1975 and the formulation of the Single European Act (1986) has frequently been characterized as one of malaise.³

Yet just as one might argue that the darkest hour is just before the dawn, the European Economic Community rebounded. Invigorated by the completion of the internal market, the Community morphed into the EU in 1992 with the Treaty of Maastricht, which sported additional areas of competence (usually referred to somewhat pretentiously as “pillars”): Common Foreign and Security Policy (CFSP) and Justice and Home Affairs.⁴ Other significant additions were embodied in the Treaty: for example, consider citizenship of the Union and the move to a common currency and central bank.⁵ If this massive leap forward in the 1990s was not sufficiently impressive, the following decade witnessed the near doubling (at least figuratively, if not actually) of the number of stars on the blue and gold EU flag.⁶

As noted, one of the additional competencies established in the Treaty of Maastricht of 1992 is the CFSP.⁷ The modest scope of the power envisaged therein was extended in the Treaty of Lisbon, which

2. See generally Renaud Dehousse, *The Unmaking of a Constitution: Lessons from the European Referenda*, 13 CONSTELLATIONS 151 (2006) (discussing the perils and history stemming from the EU's use of referenda).

3. PAUL CRAIG & GRAÍNNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 12 (4th ed. 2008).

4. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter Treaty of Maastricht].

5. *Id.*

6. The number of Member States increased from fifteen to twenty-seven, with Croatia standing in the wings. See *Enlargement*, EUR. COMM'N, http://ec.europa.eu/enlargement/the-policy/from-6-to-27-members/index_en.htm (last visited Sept. 5, 2011).

7. Treaty of Maastricht, *supra* note 4.

came into effect in 2009.⁸ Perhaps the most salient institutional accretion was the introduction in Maastricht, and the upgrading in Lisbon, of a post currently designated as the “High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission” (High Representative).⁹ The first major test for the enhanced foreign affairs collaboration after Lisbon followed about a year thereafter: the so-called “Arab Spring.”¹⁰ This Article will discuss, chart, and ruminate upon the reaction of European nations and the EU to this momentous event, paying particular attention to the military action currently underway in Libya.

The purpose of this Article is to issue a report, albeit a preliminary one because the Libyan enterprise is at the time of this writing a work in progress, on the manner in which the Treaty of Lisbon innovations have actually functioned in the course of its first ordeal. Three points will be addressed. The first is whether the structural innovations, in particular the creation of the High Representative post, have actually facilitated a common European response to the revolts in the Arab world. My vantage point and perspective is from without the Union rather than from within, in part given the topic of this session, “The EU as a Player in a Multipolar World.” However, looking through the CFSP telescope from this end provides a reasonable view because, while the Lisbon reformers might have looked at the creation of the enhanced foreign affairs powers as simply another area for functional harmonization, outsiders (non-EU nations) also have an interest in the operation of the CFSP. For other countries—the United States, for example—it is the impact of the Treaty of Lisbon on the conduct of European foreign policy that matters. One might hope that the reforms embodied in the upgraded CFSP, particularly the post of High Representative, produce a more unified stance. Such an outcome might be positive because it is probably more straightforward for other players to deal with a single bloc with a common position on a foreign policy issue than it is to deal with multiple entities, even in circumstances in which their views do not vary significantly. On the other hand, if the structure fashioned by the Treaty of Lisbon supplements (rather than supplants) Member State positions, and the CFSP fails to mediate between them, all the reform has achieved in

8. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

9. *Id.* art. 9(E).

10. George Friedman, *Re-Examining the Arab Spring*, STRATFOR (Aug. 15, 2011, 21:34 GMT), <http://stratfor.com/weekly:20110815-re-examining-arab-spring>.

substance is to add another voice with which an American or Russian or Chinese administration must contend. In short, if Catherine Ashton, the current High Representative, cannot speak for Europe, but simply for the EU, another player has merely been added to the already crowded table where complex decisions leading to international action are forged.¹¹

The vexing matter alluded to above, “who speaks for Europe,” presents an interesting vantage point from which to observe the process of European integration, both past and present. Moreover, it may present guidance for the future: how it does and should progress. Integration proceeds incrementally. As noted, the Treaty of Lisbon builds upon the Treaty of Maastricht by creating a more robust structure for foreign affairs governance. No doubt it would be preferable if that configuration could hit the ground running, but it is perhaps fanciful to think that such a major transition within the EU could occur seamlessly. While it is not a perfect world, some efforts at integration may proceed more gracefully than others. Comparison with the adoption of the euro may provide a lesson on how further harmonization should occur. Though there is a tortured history that precedes its introduction,¹² might one learn from a review of that journey and contrast it with that of the CFSP in tackling the next European integration aspiration?

I frame the second issue as follows: whether change within the Union is best accomplished when institutional or structural change actually comports with functional reality. The consideration is whether the Union’s interest is best served where an institution is created which has some apparent, but little actual, authority and operates without a *policy consensus*. More colloquially, and with specific reference to our concern over foreign affairs, does it further the conduct of international relations when the High Representative is “all hat and no cattle?”¹³

11. Press Release, Foreign Affairs Comm. of the European Parliament, Catherine Ashton High Representative of the Union for Foreign Affairs and Security Policy, and Vice President of the European Commission Written Statement (Dec. 2, 2009), <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/567>.

12. The literature on the adoption of the euro is formidable. It is not the purpose of this Article to revisit in great detail the history of the euro, but for a useful source in setting out the history of the euro, see, for example, Sebnem Kalemli-Ozcan, Elias Papaioannou & José-Luis Peydró, *What Lies Beneath the Euro’s Effect on Financial Integration? Currency Risk, Legal Harmonization, or Trade?*, 81 J. INT’L ECON. 75 (2010).

13. I am grateful to President Bush for bringing to the forefront this Texas expression; alarmingly, it seems frequently appropriate. See Katrina vanden Heuvel, *Governor for Sale*, WASH. POST, Aug. 23, 2011, http://www.washingtonpost.com/opinions/governor-for-sale/2011/08/23/g/QAGC3vY2_story.html (explaining that “all hat and no cattle” refers to “someone [with] the swagger of success without accomplishments to back it up”).

Finally, I assert that the balance between Member State power and the Union's foreign affairs competence can be observed through the lens of the current debate over Security Council permanent membership. Space constraints and my own expertise do not allow a complete consideration of the variety of issues that a reconfiguration of the permanent membership of that august body raises. My ambitions and observations shall be more modest, eschewing the obvious question as to whether an additional European presence is warranted (after all, even excluding Russia, which perhaps should be regarded as one-half, Europe has forty percent of the seats). But the question of whether the EU should have a permanent seat in the Security Council is integrally connected to the previously mooted one. Like the first issue, whether the post of High Representative serves the purpose of facilitating the conduct of international relations, the observer of the EU in a multipolar world might want to ponder whether similar and additional presence at the meeting table in the Security Council simplifies or complicates what can at times be regarded as a difficult deliberative process. If the High Representative is without "cattle," does the international community need another "hat?"

II. AMERICAN STATES IN A MULTIPOLAR WORLD

Imagine a hypothetical scenario: the following is a paraphrase of an article that appeared in the *New York Times* on March 12, 2011. However, imagine the meeting takes place in Brussels, Kansas, as opposed to Belgium:

At an emergency meeting of American state governors the previous Friday, a statement was issued in which it was agreed to examine "all necessary options"—including armed intervention—to protect civilians should the Libyan leader, Colonel Muammar el-Qaddafi escalate attacks on rebel-held territories. No specific reference was made to the calls by New York and California for a no-fly zone over Libya, but Governor Bobby Jindal of Louisiana said he was "fundamentally skeptical." A diplomat attending the meeting reported that the only states supporting that action were, in fact, New York and California, but Louisiana is against it. Tensions at the meeting were said to be exacerbated by California's decision to grant de facto recognition to a Libyan opposition group. Louisiana refused to recognize the group as a legitimate government and Governor Jindal indicated that the recognition of California must be regarded as only creating a "political interlocutor." Even before the meeting, upon his arrival, Governor Andrew Cuomo of New York suggested that both New York and California (Governor Cuomo having met separately with Governor Jerry Brown) were considering airstrikes in Libya. At the

meeting, although both Cuomo and Brown “fought hard” to obtain authorization for a no-fly zone; Jindal was opposed, and the statement by the governors made no mention of the action.¹⁴

An update: a resolution was introduced in the American Security Council on March 17, 2011.¹⁵ Permanent members New York and California strongly supported the resolution, which passed, but Louisiana abstained.¹⁶ Immediately upon the adoption of the resolution, the armed forces of New York and California began enforcement of the no-fly zone in concert with other members of the mutual defense alliance. Although also a member of that alliance, Louisiana’s armed forces have not as yet participated.

The savvy reader will at once comprehend that the American states of California and New York serve as proxies for the United Kingdom and France, and Louisiana’s position is meant to track that of Germany. The exercise illustrates two points. The first is obvious: while Governors Cuomo, Brown, and Jindal may have views about the wisdom of intervening in Libya, they sport in such matters neither much of a “hat,” nor any “cattle.” The second pertinent point is likewise evident: President Barack Obama has the “cattle.” So why is he absent from the Americanized version of the Brussels discussion? That is simply because the view of the Union (for whom he would be a proxy) is not reported in the Brussels excerpt, and the reason simply is that it appears that the High Representative was not involved in the Brussels dialogue.

III. THE HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY AND VICE-PRESIDENT OF THE COMMISSION’S “HAT”

Although the presence of the High Representative was not manifested at either the Brussels meeting or in the Security Council debate, Catherine Ashton has spoken frequently on the Libyan crisis.¹⁷ But before rehearsing some of her statements in more detail, it is necessary to consider with more precision the function of the position by

14. Stephen Castle, *European Leaders Don't Rule Out Armed Intervention in Libyan Conflict*, N.Y. TIMES, Mar. 12, 2011, at A7.

15. Of course, no such resolution was voted upon by the hypothetical parties. But see S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011), which was adopted by the members of the United Nations Security Council.

16. *Id.*

17. There is ample discussion in this Article of Ashton’s positions and no need to provide further examples. For speeches and statements by Ashton concerning the Libyan crisis, see *Libya: Latest News*, EUR. COMM’N, http://www.ecas.europa.eu/libya/index_en.htm (last visited Aug. 1, 2011).

reference to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

The position of High Representative is created in article 18 within Title III “Provisions of the Institutions.”¹⁸ The ambit of the High Representative’s power is limited: the relevant language in the TEU provides, “He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action.”¹⁹ Within the institutional hierarchy, the High Representative’s role is to act *within the Commission* and coordinate *the Union’s external action*. No serious argument can be crafted from treaty language that the brief of the High Representative is to coordinate the foreign policy of the individual Member States, however laudable that goal might be.

But the uneducated observer might be persuaded otherwise, particularly if she pays attention to some of the High Representative’s own words. For example, on December 2, 2009, Catherine Ashton, in a written statement “based on remarks to the Foreign Affairs Committee of the European Parliament,” employed some rather ambitious language.²⁰ Though much of the presentation was directed towards her audience (Ashton stressed that her own role would also be calibrated and calculated to further the importance of the European Parliament as a player in forging the foreign affairs agenda of the Union), one could read some of her statements as suggestive of a more proactive role for the High Representative vis-à-vis the Member States. While Ashton

18. Consolidated Version of the Treaty on European Union art. 18, Sept. 5, 2008, 2008 O.J. (C 115) 26 [hereinafter TEU]:

1. The European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy. The European Council may end his term of office by the same procedure.
2. The High Representative shall conduct the Union’s common foreign and security policy. He shall contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council. The same shall apply to the common security and defence policy.
3. The High Representative shall preside over the Foreign Affairs Council.
4. The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union’s external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.

19. *Id.* art. 18(4).

20. Press Release, Foreign Affairs Comm. of the European Parliament, *supra* note 11.

conceded her authority was derived from the European Council and from the Foreign Affairs Council comprised of Member State foreign ministers, she made the following three observations that suggest that she believed that her function consisted of something more than a voice. First, Ashton described her role as one of a unifier, presumably between foreign affairs policies of the Member States,²¹ because there is power in unity: “My job is to make our voice stronger and more unified still. As underlined in the European Security Strategy, the European Union should become a more capable, more coherent and more strategic global actor.”²² To that we might add the notion that she also perceived her role as that of a power broker:

There will also be continuity in our capacity to react in situations of crisis. Our security and defence policy is now a reality, and our capacity in the area of crisis-management is making a real difference on the ground. There is much to be proud of where there was only a common will ten years ago. We do not just make declarations, we act to monitor, to protect, and to stabilise. With concrete results.²³

Finally, she expressed her function more succinctly as that of a mediator, calculated to lead European nations to common foreign policy positions:

As High Representative I do not replace member states or the Commission, but rather ensure that we combine views and input in the best interests of Europe. My ambition is to help member states and the Commission, through dialogue, to upgrade their level of consensus on CFSP. I will do so proactively, and I will not settle for the lowest common denominator.²⁴

Without doubt, Ashton’s words are measured. After all, as she reminded the European parliamentarians in her written statement, Catherine Ashton is a British Labour Party politician with an impressive pedigree. Yet it must be noted that, to the extent she believes that her role is to mediate between opposing, or not entirely consistent, Member States’ positions on matters dealing with foreign affairs, she must unearth that authority from outside the narrow language of her mandate in article 18 of the TEU, which stipulates only a role *within* the Commission.²⁵

Reference to the actual provisions is useful. Clause 2 directs that the High Representative shall conduct the Union’s common foreign

21. If not that, what else could she be unifying? The Union position need not be unified; Member States’ positions could require unification.

22. Press Release, Foreign Affairs Comm. of the European Parliament, *supra* note 11.

23. *Id.*

24. *Id.*

25. TEU art. 18.

and security policy,²⁶ while clause 4 makes it quite clear that the High Representative “shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action.”²⁷ Unless Ashton regards conducting the Union’s CFSP as somehow implying “combining views” or harmonizing Member States’ policies, her position seems to have rather modest treaty authority.²⁸

If treaty authority is not explicit, can it be extrapolated from the provisions’ context? Let us agree that though such an expansive interpretation may not be entirely spurious, its logic is by no means obvious. Regardless of whether one is persuaded by Ashton’s position, reality intervened. Given the manner in which events unfolded at the Security Council on March 17, 2011, Ashton’s apparent inability to

26. *Foreign Policy*, EUR. COMM’N, <http://www.consilium.europa.eu/policies/foreign-policy.aspx?lang=en> (last visited May 19, 2011). The following is a summary of the ambit of that power from the Council’s Web site:

The Common Foreign and Security Policy (CFSP) of the European Union established In 1993 with the Maastricht Treaty aims to: preserve peace and strengthen international security in accordance with the principles of the United Nations Charter; to promote international co-operation; and to develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms.

An important decision in terms of improving the effectiveness and profile of the CFSP was the creation of the office of High Representative for CFSP (1999) whose role it was to co-ordinate EU foreign policy and, in conjunction with the rotating Presidency, speak on behalf of the EU in agreed foreign policy matters.

By adopting the EU Security Strategy (2003) and the subsequent report on implementation (2008), the EU established a strategic approach and set clear objectives for advancing its security interests based on core European values. The strategy takes into account key concerns such as: proliferation of weapons of mass destruction, terrorism, regional conflicts and problems related to state failure, including organised crime.

With the entry in into force of the Lisbon Treaty (2009) the post of High Representative of the Union for Foreign Affairs and Security Policy was created. This post combines three functions: the EU’s representative for the CFSP, the President of the Foreign Affairs Council and a Vice-President of the Commission. At the moment, this post is held by Catherine Ashton.

Member states of the EU define the principles and general guidelines for the CFSP. On this basis, the Council adopts decisions or common approaches.

A major component of CFSP is the Common Security and Defence Policy (CSDP) which includes to date more than 20 civilian and military missions and operations on three continents.

Id.

27. TEU art. 18(4).

28. One finds no support for the proposition in the above description. See *Foreign Policy*, *supra* note 26.

“combine views” on Libyan action leaves her with a “hat,” but with very little “cattle.”²⁹

Indeed, the interpretive subtleties³⁰ that Ashton offers above would likely be very well lost upon outsiders. After all, a casual student of the Union might assume that well-worn principles of law like “direct effect” and the supremacy of Union law over Member State law that obtain in the Community pillar might fold over into Foreign Affairs and Security Policy. That proposition is at the very least debatable, and currently unsettled.³¹ Others, at times, have expressed the ambit of the CFSP in grandiose terms. For example, the Union’s ambassador to the United States, João Vale de Almeida, was reported as remarking that he is empowered “to speak on behalf of EU Council President Herman Van Rompuy, EU Commission chief Jose Manuel Barroso *and EU member states*.”³² While he was subsequently reported as referring only to areas in which the Union took a common position, such a distinction may not seem apparent to less savvy outsiders. The nuances of language matter. In that vein, particularly intriguing, and perhaps to some extent quite disturbing, is Ashton’s perplexing use of the royal “we” in the above excerpted statements. To whom, or to what entities, does it refer? Is the “we” the EU, the Member States, or, perhaps, even the High Representative’s office? A real danger for “consumer confusion” arguably exists by use of this hitherto undesignated pronoun.

An example may serve to illustrate the point. On March 14, 2011, as the Security Council drama was unfolding, Ashton found herself in

29. France and the United Kingdom voted in favor of Resolution 1973, S.C. Res. 1973, *supra* note 15. Although Germany did not vote against the Resolution, it did abstain from voting, essentially shrugging its shoulders at any suggestion of unanimity amongst EU member states with seats on the Security Council. Germany’s abstention is viewed by some as a statement of disregard for European unity and highlights the ineffectiveness of the European External Action Service (EEAS). See Richard Rousseau, *Why Germany Abstained on UN Resolution 1973 on Libya*, FOREIGN POL’Y J. (June 22, 2011), <http://www.foreignpolicyjournal.com/2011/06/22/why-germany-abstained-on-un-resolution-1973-on-libya/>.

30. See the unofficial Web site of the High Representative for another perplexing distinction: “Ashton will mainly be responsible for so-called implementation missions (*peace-keeping*), since the Union sees NATO responsible for its territorial defence (*peace-making*).” HIGHREPRESENTATIVE.EU, <http://www.highrepresentative.eu> (last visited Sept. 5, 2011).

31. This question has been raised in the context of whether CFSP instruments bear the same legislative authority as legislative instruments adopted within the mantle of the Community pillar. See Ricardo Gosalbo Bono, *Some Reflections on the CFSP Legal Order*, 43 COMMON MKT. L. REV. 337 (2006).

32. Andrew Rettman, *EU Envoy to US Flaunts New Powers*, EUOBSERVER (Aug. 11, 2010, 1:31 PM), <http://euobserver.com/9/30607> (emphasis added).

Egypt.³³ In remarks made after her meeting with Arab League Secretary General Amr Moussa, she said:

Finally, we talked about Libya and the UN Security Council, which I understand will be discussing the issues again today and the possibilities of a no-fly zone. The European Council said very clearly that *we* are doing planning for all options, but looking to the legal basis for action which is the Security Council, and *we* are looking to the Arab League statement for Saturday which has now happened and which *we* were able to discuss. I think in a sense *our* eyes are now on the Security Council, but as *we* look at the situation in Libya *we* call again for an end to violence.³⁴

Given the High Representative's claim that the Union, through her office, would undertake peace keeping, and not peacemaking, operations,³⁵ one might wonder what "cattle" "we" could possibly deliver if not unanimity amongst Member States with respect to votes in the Security Council in responding to the Libyan crisis.

IV. MODELS OF INTEGRATION: SHOULD THE INSTITUTIONAL PRECEDE THE FUNCTIONAL?

My argument thus far has been that consumers of diplomatic information in our multipolar world may be misled by pronouncements from the "High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission." Rhetoric from Ashton, even guarded language that may be suggestive of authority to speak for the Member States in high-profile matters such as Libya, may raise perceptions in the minds of other international actors that some meaningful Union action may follow. Setting aside external perceptions and expectations in this particular chapter in the progress of harmonization (and with recognition that a seamless transition in the foreign policy arena would be difficult), the episode is a useful one in considering the manner in which the implementation of functional change in the structure of the EU should proceed. It is to that issue, the second on my agenda, that we may now turn.

The underlying assumption that informs this inquiry is that the EU has achieved success nothing short of remarkable over the past half-century in bringing together sovereign states with differing languages, cultural traditions, political systems, economic structures, etc. Surely,

33. *Remarks by EU HR Ashton After Meeting Arab League SG Amr Moussa*, EUR. COMM'N (Mar. 14, 2011), http://eu-un.europa.eu/articles/fr/article_10808_fr.htm.

34. *Id.* (emphasis added).

35. HIGHREPRESENTATIVE.EU, *supra* note 30. One might argue that the Libyan venture is neither peace keeping nor peacemaking.

fissures are not absent, and stress can be discerned in times of crisis.³⁶ It is also necessary to note that the harmonization of either institutions or policies should not be assumed to proceed following a single motif. One harmonization size neither can nor should fit all. Yet, contrasting the process by which the common currency was introduced with the most recent phase of enhancement of the CFSP may be of some use in determining the more appropriate pathways along which to proceed in order to facilitate progress in other areas of harmonization.³⁷

While the establishment of a European Central Bank and the euro were not explicitly contemplated in the Treaty of Rome, considerations of money were not absent: free movement of capital was a core principle of Community law and was calculated to facilitate cross-border investment and trade.³⁸ The scope of protection against restrictions on free movement of capital is not specified in the TFEU, but in the very broad language of the Treaty reduced to particulars in annex 1 of Directive 88/361, which provides a detailed, but nonexhaustive, list of what actions constitute restrictions under the TFEU.³⁹ In common with other areas of free movement, the Treaty does permit Member States a limited ability to infringe upon free movement of capital (particularly where there are tax ramifications and where the “prudential supervision of financial institutions” is at stake)⁴⁰ subject to the usual caveat in the other free movement contexts that the measures adopted do not amount to “arbitrary discrimination or a disguised restriction on the free movement of capital.”⁴¹

Thus free movement of capital was implemented, and it probably did, albeit imperfectly, facilitate cross-border investment and trade. Yet the integrated market for goods, services, and workers was, to some extent, impeded by exchange rate risk because the value of one Member

36. See, for example, a recent statement by Roberto Maroni, the Italian Interior Minister, uttered in desperation over what he regarded as other Member States' lack of sympathy for Italy's plight over the influx of immigrants: “[I]t is better to be alone than in bad company. . . . I wonder if it makes sense to stay in the European Union.” Rachel Donadio, *Italy Lashes Out at European Union over Immigrants*, N.Y. TIMES, Apr. 12, 2011, at A9 (internal quotation marks omitted).

37. Since this Article has been presented at a conference, the monetary crisis in the eurozone has escalated, casting doubt on whether even an incremental evolutionary process of harmonizing areas of policy critical to Member State interests can be successful.

38. Consolidated Version of the Treaty on the Functioning of the European Union art. 63, Sept. 5, 2008, 2008 O.J. (C 115) 47 (formerly Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, art. 56) [hereinafter TFEU].

39. Council Directive 88/361, Annex 1, 1988 O.J. (L 178) 1 (EC).

40. TFEU art. 65(1)-(2). These restrictions are justified on the grounds of public policy/public security and are akin to the exceptions permitted in other free movement provisions. *Id.*

41. *Id.* art. 65(3).

State's currency fluctuated against that of the others. As early as the late 1960s, aspirations towards remedying that shortcoming emerged, due in part to the realization that exchange rate uncertainty hindered cross-border economic activity.⁴² Discussions in the Community proceeded towards creating the Economic and Monetary Union (EMU). Options from fixed exchange rates to a single currency were mooted. The Union (or the Member States) realized, however, that a common currency required something more than free movement and that coordination between national banks and a common monetary policy was critical.⁴³

The first attempt to set exchange rates in the Community was more modest. The pathway selected was to allow currencies to float against each other, but generally within a narrow 2.25% band.⁴⁴ This EMU morphed into the comprehensive European Monetary System (EMS) in 1978, which created the European Currency Unit (ECU).⁴⁵ The Exchange Rate Mechanism (ERM) was established to peg the value of national currencies to the ECU.⁴⁶ While the system was more rigorous than its predecessor, alterations and fluctuations in value were allowed, again within bands.⁴⁷

Governmental institutions (be they Union or Member State) cannot control events; they must, however, necessarily respond. Both the EMU and the EMS were required to weather periodic economic crises over which the Union and the established system had little control. Market pressure led to the collapse of the ERM in the currency crises of 1992-93, largely because Member States were forced to act in their own national interest. Existing bands were breached, leading ultimately to the devaluation of the currencies of the nations with more fragile economies.⁴⁸

While the episodes sketched above cannot be regarded as the Community's finest hour, the structural weaknesses from which the ERM suffered made it clear that, in a properly functioning world, horses come before carts: *common economic policies have to precede monetary union*. Indeed, even before its demise, the existing edifice was not regarded as capable of enduring.⁴⁹ Various efforts were already underway

42. CRAIG & DE BÚRCA, *supra* note 3, at 728.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 728-29.

48. *Id.* at 729.

49. *Id.*

to rethink the basic structure that monetary union should assume.⁵⁰ These discussions appear to have recognized that before constructing any form of monetary union, whether a single currency or fixed exchange rates, some coordinated, if not strictly unified, approach to setting fiscal policy amongst the participants had to be fashioned.⁵¹ Though recent events in Greece, Ireland, and Portugal suggest only limited success was ultimately achieved, the need to control national budget deficits was viewed as crucial to creating stability. Likewise, a monetary system requires a coordinated monetary policy.

These preliminary discussions led to the successful creation of a more enduring EMU in the Treaty of Maastricht than its 1960s predecessor. Its creation was embodied in a process (as opposed to being the product of a single event), the complex details of which need not concern us here. Suffice it to say that the current phase of the EMU has succeeded (at least thus far) because, unlike its predecessors, economic coordination *accompanied* institution building. Those who crafted Maastricht's EMU recognized that price stability must be maintained, interest rate convergence assured, and budget deficits controlled. Indeed, they stipulated in detail the need for, and the means to attain, policy coordination in a protocol attached to the Treaty.⁵² To be sure, this

50. *Id.*

51. *Id.*

52. Treaty on European Union, Protocol on the convergence criteria referred to in Article 109j of the Treaty Establishing the European Community, July 29, 1992, 1992 O.J. (C 191) 1 (as in effect 1993):

ARTICLE 1

The criterion on price stability referred to in the first indent of Article 109j(l) of this Treaty shall mean that a Member State has a price performance that is sustainable and an average rate of inflation, observed over a period of one year before the examination, that does not exceed by more than 1½ percentage points that of, at most, the three best performing Member States in terms of price stability. Inflation shall be measured by means of the consumer price index on a comparable basis, taking into account differences in national definitions.

ARTICLE 2

The criterion on the government budgetary position referred to in the second indent of Article 109j(l) of this Treaty shall mean that at the time of the examination the Member State is not the subject of a Council decision under Article 104c(6) of this Treaty that an excessive deficit exists.

ARTICLE 3

The criterion on participation in the Exchange Rate Mechanism of the European Monetary System referred to in the third indent of Article 109j(l) of this Treaty shall mean that a Member State has respected the normal fluctuation margins provided for by the Exchange Rate Mechanism of the European Monetary System without severe tensions for at least the last two years before the examination. In particular, the Member State shall not have devalued its currency's bilateral central rate against any other Member State's currency on its own initiative for the same period.

economic policy coordination was supported by the fashioning of institutions: first the European Monetary Institute and then the European Central Bank.

Is there a lesson to be learned from the process of monetary union, the barebones of which has been sketched above, which might have been applied to facilitate the transition from a more modest to an enhanced role for the EU in foreign affairs under the Treaty of Lisbon version of the CFSP? I would argue in the affirmative. The lesson to be learned is policy before institutions: cattle before hat. Before the CFSP as an institution can contribute to an international dialogue in response to a crisis, it must mediate the differing views of Member States to produce a common policy or, at the very least, a least common denominator. My point is simply that without policy coordination, institutions themselves, even as impressive as they are, could not have brought about the desired goal: monetary union.

By contrast with the EMU, the CFSP does not appear to have much in the way of a coordinated policy. Nor does it have a robust supporting infrastructure. While article 27(3) of the Treaty of Lisbon does establish the European External Action Service (EEAS),⁵³ this body is currently a work in progress.⁵⁴ Ashton is responsible for appointing staff drawn from three sources: the General Secretariat of the Council, the Commission, and national diplomatic services.⁵⁵ By Council Decision, the staff of the

ARTICLE 4

The criterion on the convergence of interest rates referred to in the fourth indent of Article 109j(1) of this Treaty shall mean that, observed over a period of one year before the examination, a Member State has had an average nominal long-term interest rate that does not exceed by more than 2 percentage points that of, at most, the three best performing Member States in terms of price stability. Interest rates shall be measured on the basis of long term government bonds or comparable securities, taking into account differences in national definitions.

53. See TEU art. 27(3):

In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.

54. Even the location of its offices was a subject of considerable controversy. See Andrew Rettman, *Ashton Set To Take New Office in EU Nerve Centre*, EUOBSERVER (Aug. 24, 2010, 2:21 PM), <http://www.euobserver.com/9/30666>.

55. TEU art. 27(3).

EEAS is managed by an executive secretary general.⁵⁶ While the hope may be that policy proposals fashioned by a technocratic elite might have more influence within Union institutions, it is not clear how the EEAS will actually, according to the Treaty, “work in cooperation with the diplomatic services of the Member States”⁵⁷ or as a Council press release promises, “ensure close cooperation with the Member States.”⁵⁸ These aspirations aside lead the observer of the EU in a multipolar world to query whether it would have been more sensible to have created the EEAS (and perhaps awaited their unifying expertise) before the High Representative began to take an active role on the international stage.⁵⁹

V. THE EU AND THE UNITED NATIONS: EUROPEAN SEATS AROUND THE SECURITY COUNCIL’S TABLE

The reforms to the CFSP in the Treaty of Lisbon and, in particular, the establishment of the post of “High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission” also raises the question of how the EU should be represented at the United Nations. Recently, the EU has achieved one of its cherished aspirations: its observer status in the General Assembly was upgraded.⁶⁰ The General Assembly voted:

[T]o adopt the modalities set out in the annex to the present resolution for the participation of the representatives of the European Union, in its capacity as observer, in the sessions and work of the General Assembly and its committees and working groups, in international meetings and

56. The exact employment data for the EEAS is unpublished, but the 2011 budget requested 3720 staff slots (1643 policy and operational officers plus 2077 “additional staff”). See *Daily Hansard*, PARLIAMENT.UK (July 15, 2011), <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110715w0001.htm#11071555000063>; Andrew Rettman, *France and Germany Eye Top Job in EU Diplomatic Corp*, EUOBSERVER (Nov. 3, 2010, 2:05 PM), <http://euobserver.com/18/29659>.

57. TEU art. 27(3).

58. Press Release, General Secretariat of the Council of the EU, Background—The High Representative for Foreign Affairs and Security Policy/The European External Action Service (Nov. 2009), http://www.consilium.europa.eu/uedocs/cmsUpload/Background-HighRepresentative_EN.pdf.

59. It should be noted that the creation of such a large additional foreign affairs bureaucracy in Brussels at the same time in which Member States are endeavoring to reduce public expenditure (and therefore cut existing positions) has raised consternation, particularly in the United Kingdom.

60. *General Assembly Designates Friendship Day and Grants EU Higher Participation Status*, UN NEWS CENTRE (May 3, 2011), <http://www.un.org/apps/news/story.asp?NewsID=38261&Cr=general+assembly&Cr1>.

conferences convened under the auspices of the Assembly and in United Nations conferences.⁶¹

To clarify the extent of its enhanced role, although the Union does not have the right to vote or to put forward candidates, the annex of the General Assembly Resolution accords the Union the rights to present proposals and amendments agreed to by EU Member States (but not to challenge decisions of the Assembly's presiding officer), to be invited to participate in the general debate of the General Assembly, to speak during sessions, to allow Union communications relating to the sessions and work of the Assembly to be circulated directly as documents of the Assembly, to reply, and to raise points of order.⁶²

This significant hurdle at the United Nations successfully cleared, one may ponder whether the logical next step for the EU is permanent membership in the Security Council. One could fill volumes rather than pages in tackling one of the most vexing issues with which students of international organizations must grapple: whether the structure of the Security Council should be altered and, if so, what form the revisions should assume. The membership conundrum is all the more baffling because of the rather stable history of the body: change in membership has not come easily to the Security Council. On the other hand, one could argue that "transmogrification" has occurred: the seat allocated to China moved west (from the island of Taiwan to the mainland) and the

61. G.A. Res. 65/276, U.N. Doc. A/RES/65/276 (May 3, 2011).

62. *Id.* annex:

Annex

Participation of the European Union in the work of the United Nations

1. In accordance with the present resolution, the representatives of the European Union, in order to present positions of the European Union and its member States as agreed by them, shall be:
 - (a) Allowed to be inscribed on the list of speakers among representatives of major groups, in order to make interventions;
 - (b) Invited to participate in the general debate of the General Assembly, in accordance with the order of precedence as established in the practice for participating observers and the level of participation;
 - (c) Permitted to have its communications relating to the sessions and work of the General Assembly and to the sessions and work of all international meetings and conferences convened under the auspices of the Assembly and of United Nations conferences, circulated directly, and without intermediary, as documents of the Assembly, meeting or conference;
 - (d) Also permitted to present proposals and amendments orally as agreed by the States members of the European Union; such proposals and amendments shall be put to a vote only at the request of a Member State;
 - (e) Allowed to exercise the right of reply regarding positions of the European Union as decided by the presiding officer; such right of reply shall be restricted to one intervention per item.

Soviet Union's seat was reallocated to Russia (where, at least arguably, it had always been).

Regardless of whether the dedication of a permanent seat in the Security Council to the EU is somehow rational and justifiable, political concerns intervene. To enlarge membership, even (or perhaps especially) by one, would require a comprehensive rethinking of the criteria for permanent membership of the Security Council. After all, there are other candidates for such recognition so an enlargement exercise would surely require a consideration of the claims of other countries, particularly those with emerging, and now powerful, economies. Brazil and India, in particular, come to mind. Moreover, balance is necessary between continents. The General Assembly was careful not to appear Eurocentric when it upgraded observer status for the EU in the General Assembly, noting that other regional organizations could seek similar observer status. Such equality, however, would hardly be feasible around the much smaller table in the Security Council.

There is an alternative to the enlargement of the permanent membership of the Security Council, and that is additional transmogrification reminiscent of those examples referred to above. Could not an existing seat move to the EU? There are, after all, no shortage of European seats currently around the table. This solution has been already considered. In an article in the *Harvard International Review*, Commander Norman Denny mooted the issue of Security Council permanent membership for the EU.⁶³ While he recognized the claims of "emerging world powers," Denny found a solution in what I have called transmogrification.⁶⁴ First, he assessed the EU's claim.⁶⁵ Denny illuminated the enhanced CFSP that was implemented in the Treaty of Lisbon.⁶⁶ He also noted the EU's weight, both in terms of population (500 million) and economy (thirty percent of the world's Gross Domestic Product (GDP)).⁶⁷ Yet he adopted a curious solution: France should cede its permanent seat in the Security Council to the EU.⁶⁸ While he conceded that support in France for such a proposition was "unlikely,"⁶⁹ others might regard it as odd, given the fact that there

63. Norman Denny, *There Is a Seat on the UN Security Council for the European Union—The French Seat*, HARVARD UNIV. (Dec. 22, 2010), <http://www.hir.harvard.edu/pressing-change/there-is-a-seat-on-the-un-security-council-for-the-european-union-the-french-seat>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

was another candidate for equally unlikely generosity: the United Kingdom. To be sure, Denny did not forget the United Kingdom, but he preferred British continued presence as a permanent member to that of the French on two grounds: first, due to the United Kingdom's having a larger GDP than France; and second, owing to a lesser level of integration of the United Kingdom into the EU.⁷⁰

Both these points require consideration and, perhaps, clarification. Regarding GDP, Denny argued that the United Kingdom's continued membership (as opposed to that of France) could be supported based upon its share of EU GDP in 2010, which was modestly higher than that of France.⁷¹ The mathematics supporting the proposition are questionable given both the International Monetary Fund and the World Bank estimates that France's GDP exceeds that of the United Kingdom by more than one percent.⁷² Of course, the GDP card is a difficult one to play, since Russia's GDP is close to half as much as France or the United Kingdom; and the GDP of Japan is more than that of France and the United Kingdom combined (and then there is Germany).⁷³

Economic considerations aside, the second point that made France, rather than the United Kingdom, the logical choice was how each nation went about the business of exercising power in the area of international affairs. In the first place, Denny argued that France's influence was limited to Francophone regions (primarily, he noted, in Africa).⁷⁴ There may be something to that assertion, though its current lead role in Libya may give one pause to reflect. But Denny argued that France "exercises a level of influence through its seat on the Security Council beyond that justified by its military, political, or economic ranking in the world."⁷⁵ If this cooperative approach is a justification for removing France from Security Council permanent membership, it creates perverse incentives to international actors: being a team player may limit a nation's potential for exercising influence through permanent membership in the Security Council. Finally, Denny also argued that the United Kingdom is not "a

70. *Id.*

71. *Id.*

72. See *World Economic Outlook Database: September 2011 Edition*, INT'L MONETARY FUND, <http://www.imf.org/external/data.htm> (follow "Data" hyperlink; then follow "World Economic Outlook Databases (WEO)" hyperlink; then follow "World Economic Outlook Database September 2011" hyperlink); *World Bank Data*, WORLD BANK, http://databank.worldbank.org/ddp/home.do?Step=2&id=4&hActiveDimensionId=WDI_Series# (listing France's GDP as over one percent higher than the United Kingdom's GDP).

73. *Gross Domestic Product 2010*, WORLD BANK, <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (last visited Oct. 13, 2011).

74. Denny, *supra* note 63.

75. *Id.*

fully integrated EU member.”⁷⁶ To be sure, the United Kingdom has retained its own currency and often expresses economic and political views that are out of the European mainstream, but in the area of the exercise of foreign affairs, it is as fully integrated into the CFSP as is France.

The idea of the transmogrification of a European seat is intriguing. Here I am not arguing that geopolitical and economic reality suggests that the United Kingdom *rather* than France should be shown the door to the Security Council chamber, at least as a permanent member, and be replaced by the EU. Rather, a focus on *which one* should exit is in my view misplaced; the conversation should turn from which one to whether *both* should cede their places at the table before the EU is seated. In the preamble to its recent resolution enhancing the EU’s observer status, the General Assembly made the following point: “that it is for each regional organization to define the modalities of its external representation.”⁷⁷ While it is for the international community to decide which nations sit around the table at the Security Council on a permanent basis, it is for the EU to decide whether it should be Member States *or* the Union. If Ashton’s representation that the goal of the CFSP is to arrive at common positions on matters of international affairs is to be realized, then perhaps a second European seat (for an EU member at least) must be considered superfluous.

VI. CONCLUSION

Much of the thrust of this Article is critical of the implementation of the CFSP as it pertains to the exercise of Union-based foreign policy initiatives, particularly with regard to the High Representative’s representations in response to the “Arab Spring” and the intervention in Libya. But my argument has been undertaken with the full realization (and with considerable admiration) that in many areas of its competence and its agenda, the Union has made remarkable strides. One way of placing the debate on any single aspect of Union action in proper context is to ask the broader question: who amongst us would prefer to return to the Europe of the first half of the twentieth century? Without a doubt the enhancement of the CFSP was an ambitious undertaking. While the Union has impinged upon Member State sovereignty in a variety of critical areas, there may be some aspects of the exercise of foreign relations powers that cut more deeply into closely held notions of

76. *Id.*

77. G.A. Res. 65/276, *supra* note 61, pmb1.

appropriate national dominion. While one might readily concede that creating a “common” policy in the area of foreign affairs was a particularly tough row to hoe, it was one the Union itself selected to till.

Accomplishments acknowledged and difficulties conceded, two points bear consideration by way of conclusion. One is practical, the other more theoretical. The first is simply that the High Representative, by promising more than can be delivered by the Union, creates an interesting permutation of that old saw the “moral hazard.” Taking positions in the way Ashton has, as highlighted in the above discussion, might lead one to conclude that the Union’s CFSP is able to deliver more in the way of coherence than it actually can. Arguably, such pronouncements may incline third-party independent actors to a course of action in reliance that Member State action will accurately reflect EU pronouncements. Perhaps this particular argument is more academic than it is practical, and I have grossly underestimated the savvy or realism of other international actors. To pursue the expression in my title: they are aware of the ratio between the High Representative’s “hat” and her “cattle.”

The second point, however, raises a crucial question as the Union considers further enlargement of its areas of competence. While some may wonder whether the common enterprise has proceeded to its logical conclusion, others may believe that the journey may well continue. If there are to be future competencies added, or existing ones augmented, more thought must be devoted to the manner in which they are articulated and implemented. Careful delineation between Member State and EU competence is required, particularly in areas in which the Union specifically shares functions and powers with the Member States. While the observer may have been disappointed by the rift over Libya between France/Britain and Germany, it is not surprising given the experience of the war in Iraq. That experience highlighted that there are some significant residual differences between some of the Member States in the conduct of foreign affairs, and that the individual philosophy of the person who controls Member State government may matter. Such divergence might also arise in a variety of other areas making convergence more problematic. It is therefore important that the creation of a common policy in the area should either precede, or at the very least accompany, the creation of additional competencies. Finally, where the particular area of Union infiltration requires or imagines the creation of a significant bureaucracy, it may be useful to have it up and running before (or at least simultaneous with) its launch.

Getting it right is imperative because of the significant impact that Europe has in the international arena. One could argue that in the international arena, Europe punches above its weight. But there is an additional responsibility that is derived from its astonishing success as an international organization. The EU is a noble experiment, an innovative paradigm for regional and multinational cooperation; it should, and will, be regarded as a model for similar regional organizations.