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**Style or Substance? An Analysis of the  
Major Reforms to CFSP by the Treaty of  
Lisbon**

**Michael J. Austin**

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edited by Siegfried Fina and Roland Vogl

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## **Abstract**

This paper addresses the legal significance of the revisions included in the Treaty of Lisbon to the Common Foreign and Security Policy (CFSP), including the Common Security and Defense Policy (CSDP), and it attempts to answer the question as to whether those changes are legally substantive modifications. To do so, it reviews the recent political science literature on the effects of the Treaty of Lisbon on CFSP, grouping scholars into camps of optimists and skeptics. Then to analyze the overall legal impact of the Treaty of Lisbon on CFSP, the paper analyzes the three most significant changes to those policies: new required legal duties, including mutual defense and solidarity; the creation of new institutional actors, the High Representative and the President of the European Council; and Permanent Structured Cooperation. Each change is addressed from a legal perspective to determine whether the revision requires a change legally, provides a legal framework for possible change, or has no legal effect on change to CFSP.

The paper concludes that as a legal document, the Treaty of Lisbon represents progress in certain areas of CFSP by requiring Member States and certain institutional actors to do more to create an integrated CFSP. However, these obligations are mitigated by certain factors, in particular, by a lack of enforcement mechanism. These mitigating factors are certainly problematic in the present, as they impede the creation of a coherent and unified CFSP right now. However, they may be necessary as part of the functionalist evolution of CFSP, by allowing this process to be more gradual in order to retain the support and participation of all EU Member States. Ultimately, the legacy of the Treaty of Lisbon regarding CFSP may not come from these legal functionalist steps but from the framework it has created for future integration.

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## I. Introduction

The Treaty of Lisbon became effective on December 1, 2009, representing several years of national and international debate about the reform treaty and its consequences for the future of the European Union (EU.)<sup>1</sup> The Treaty of Lisbon, while not as integrative as the defunct Constitutional Treaty, represents another significant step forward in the process of creating a coherent and well-integrated EU. Among its achievements, the Treaty of Lisbon created a single legal personality for the EU and thereby abolished the pillar structure,<sup>2</sup> officially included the European Council as an institution of the EU,<sup>3</sup> and revised and expanded the use of qualified majority voting within the Council.<sup>4</sup> As part of this reform effort, the Member States and their representatives, paid a significant amount of attention to addressing the Common Foreign and Security Policy (CFSP) and particularly a component of CFSP, the Common Security and Defense Policy (CSDP).<sup>5</sup> The question remains, however, whether these amendments are significant legal changes, if they provide the legal framework for further integration at the discretion of Member States but do not require a more legally integrated CFSP, or if they represent no substantive changes at all. In this paper, I will address this question, analyzing the changes made by the Treaty of Lisbon to CFSP from a legal perspective, to determine what changes, if any, Lisbon represents for CFSP.

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<sup>1</sup> Arthur Beesley, *Lisbon Treaty Comes into Legal Force Across EU*, IRISH TIMES, Dec. 2 2009, at 12, available at <http://www.irishtimes.com/newspaper/world/2009/1202/1224259892338.html>; Dan Bilefsky & Stephen Castle, *Historic Overhaul Cleared for Europe; Reluctantly Czech leader seals Lisbon Treaty after 8 years of debate in bloc*, INT'L HERALD TRIBUNE, Nov. 4 2009, at A4.

<sup>2</sup> Treaty of Lisbon amending the Treaty on the European Union and the Treaty Establishing the European Community, art. 47, Dec. 13 2007, 2008 O.J. (C 115) 41 [hereinafter "TEU" or "TFEU" respectively].

<sup>3</sup> *Id.* at arts. 13, 15.

<sup>4</sup> *Id.* at art. 16.

<sup>5</sup> Richard G. Whitman, *Foreign, Security and Defence Policy and the Lisbon Treaty: Significant or Cosmetic Reforms?*, 2008/1 Global Eur. Papers 1, 2 (2008), available at [www.bath.ac.uk/esml/research/security/pdf/whitman.pdf](http://www.bath.ac.uk/esml/research/security/pdf/whitman.pdf) ("The [TEU] is heavily amended by the [Treaty of Lisbon] with 25 of the 62 amendments to the TEU pertaining to CFSP and [C]SDP provisions of the existing Treaty.").

To understand whether the Treaty of Lisbon has changed the EU's CFSP and the extent to which it represents significant change, it is important to review the context and theory of European integration. A functionalist perspective is one of the most common ways to understand the process of European integration. This theory argues that "sector integration . . . will, by a kind of law of nature, spread to all other sectors of the economy. After that, again, by a kind of law of nature, it will enter also political fields and, eventually end up in a federation of States."<sup>6</sup> The functionalist approach has been criticized by some academics as overly simplistic in its description.<sup>7</sup> However, as a means to understand the evolution of the EU, it still holds some significant power in describing the events, if not articulating exact causes.<sup>8</sup> For example, the functionalist approach seems to adequately describe the evolution of the EU economic structure, from a limited agreement to cooperate on coal and steel issues to a more integrated customs union, to a single currency, to the four freedoms for all EU citizens.<sup>9</sup>

Much like the evolution of economic integration, the evolution toward an integrated foreign, security and defense policy has taken a seemingly gradual integrationist route, as well.<sup>10</sup> At the beginnings of European integration, there was much more focus on creating an integrated European economic community rather than an integrated foreign and security policy, as evidenced by the many developments furthering the integration of Europe's economies, e.g., the European Steel and Coal Community, the European Free Trade Agreement. There were some steps toward creating an integrated European foreign policy, as in 1954 with the creation of the

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<sup>6</sup> Peter Fischer, *The Legal System of the European Union 10* (Fall Semester 2009/10) (unpublished manuscript, on file with the author). For further discussion of the functionalist theory of integration, see JOSEPHINE STEINER & LORNA WOODS., *EU LAW 20* (10th ed. 2009).

<sup>7</sup> See STEINER & WOODS., *supra* note 6 at 20.

<sup>8</sup> See Fischer, *supra* note 6 at 12-13 for an excellent synopsis of the evolution of the European Union, which illustrates the evolving integration of the EU, in keeping with the "law of nature" spill-over from one sector of the European Union to another.

<sup>9</sup> *Id.*

<sup>10</sup> For a more comprehensive history of the development of CFSP, see Malgorzata Lawrynowicz, Note, *A Foreign Policy for Europe: Integration or Illusion?*, 16 MICH. ST. J. INT'L LAW 691 (2008).

Western European Union (WEU).<sup>11</sup> However, the WEU “was not given a chance to really develop itself into a fully-fledged security institution” for at least thirty years.<sup>12</sup> Foreign and security policy was broached again in 1986 with the signing of the Single European Act, which in its Article 30 stated that Member States shall endeavor jointly to formulate and implement a European foreign policy and shall consult each other in making these decisions.<sup>13</sup> In 1992, the EU was “founded” by the Treaty of European Union, signed at Maastricht (Maastricht Treaty), which included a significant section on the development of a CFSP, establishing it as one of the three pillars of the EU.<sup>14</sup> In the Maastricht Treaty, however, the provisions on CFSP are generally very vague and require any important action to be taken unanimously.<sup>15</sup> Since the Maastricht Treaty, CFSP has continued to be revised as part of the treaty revisions of Amsterdam and Nice, but CFSP has remained relatively vague and intergovernmental in character, thereby requiring little action on the part of Member States.<sup>16</sup>

As the latest reform treaty, the Treaty of Lisbon is the next step in the evolution of the EU, and in this paper, I will attempt to determine what kind of step Lisbon is regarding CFSP. There are clearly some significant superficial changes for CFSP contemplated by the Treaty of Lisbon: the abolition of the pillar structure, which bring CFSP under the same umbrella as the rest of the EU;<sup>17</sup> the creation of the High Representative of the Union for Foreign Affairs and

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<sup>11</sup> For a brief history of the WEU and its purpose, see Arie Bloed & Ramses Wessel, *Introduction to THE CHANGING FUNCTIONS OF THE WESTERN EUROPEAN UNION (WEU): INTRODUCTION AND BASIC DOCUMENTS* xi, xi-xxix (Arie Bloed & Ramses Wessel eds.) (1994). There were also some false starts along the way, such as the European Defence Community (EDC). For a history of the EDC, see EDWARD FURSDON, *THE EUROPEAN DEFENCE COMMUNITY: A HISTORY* (1980).

<sup>12</sup> *Id.* at xviii.

<sup>13</sup> Single European Act, art. 30, Feb. 28 1986, 1987 O.J. (L 169) 16-17.

<sup>14</sup> Treaty on European Union, art. J, Feb. 7 1992, 1992 O.J. (C 191) 58-60.

<sup>15</sup> *Id.*

<sup>16</sup> See Treaty of Nice amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26 2001, 2001 O.J. (C 80) 1 [hereinafter “TEU Nice” and “EC Treaty Nice”, respectively.]

<sup>17</sup> TEU art. 47.



Security Policy (High Representative) as the EU's representative on foreign policy;<sup>18</sup> the addition of multiple provisions on the CSDP to the TEU.<sup>19</sup> But, the question I wish to address is whether there is legal substance to these changes, a question that has not been specifically addressed in the legal literature regarding the Treaty of Lisbon.<sup>20</sup> There has been some scholarly treatment of the practical and political effect of the Treaty of Lisbon, and while there has been some focus on the legal requirements and effects of this revision in those discussions, the authors have focused more on the potential on-the-ground effects of the Treaty of Lisbon and the political ramifications stemming from Lisbon.<sup>21</sup>

Based on my legal analysis, the Treaty of Lisbon provides another step on the functionalist path toward integration in the field of foreign and security policy through two means. First, it creates several new legal obligations on Member States and on institutional actors within the EU, in the form of mutual defense, solidarity, and further alignment that, while mitigated and not subject to judicial review, are a significant step forward. Second, it creates a legal framework within the EU for Member States to cooperate more closely in the area of

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<sup>18</sup> *Id.* at art. 18.

<sup>19</sup> *Id.* at arts. 42-46.

<sup>20</sup> Much of the legal academic discussion has focused on situating the Treaty of Lisbon in the history of the evolution of CFSP or the CSDP rather than analyzing the Treaty of Lisbon as a legal document. *See, e.g.,* Steven Blockmans & Ramses Wessel, *The European Union and Crisis Management: Will the Lisbon Treaty Make the EU More Effective?*, 14 J. CONFLICT & SECURITY L. 265 (2009); Lawrynowicz, *supra* note 10.

<sup>21</sup> *See, e.g.,* NICOLE ALECU DE FLERS, THE PROVISIONS ON CFSP AND CSDP IN THE LISBON REFORM TREATY: STUMBLING BLOCKS OR MILESTONES? (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1262921](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1262921); Sophie Dagand, *The Impact of the Lisbon Treaty on CFSP and ESDP*, EUROPEAN SECURITY REVIEW, 03 March 2008, 5, available at [http://www.isis-europe.org/pdf/2008\\_esr\\_51\\_esr37.pdf](http://www.isis-europe.org/pdf/2008_esr_51_esr37.pdf); Simon Duke, *The Lisbon Treaty and External Relations*, EIPASCOPE, 2008/1, 13, available at <http://publications.eipa.eu/en/eipascope/downloadarticle/&tid=1734>; Kateryna Koehler, *European Foreign Policy After Lisbon: Strengthening the EU as an International Actor*, 4 CAUCASIAN REV. INT'L AFF. 57 (2010) available at [http://cria-online.org/Journal/10/Done\\_European\\_Foreign\\_Policy\\_After\\_Lisbon\\_Strengthening\\_the\\_EU\\_as\\_an\\_International\\_Actor\\_Kateryna%20Koehler.pdf](http://cria-online.org/Journal/10/Done_European_Foreign_Policy_After_Lisbon_Strengthening_the_EU_as_an_International_Actor_Kateryna%20Koehler.pdf); Wolfgang Wessels & Franziska Bopp, *The Institutional Architecture of CFSP after the Lisbon Treaty - Constitutional breakthrough or challenges ahead?*, CENTRE FOR EUROPEAN POLICY STUDIES: CHALLENGE PAPERS, June 23, 2008, <http://ceps.eu/ceps/download/1505>.

foreign, security, and defense policy, which, while not legally binding, create opportunities for further integration in the field of CFSP.<sup>22</sup>

This paper will make its argument in the following manner. First, it will review the current literature on the effect of the Treaty of Lisbon on creating a more coherent CFSP. As mentioned previously, this literature focuses more on the political effects on CFSP arising from the Treaty of Lisbon rather than the legal effects, but that discussion provides a useful context in understanding the legal ramifications of the Treaty of Lisbon. Following the literature review, this paper will then focus on three specific major changes articulated in the Treaty of Lisbon regarding CFSP: the creation of certain legal duties on Member States; the installation of two new institutional actors, the High Representative and the President of the European Council;<sup>23</sup> and the creation of a new innovation in the field of CSDP, Permanent Structured Cooperation (PSCoop). This analysis will focus on the actual legally binding language in the Treaty of Lisbon to determine the extent of legal obligations created rather than on the expected outcome based on possible Member State action.

## II. Literature Review

Unsurprisingly, following its signing in late 2007, the Treaty of Lisbon generated a number of responses in the scholarly community as to its potential effect on the evolution of European integration.<sup>24</sup> Most of the analysis focused on the same changes: the abolition of the pillar system, the creation of the High Representative and the President of the European Council,

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<sup>22</sup> This paper will not address areas where the Treaty of Lisbon did not make any progress, either superficially or substantively, such as clarifying the line between CFSP and other European Union matters as governed by TEU Article 40. For a treatment of that particular issue, see Dominik Eisenhut, *Delimitation of EU-Competencies Under the First and Second Pillar: A View Between ECOWAS and the Treaty of Lisbon*, 10 GERMAN L.J. 585 (2009).

<sup>23</sup> One of the most interesting innovations coming out of the Treaty of Lisbon is the creation of the European External Action Service (EEAS). TEU art. 27(3). This paper will not address the EEAS, however, because its “organization and functioning . . . shall be established by a decision of the Council” and not by the Treaty of Lisbon itself. *Id.*

<sup>24</sup> See *supra* note 21.

the institution of PSCoOp.<sup>25</sup> But the content of the analysis split roughly between two schools of thought, the skeptics and the optimists.

#### *A. The Skeptics*

The skeptics ultimately see the Treaty of Lisbon's effect on further integration of CFSP as minimal, at best, with possible negative effects arising from confusion and tension inherent in the provisions of the Treaty of Lisbon. As Nicole Alecu De Flers argues, it is "questionable whether these innovations can be seen as milestones in the development of CFSP."<sup>26</sup> Wessels and Bopp are perhaps more skeptical in arguing that "[Lisbon] did not give the Union the necessary instruments and institutions to fulfil the self-postulated aim to be a missionary community of norms."<sup>27</sup> Wessels and Bopp then go on to conclude that "the 2007 reform would then document (just) another step on the same plateau of ratchet fusion process."<sup>28</sup> These scholars typically focus on the fact that unanimity remains the default for decisions made regarding CFSP. They also point to the certain ambiguities regarding the process for implementing CFSP as significant stumbling blocks for a more coherent policy.

In particular, De Flers finds the inability of the EU to move beyond unanimity for CFSP as a major hindrance. He refers to this failure as a result of the "sovereignty reflex" and argues that clear limits remain following the Treaty of Lisbon because Member States "remain the 'master' of their actions in the field of foreign, security and defence policy."<sup>29</sup> He further emphasizes that this failure to change decision-making procedures suggests "not much has changed in comparison to Maastricht."<sup>30</sup> Kateryna Koehler, while more optimistic about the

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<sup>25</sup> See *supra* note 19.

<sup>26</sup> DE FLERS, *supra* note 21, at 18.

<sup>27</sup> Wessels & Bopp, *supra* note 21, at 30.

<sup>28</sup> *Id.*

<sup>29</sup> DE FLERS, *supra* note 21, at 13, 19.

<sup>30</sup> *Id.*, at 18.

Treaty of Lisbon's effects overall, focuses on this failure as reason to be concerned about the further integration of CFSP, concluding that "the Treaty of Lisbon simplified the structure of the EU [in regards to CFSP] but it failed to unify it" because it still requires unanimity in the field of CFSP.<sup>31</sup>

Beyond concern with the continued unanimity requirement for CFSP, the skeptics also point to the ambiguity of certain new innovations of CFSP as preventing any real progress in the field of CFSP. For example, Wessels and Bopp concede that certain EU institutions were strengthened by the Treaty of Lisbon, but they argue it is unclear if that strengthening will "lead to more overall efficiency and coherence or, contrary, to mutual blocks, overlapping competences and inter-institutional tensions."<sup>32</sup> More specifically, in looking to the High Representative, Wessels and Bopp argue that the High Representative position because it substantively participates in several different EU institutions runs the risk of being, at best, marginally effective due to conflicting loyalties to the different EU institutions.<sup>33</sup> Jan Gaspers, though overall more receptive to the integrative effect of the Treaty of Lisbon on CSFP, echoes Wessels and Bopp's argument that the position of the High Representative is ambiguous.<sup>34</sup> Gaspers argues that the High Representative's role in so many EU institutions will lead to ambiguity as to how accountable the High Representative is to each of those institutions.<sup>35</sup>

The skeptics thus see the Treaty of Lisbon's effect on a more coherent CFSP as highly questionable at best, and potentially regressive, if the ambiguities created within the Treaty

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<sup>31</sup> Koehler, *supra* note 21, at 62.

<sup>32</sup> Wessels & Bopp, *supra* note 21, at 28.

<sup>33</sup> *Id.* at 23-24. For a further discussion of the different roles that the High Representative will play, see *infra* Part IV.A.

<sup>34</sup> Jan Gaspers, *The Quest for European Foreign Policy Consistency and the Treaty of Lisbon*, 2 HUMANITAS J. EUR. STUD. 19, 25 (2008), available at [http://www.humanitas.edu.pl/hjes/1vol\\_issue2/gaspers.pdf](http://www.humanitas.edu.pl/hjes/1vol_issue2/gaspers.pdf). In fact, Gaspers argues even the title of High Representative will cause ambiguity and uncertainty about the duties of the High Representative, thereby making the role ineffective in making CFSP more coherent. *Id.* at 27.

<sup>35</sup> *Id.* at 25.

create more inconsistencies within CFSP. Certainly all of the skeptical authors see the possibility of a more coherent CFSP arising out of the Treaty of Lisbon, but these authors are more focused on the likelihood of failure.

### *B. The Optimists*

The optimists generally see the Treaty of Lisbon's effect on the CSFP very much in line with the functionalist analysis of European integration, that is, as another gradualist step toward integration. Sophie Dagand perhaps best articulates the optimists' overall position on the effect of the Treaty of Lisbon on a more coherent CFSP: "[The Treaty of Lisbon] aims to create an enhanced institutional architecture and to offer better opportunities for strengthened collective action."<sup>36</sup> As Dagand does in her overall assessment, optimists tend to focus on the frameworks that the Treaty of Lisbon creates, specifically, the creation of a pan-institutional role, the High Representative, and the establishment of PSCoop. These frameworks, the optimists argue, will provide Member States with the freedom to create a more coherent CFSP, if there is the requisite political will.

The optimists have focused a significant portion of their optimism on the creation of the new High Representative position. In speaking of the new High Representative position, Dagand argues that its purpose "is to achieve greater coherence across the first and second pillars within the EU; creating a post that straddles the Council and the Commission" thereby supporting her conclusion for a more enhanced institutional architecture arising from Lisbon.<sup>37</sup> Graham Avery similarly offers the High Representative as an improvement in CFSP because it represents a

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<sup>36</sup> Dagand, *supra* note 21, at 9.

<sup>37</sup> *Id.* at 5.

“system which can articulate the EU’s policies and positions with a single voice.”<sup>38</sup> Kateryna Koehler addresses some of the skeptics’ concerns about the over-burdening of the High Representative and ultimately concludes that “the Treaty of Lisbon strengthens the institutional preconditions for more coherence and efficacy of the European foreign policy by introducing . . . the High Representative.”<sup>39</sup> Thus, the argument seems to be that the High Representative, despite the possibility for confusion and ambiguity, will be able to provide a more effective CFSP by giving the EU one real institutional voice.

Even within the more specific realm of CSDP, the argument has been made that the Treaty of Lisbon provides the necessary legal framework for a more integrated European policy, particularly in the authorization of PSCoP. Specifically, Antonio Missiroli argues that “The Lisbon Treaty provides a good legal and political basis for . . . giving the Union the ‘politics of scale’ that would permit it to play a more active international role, and one commensurate to its stated ambitions.”<sup>40</sup> Missiroli argues that PSCoP, in particular, by its breaking of the “EU political taboo over the unanimity rule” adds a great deal of flexibility to the CSDP, which could therefore create a more effective CSDP. In a slightly different vein, Pierre Hougardy argues that “[PSCoP] has the potential to generate a top-down approach [to CSDP],” with which the leaders of the CSDP could create a far more coherent and effective CSDP.<sup>41</sup> Though there are some varying thoughts as to how PSCoP will effect a more coherent CSDP, there does appear to be some scholarly optimism that it will do so.

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<sup>38</sup> Graham Avery, *The New Architecture for EU Foreign Policy, in CHALLENGE EUROPE: THE PEOPLE’S PROJECT?: THE NEW EU TREATY AND THE PROSPECTS FOR FUTURE INTEGRATION* 17, 18 (European Policy Centre ed., 2007), available at <http://ftp.infoeuropa.euroid.pt/000040001-000041000/000040206.pdf#page=18>.

<sup>39</sup> Koehler, *supra* note 21, at 68.

<sup>40</sup> ANTONIO MISSIROLI, *THE IMPACT OF THE LISBON TREATY ON ESDP* 17 (2008), available at [www.statewatch.org/news/2008/feb/ep-esdp-lisbon.pdf](http://www.statewatch.org/news/2008/feb/ep-esdp-lisbon.pdf).

<sup>41</sup> Pierre Hougardy, *Permanent Structured Cooperation, in THE LISBON TREATY AND ESDP: TRANSFORMATION AND INTEGRATION* 11, 11-12 (Sven Biscop & Franco Algieri, eds. 2008), available at [www.egmontinstitute.be/paperegm/ep24.pdf](http://www.egmontinstitute.be/paperegm/ep24.pdf).

Beyond the specific revisions brought about by the Treaty of Lisbon, a lot of scholars emphasize that the Treaty of Lisbon now puts the ball squarely in the court of Member States to create a more effective CFSP. For example, after his analysis of the Treaty of Lisbon, Simon Duke argues that “The test for the future coherence and credibility of EU external relations depends upon the political will of the Member States to breathe life into the new institutions and practices created by the Treaty of Lisbon.”<sup>42</sup> Katereyna Koehler repeats this sentiment in arguing that “the implementation of the European foreign policy in concrete situations continues to depend, to a great extent, on the Member States’ willingness to cooperate and compromise” despite the fact that “the Lisbon Treaty considerably strengthens the EU as an international actor.”<sup>43</sup>

Ultimately, these scholars’ optimism rests not on the requirements of the Treaty of Lisbon but on the framework it puts in place. Their argument, taken collectively, is that the Treaty of Lisbon gives the Member States enough of a framework that it is now squarely up to those Member States to hang a coherent CFSP on that frame. In reading the legal requirements of the Treaty of Lisbon, the optimists appear to have ignored some of the legal obligations coming out of the Treaty, but they have accurately assessed the potentials arising out of the legal frameworks created by the Treaty.

### **III. Required Legal Duties**

The Treaty of Lisbon, despite its overall intergovernmental, unanimous approach to CFSP,<sup>44</sup> does create certain new affirmative legal duties for its Member States in the field of CFSP. More specifically, the Treaty of Lisbon mandates two concrete legal obligations of

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<sup>42</sup> Duke, *supra* note 21, at 18.

<sup>43</sup> Koehler, *supra* note 21, at 71.

<sup>44</sup> TEU art. 24(1)

Member States, mutual defense<sup>45</sup> and solidarity,<sup>46</sup> while it also provides more general legal requirements for Member States and institutions of the EU to develop a more coherent and consistent CFSP.<sup>47</sup> Admittedly, these new affirmative legal duties are mitigated somewhat by their nature as well as by the special treatment of CFSP, but the creation of affirmative legal duties is not typical in the field of CFSP and therefore represents a significant step forward. The academic reaction, however, to these duties has been to minimize or ignore these new affirmative legal duties as being so mitigated as to be effectively useless. Given that scholars have tended to dismiss or ignore these changes altogether, I will address their perspectives on all three areas together. Then, I will address each of the three areas of new legal duties (mutual defense, solidarity, and general legal obligations) separately to determine the effect of each revision.

The academic assessment of these new required legal duties remains split along the same lines as the overall division between skeptics and optimists, though, in this area, more scholars are skeptical than optimistic. For example, Nicole Alecu De Flers, in dismissing the mutual defense clause, states that it “has been clearly mitigated.”<sup>48</sup> Simon Duke, who is more optimistic overall about the impact of the Treaty of Lisbon on CFSP, argues that the “practical impact [of the mutual defense clause] is limited.”<sup>49</sup> Antonio Missiroli, in addressing both the mutual defense and the solidarity clauses, minimizes their impact as “unlikely to generate any special policy initiative in the [C]SDP domain.”<sup>50</sup> Several scholars do not even mention these specific changes in summarizing and analyzing the impact of the Treaty of Lisbon on CFSP, and many do not address the addition of general legal requirements for a more cohesive CFSP.<sup>51</sup> This

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<sup>45</sup> *Id.* at art. 42(7).

<sup>46</sup> TFEU art. 222.

<sup>47</sup> *See, e.g.*, TEU art. 42(1); TEU 21(3)

<sup>48</sup> DE FLERS, *supra* note 21, at 13.

<sup>49</sup> Duke, *supra* note 21, at 18.

<sup>50</sup> MISSIROLI, *supra* note 40, at 15.

<sup>51</sup> *See, e.g.*, Avery, *supra* note 38; Koehler, *supra* 21.



complete omission in discussing these changes in CFSP arising from the Treaty of Lisbon strongly suggests that these scholars find the changes to be cosmetic, at best, and utterly useless, at worst, and are therefore skeptical of these particular revisions' ability to affect CFSP.

These skeptical scholars, while more numerous, do not monopolize the opinions on these particular revisions. For example, in regards to the mutual defense and solidarity clauses, Sophie Dagand emphasizes that they are "important innovations" and that the solidarity clause in particular "represents a new legal mechanism of assistance," suggesting that, contrary to the skeptical view, these new legal duties have some significance in the creation of a more cohesive CFSP.<sup>52</sup> And Jan Gaspers finds some benefit in the revision of certain passages in the Treaty of Lisbon to fortify the general legal requirement to create a more coherent CFSP. Specifically, Gaspers focuses on a change in TEU Article 42(2), where now Member States have agreed that they "will" create a common defense in the Treaty of Lisbon rather than simply agreeing that they "might" create a common defense, as they had left it in the Treaty of Nice.<sup>53</sup> Gaspers does temper his optimism, in arguing that this type of change is not a "legally binding obligation."<sup>54</sup> Thus, the optimists emphasize that these changes, while not revolutionary, provide further steps toward a more coherent CFSP.

#### *A. Mutual Defense Clause*

The mutual defense clause is found in TEU Article 42(7) of the Treaty of Lisbon and requires, in part, that "[i]f a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in its power."<sup>55</sup> This provision does not distinguish between types of armed aggression, be it inter-

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<sup>52</sup> Dagand, *supra* note 21, at 8.

<sup>53</sup> Gaspers, *supra* note 34, at 39; *compare* TEU art. 42(2) with TEU Nice art. 17(1).

<sup>54</sup> Gaspers, *supra* note 34, at 39.

<sup>55</sup> TEU, Art. 42(7).

state conflict, international terrorist, or domestic terrorist, and requires that other Member States respond with “all the means in their power” to assist.<sup>56</sup> This obligation is mitigated by the second sentence in the paragraph that “This [obligation] shall not prejudice the specific character of the security and defence policy of certain Member States” meaning that the mutual defense clause will not require a non-aligned or neutral state to fundamentally change its approach to international conflict.<sup>57</sup> This mitigated mutual defense clause is crucial in a functionalist evaluation of CFSP’s evolution because it inserts another area of integration in CFSP where one did not exist before.

This mutual defense clause creates something uncommon in the field of CFSP, an affirmative duty on Member States in this field. The language in the Treaty of Lisbon is relatively unambiguous in creating this duty, in saying that Member States “shall have towards [the aggrieved Member State] an obligation.”<sup>58</sup> This clause, though mitigated in the second sentence, does not make the obligation of mutual defense dependent on the Member States’ convenience, judgment, or any other short-term decision of the Member States. Rather, each Member State has to provide all the aid it can to a fellow Member State victimized by an act of aggression. Perhaps most important for a functionalist analysis of CFSP regarding the mutual defense clause is that it is entirely new to the TEU framework. A mutual defense clause was lacking entirely from the earlier version of the TEU signed in Nice.<sup>59</sup> This insertion of a new provision that creates a new duty would seem to strongly suggest the further evolution of CFSP toward a fully integrated whole. In fact, the choice of mutual defense fits nicely within the

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* This interpretation of Article 42(7) is further supported by Declarations 13 and 14 to the Treaty of Lisbon. Declarations Annexed to the Final Act of the Intergovernmental Conference Which Adopted the Treaty of Lisbon, declarations 13, 14, Dec. 13 2007, 2008 O.J. (C 115) 343.

<sup>58</sup> TEU art. 42(7).

<sup>59</sup> See TEU Nice art. 17; see generally TEU Nice arts. 11-28.

functionalist framework because given the relatively few times Member States have been attacked within their own borders since World War II, it seems unlikely that the mutual defense clause will be invoked often. However, it has begun the process of creating affirmative legal duties for Member States within the field of CFSP.

Certainly, those duties are not as robust as they could be. The second sentence in TEU Article 42(7), as discussed above, dampens the effect of the mutual defense by subjecting the extent of the obligation to the foreign policy of each Member State.<sup>60</sup> Thus, Member States may be able to limit or shirk entirely the obligations of the mutual defense clause. However, the ability to shirk entirely is limited by the fact that most Member States have not pursued a policy of neutrality or non-alignment.<sup>61</sup> And while the limitation of the obligation is not ideal in the establishment of a fully cohesive CFSP, the fact that some legal obligation rests upon most Member States in the event of an act of armed aggression on any other Member State represents a significant legal step forward.

However, there is another significant limitation of the mutual defense clause, its lack of enforceability. All CFSP provisions are limited by TEU Article 24, which states, in relevant part, that the High Representative is responsible for putting the policies into effect and that the European Court of Justice has no jurisdiction with respect to CFSP.<sup>62</sup> While the High Representative can apply public pressure to Member States avoiding obligations under the mutual defense clause, the lack of jurisdiction by the European Court of Justice would appear to make it legally impossible by means of an EU institution to enforce an obligation under the

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<sup>60</sup> TEU art. 42(7).

<sup>61</sup> For example, many of the members of the EU are also members of NATO. *Compare* European Union, *European Countries*, [http://europa.eu/abc/european\\_countries/index\\_en.htm](http://europa.eu/abc/european_countries/index_en.htm) (last visited Mar. 20, 2010), *with* North Atlantic Treaty Organization, *NATO - Member Countries*, [http://www.nato.int/cps/en/natolive/nato\\_countries.htm](http://www.nato.int/cps/en/natolive/nato_countries.htm) (last visited Mar. 20, 2010).

<sup>62</sup> TEU art. 24(1).

mutual defense clause. This lack of enforcement capability is problematic to a cohesive CFSP because it prevents a Member State from being required to perform its obligations under the clause. But the functionalist response would be that this integration project is a gradual one. The EU cannot be expected to be able to change immediately from no obligation of mutual defense to a requirement that all Member States to being required to provide all available aid, which obligation, if they avoid, will subject them to action by the European Court of Justice.

The mutual defense clause, by creating a new legal requirement in the field of CFSP, represents a significant step in the functional evolution of the EU in that field. To create a fully cohesive CFSP, it cannot be the last step, but its importance should not be minimized in potentially helping to begin the process of imposing legal duties on Member States within the field of CFSP.

### *B. Solidarity Clause*

The concept of mutual solidarity pervades the Treaty of Lisbon, as it had in the TEU's previous incarnations.<sup>63</sup> But the insertion of a new solidarity clause in the TFEU portion represents another significant step forward in the process of integrating CFSP because it creates another affirmative legal obligation for Member States in the field of CFSP. The solidarity clause, TFEU Article 222, requires that the Union will mobilize its resources, including any military resources other Member States provide, in the face of a disaster facing a Member State.<sup>64</sup> Beyond the EU's obligations, the solidarity clause also provides that "[s]hould a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities."<sup>65</sup> This duty, unlike the mutual defense clause, is not mitigated by any deference to each Member State's own

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<sup>63</sup> See, e.g., TEU arts. 24, 31, 32; TEU Nice arts. 11, 23.

<sup>64</sup> TFEU art. 222(1).

<sup>65</sup> *Id.* at art. 222(2).

foreign policy; however it suffers from other legal infirmities that prevent it from more fully establishing an integrated CFSP.

First, though, it is important to recognize that the solidarity clause, in much the same way as the mutual defense clause, represents a significant step forward in the functionalist evolution of CFSP. The solidarity clause creates another affirmative legal obligation in the field of CFSP by requiring that Member States “shall assist [the aggrieved Member State] at the request of its political authorities.”<sup>66</sup> Furthermore, the solidarity clause does not provide an ability for a Member States to limit its obligation by claiming that to assist would violate its own foreign or security policy. Also, as with the mutual defense clause, a solidarity clause was lacking entirely from the Treaty of Nice, and CFSP considerations were generally not included in the Treaty of Nice’s EC Treaty.<sup>67</sup> Therefore, the mutual solidarity clause represents another significant step toward integration by creating another affirmative legal obligation that did not exist before. Taken with the insertion of a new mutual defense clause, this addition strongly supports the concept of a functionalist evolution of CFSP, where the EU gradually adds more integrative aspects to CFSP until it finally becomes fully coherent and cohesive.

Much like the mutual defense clause, the solidarity clause is not as robust in integrating CFSP as it could have been. In particular, TEU Article 24(1) states that any of the EU’s requirements for CFSP are not subject to the jurisdiction of the European Court of Justice.<sup>68</sup> Thus, as with the mutual defense clause, there are no legal means to enforce Member States’ duties under the solidarity clause, leaving it again to actors such as the High Representative to apply public pressure with no legal recourse. This lack of enforceability may prove to be more problematic with the solidarity clause due to the ambiguity of some of the terms in it. First the

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<sup>66</sup> *Id.*

<sup>67</sup> *See generally*, EC Treaty Nice.

<sup>68</sup> TEU art. 24(1).

clause requires that Member States “assist,” which is a fairly vague term and could cover widely varying levels of aid from a minor monetary contribution to the provision of military, economic, and human resources.<sup>69</sup> Second, the solidarity clause is limited in requiring other Member States to assist the victim Member State in the case of a disaster or a terrorist attack.<sup>70</sup> These terms, especially “terrorist attack” are open to interpretation as to what actions fall within them. It leaves open the possibility that Member States could avoid sending any aid under the solidarity clause by characterizing the action in question as a dispute between states rather than a terrorist attack.<sup>71</sup> Finally, the solidarity clause requires the aggrieved Member State to request aid of its fellow Member States, though that legal hurdle seems relatively easy to surmount as it would be unlikely for a nation to not avail itself of aid in the face of terrorist attack or disaster. And without judicial oversight, Member States are free to interpret these words and obligations as they see fit.

The solidarity clause provides another gradualist step forward in the creation of a cohesive CFSP by creating new legal duties for Member States in the field of CFSP. These obligations are not as vigorous as they could be, mainly due to the lack of enforcement mechanism and the ambiguity of some of its terms, but the clause remains a step forward by creating an obligation on Member States in the field of CFSP where no real concrete ones existed before.

### *iii. General Legal Obligations*

Beyond the new specific legal requirements, the Treaty of Lisbon also strengthened the language of the obligations of its Member States to generally create a more effective CFSP. As

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<sup>69</sup> TFEU art. 222(2).

<sup>70</sup> *Id.* at 222(1).

<sup>71</sup> This characterization would likely invoke the mutual defense clause, but as discussed in *supra* Part III.A, a Member State has a means out of that obligation as well by claiming a conflict with its national foreign policy.

these changes are framed in very general terms, they have little legal force, but they could represent steps forward on the functionalist path toward a more cohesive CFSP by getting Member States more comfortable with integration in the field of CFSP. These revisions have been made in several places throughout the Treaty of Lisbon, but there are two exemplary cases.

First, in TEU Article 21(3), the Treaty of Lisbon now requires “consistency between the different areas of its external action and its other policies” which is a new insertion of language from the Treaty of Nice.<sup>72</sup> Given that much of the other policies of the EU are very integrated, such as in the fields of trade, customs duties, border control, this clause suggests that the Treaty of Lisbon may require that Member States work to bring that level of integration and consistency to its external policies, of which CFSP is a main component.

Second, in regards to CSDP specifically, the Treaty of Lisbon states that discussions among Member States “will lead to a [CSDP],”<sup>73</sup> which represents a change from the Treaty of Nice, which stated that those discussions “might lead to a [CSDP].”<sup>74</sup> This simple change of a verb implies a legal obligation to create a cohesive CSDP where no such legal obligation existed before. As with the previously discussed clauses, this new legal obligation suggests that Member States are becoming more comfortable with integrating areas within CFSP, which, in turn, supports the argument that CFSP is being integrated along the functionalist paradigm.

Obviously, these general legal obligations, as they stand now, have several significant issues in creating an integrated CFSP. Perhaps most importantly, the obligations are not enforceable, as per TEU Article 24(1),<sup>75</sup> and none of them provide timeframes for the completion

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<sup>72</sup> Compare TEU art 21(3) with TEU Nice arts. 11-28.

<sup>73</sup> TEU art. 42(1).

<sup>74</sup> TEU Nice art. 17(1).

<sup>75</sup> TEU art. 24(1).

of these very broad objectives.<sup>76</sup> Thus, enforcement of these obligations would seem to be impossible under the current structure. Furthermore, it is more difficult to suggest that these general changes represent a shift toward a greater level of comfort with an integrated CFSP because very few scholars have touched upon these changes as being of much importance, therefore suggesting that actors are not grappling with the idea of a more integrated CFSP as a result of these particular revisions. Jan Gaspers was one of the few to do so,<sup>77</sup> and many scholars have not touched upon these revisions in their analyses.<sup>78</sup>

Ultimately, as with the mutual defense and solidarity clauses, these general legal obligations are limited by the lack of enforcement mechanisms. However, these revisions to the general legal obligations may represent further evidence of a functionalist evolutionary step toward a more integrated CFSP.

#### **IV. Creation of New Institutional Actors**

Beyond creating new legal duties in regards to CFSP, the Treaty of Lisbon created new institutional actors that have responsibilities within the field of CFSP: the High Representative and the European Council President. These two new institutional roles create the significant possibility of further integration by creating two actors that represent the EU abroad and thereby give the EU a more unified voice in the field of foreign affairs. Furthermore, the Treaty of Lisbon gave the High Representative responsibilities and relationships with most of the institutions of the EU, which creates the possibility for further integration based both on the common point of contact for CFSP among the different institutions as well as the role's responsibilities within those institutions. However, the roles of the High Representative and the European Council President are more legal frameworks for the possibility of future integration as

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<sup>76</sup> *Id.* at 21(3), 42(1).

<sup>77</sup> Gaspers, *supra* note 34, at 39.

<sup>78</sup> *See, e.g.*, Dagand, *supra* note 21; Koehler, *supra* note 21; DE FLERS, *supra* note 21.



they do not create many significant legal obligations for further integration. Though these roles overlap in certain instances, I will address each role's impact separately in order to better understand the legal effect of each on the integration of CFSP.

#### *A. The High Representative*

In TEU Article 18, The Treaty of Lisbon created the office of the High Representative and described most the role's responsibilities therein. The High Representative will have a wide range of responsibilities, and so, to analyze the effect of the High Representative, it is important to understand the scope of those duties.<sup>79</sup> First, the High Representative will participate in the discussions of the European Council.<sup>80</sup> The High Representative will also have the power to submit proposals to the Council, presumably in the configuration of the newly-created Foreign Affairs council which the High Representative will chair, and the High Representative will be responsible for conducting CFSP by carrying out the decisions of the Council.<sup>81</sup> The High Representative will also serve as a Vice-President of the European Commission, responsible for conducting the external policies of the EU.<sup>82</sup> In general, the High Representative is responsible for representing the EU to the world, ensuring compliance with the principles of a more coherent CFSP by the institutions of the EU and by Member States, and coordinating specific activities among Member States and the EU in the field of external relations.<sup>83</sup>

As discussed in the general scholarly commentary on the Treaty of Lisbon's general effect on CFSP, the role of the High Representative has generated a fair amount of scholarly

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<sup>79</sup> For a fuller description of the responsibilities of the High Representative, see Christine Kaddous, *Role and Position of the High Representative of the Union for Foreign Affairs and Security Policy Under the Lisbon Treaty*, in *THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY?* 205, 205-221 (Stefan Griller & Jacques Ziller, eds. 2008).

<sup>80</sup> TEU arts. 18(2).

<sup>81</sup> *Id.* at arts 18, 22(2).

<sup>82</sup> *Id.* at art. 18(4).

<sup>83</sup> *See Id.* at arts. 23(2), 24(3), 26(2), 34(1), 43(2).

debate about the its impact, split generally into the skeptics and the optimists.<sup>84</sup> To reiterate and expand briefly, the skeptics, such as De Flers, are concerned that the responsibilities are so wide-ranging that the High Representative will end up being unable to perform any of its duties effectively.<sup>85</sup> Christine Kaddous focuses on the fact that the creation of the High Representative does not simplify or address any of the concerns about the procedures regarding CFSP because it still leaves in place intergovernmentalism as the predominant decision-making process.<sup>86</sup> The optimists argue that the High Represtative has the significant potential to create one voice in the world for the EU.<sup>87</sup> Further, they contend that the High Representative creates a legal basis and framework for an effective, integrated foreign policy.<sup>88</sup> This paper will address each of these responsibilities to determine what legal effect, if any, each might have on the creation of a more integrated CFSP.

In perhaps its most prominent role, the High Representative's membership in the European Council will give it the opportunity to influence directly the overall strategic plan of the EU, as the European Council's mandate is to "define the general political directions and priorities" of the EU.<sup>89</sup> However, the text of the Treaty of Lisbon only requires that the High Representative "take part" at these meetings, which, as an interpretative matter, only requires that the High Representative be present.<sup>90</sup> Based on that language, there is no legal mandate that the High Representative do anything more than attend, though given the High Representative's broad scope of responsibilities, it would certainly be an ideal opportunity to synthesize multiple concerns and request the assistance and direction of the European Council.

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<sup>84</sup> See *supra* Part II.

<sup>85</sup> DE FLERS, *supra* note 21, at 12.

<sup>86</sup> Kaddous, *supra* note 79, at 220. See also, Lawrynowicz, *supra* note 10 at 711.

<sup>87</sup> See Avery, *supra* note 21, at 18; Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 COLUM. J. EUR. L. 349, 398 (2009).

<sup>88</sup> See Blockmans & Wessel, *supra*, note 20 at 295; Duke, *supra*, note 21, at 13-14; Koehler, *supra* note 21, at 68.

<sup>89</sup> TEU art. 15(1).

<sup>90</sup> *Id.* at art. 15(2).

By contrast, while the High Representative's role in the Council also provides significant opportunities for further integration of CFSP, it also has some mitigated legal requirement to do so in its role, however reactive that requirement is. The High Representative has the ability to set the agenda as chair of the Foreign Affairs Council and to provide every proposal on CFSP, which gives the High Representative significant latitude in driving the work of the Foreign Affairs Council in crafting CFSP. And the Foreign Affairs Council is tasked generally with "elaborat[ing] the Union's external action . . . laid down by the European Council."<sup>91</sup> Therefore, if the European Council directs the EU toward a more integrated CFSP, the High Representative, as the chair of the Foreign Affairs Council, has a legal requirement to further that integration. Furthermore, the High Representative is responsible for implementing the Council's directions, so it has subsequent legal requirements to implement any strategic direction by the European Council, through the filter of the Council. These legal obligations are obviously mitigated by their dependence on the direction of the European Council, such that if the European Council is silent on a more integrated CFSP, these legal obligations become moot.<sup>92</sup> Furthermore, as discussed in Part III, CFSP is outside the jurisdiction of the European Court of Justice, and so it does not seem as if these obligations are, strictly speaking, enforceable.<sup>93</sup> However, these legal obligations do remove any potential legal obstacles if the European Council does call for a more integrated CFSP, and it continues the accretive process of inserting more legal obligations regarding CFSP, much as the functionalist analysis would suggest.

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<sup>91</sup> *Id.* at art. 16(6).

<sup>92</sup> Some authors have pointed to the fact that the Treaty of Lisbon requires only qualified majority voting on matters related to CFSP when the High Representative makes a proposal approved by the European Council. TEU art. 31(2); see Blockmans & Wessel, *supra* note 20 at 292. But, the European Council still requires unanimity to approve a decision regarding CFSP, so this change does not appear substantive.

<sup>93</sup> *Id.* at art. 24(1).

The High Representative's role in the European Commission provides further opportunities for more integration, and it perhaps provides an even stronger legal obligation to do so, though it is still a mitigated mandate. As the Vice President of the European Commission, the High Representative is required to "ensure the consistency of the Union's external action."<sup>94</sup> This requirement can be read as simply requiring that the High Representative ensure that there are no blatant inconsistencies in the EU's dealings with other countries. However, a more integrationist reading would argue that the bulk of the EU's external actions are in the form of economic regulations, which is a much more integrated field of EU law. Therefore, the High Representative, in its role as the Vice-President of the European Commission, has a legal obligation to further integrate the EU's CFSP in order to make its level of integration consistent with the other fields of the EU. This ambiguity in what "ensur[ing] the consistency of the Union's external action" means makes the mitigating factor of a lack of judicial review for CFSP matter more problematic, but it does provide a legal justification for further integration efforts by the High Representative in this particular role.<sup>95</sup> This lack of judicial review to resolve the ambiguity may ultimately mean that the High Representative has more opportunities in this role than it might in other roles but that it lacks any legal obligation to do so.<sup>96</sup> Further, the European Commission is meant to be the "executive and management" function of the EU, so it would be unable to go significantly beyond the direction and scope of CFSP laid out by the European Council and the Council.<sup>97</sup>

Finally, the High Representative has several more general responsibilities under the Treaty of Lisbon that also provide significant opportunities for creating a more coherent CFSP

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<sup>94</sup> *Id.* at art. 18(4).

<sup>95</sup> *Id.*

<sup>96</sup> This legal requirement may be even further mitigated by the fact that the European Commission is not intended to set European Union policy as the more "executive" branch of the European Union.

<sup>97</sup> TEU art. 17(1).

but any legal requirement to do so is severely mitigated. To start, the High Representative's role as EU spokesperson will provide the possibility of one voice for the EU, but a singular voice is no obligation for a single message. Rather, it simply requires that the High Representative provide whatever message the EU wishes to convey, even if that message is that the Member States will be addressing a matter on an individual basis.<sup>98</sup> Then, the Treaty of Lisbon's requirement that the High Representative ensure Member States' compliance with a more coherent CFSP is problematic, as a legal duty, because it is vague.<sup>99</sup> The Treaty does not provide more discussion around what ensuring compliance entails, which could range from demanding Member States work closely to develop an integrated CFSP to simply monitoring and chastising Member States for any statements or actions contrary to stated EU policy. This problem is augmented by the lack of judicial oversight, which prevents an outside authority from providing more discussion on the meaning of those words. Finally, the Treaty of Lisbon also requires that, in certain instances, the High Representative coordinate activities of Member States in the field of CFSP.<sup>100</sup> However, as with its role on the Council, this legal obligation will only arise subsequent to action taken by Member States. Certainly, a coordination role provides the High Representative with the opportunity to implore Member States to live up to any commitments they made, but, in its role as coordinator, the High Representative has no ability to mandate that the Member States do so.

Thus, it appears as if the High Representative, in certain of its roles, has several legal obligations to create a more coherent CFSP, though these duties are mitigated both by the lack of enforceability and judicial oversight as well as by the fact that, in some cases, the obligation is

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<sup>98</sup> And in fact, the possibility of a singular voice is further complicated by the responsibilities of the European Council President as discussed *infra* Part IV.B.

<sup>99</sup> *Id.* at art 24(3).

<sup>100</sup> *See, e.g., Id.* at arts. 34(1), 43(2).

dependent on other actors. Additionally, the fact that the High Representative will be working in all of these different arenas will likely create a more coherent CFSP just by the creation of a single point of contact, but certainly there would be no obligation for the High Representative to actively serve as a conduit, especially when it has been suggested that the High Representative delegate some of its roles to subordinates.<sup>101</sup> Beyond the legal obligations, the Treaty of Lisbon has also created multiple spaces in which the High Representative will have the opportunity to create a more unified CFSP.

### *B. President of the European Council*

The President of the European Council is a position with much fewer defined responsibilities than the High Representative, and so the Presidency, as defined by the Treaty of Lisbon, has much less impact, legal or otherwise, on CFSP. The Treaty of Lisbon, in fact, says very little about the President's duties, stating only two concrete obligations related to CFSP: to chair the European Council for two and a half year terms and to represent the EU in the realm of CFSP.<sup>102</sup>

The academic response to the President of the European Council, in the context of CFSP, has been to leave it an open question because of this lack of definition. For example, skeptics, such as Wessels and Bopp, argue that the Presidency's potential role is of "major importance" but that its "tasks and functions are not very clear."<sup>103</sup> The optimists appear to have taken a similar view, as Sophie Dagand argues that the role's effectiveness "partly depends on the

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<sup>101</sup> See, e.g., MISSIROLI, *supra* note 40, at 9.

<sup>102</sup> TEU art. 15(6).

<sup>103</sup> WESSELS & BOPP, *supra* note 21 at 18; *but see* DE FLERS, *supra* note 21 (not addressing the President of the European Council as a significant change to CFSP.)

personality of the [President] and the degree to which the Member States permit him or her to take the initiative.”<sup>104</sup>

From a legal perspective, the scholarly approach is accurate in describing the impact of the Presidency as dependent on the individual performing the role and therefore as more a legal framework for the possibility of integration rather than as an actual legal obligation for further integration. As chairperson of the European Council, the President will not be given any more legal power than already existed by being able to set the agenda. The European Council functioned with an agenda before, and simply transferring the power to set that agenda to a President does not provide a legal obligation for a more integrated CFSP. It does provide the opportunity for the President to do so by allowing that role to set the agenda and make CFSP an issue during the European Council meetings, if the President is interested in a more integrated CFSP. But it also provides the opportunity for the reverse, if the President wishes to set the agenda to avoid such discussions.<sup>105</sup>

Furthermore, the President’s role as external representation of the EU serves to potentially impede any integration efforts because of its conflict with the High Representative’s role. The Treaty of Lisbon does provide that the President’s role as representative shall be without prejudice to the powers of the High Representative,<sup>106</sup> but it does not provide any indication as to how the two roles should divide their responsibilities as representatives of the EU. This confusion provides legal justification for both roles to avoid their external representation responsibilities, as they could each argue that the Treaty provides for the other

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<sup>104</sup> Dagand, *supra* note 21 at 5; *see also* Gaspers, *supra* note 34 at 30. (quoting, with approval, Dagand’s assessment).

<sup>105</sup> It could be argued that the President’s obligation to “facilitate cohesion and consensus within the European Council” mandates creating a more integrated policy. TEU art. 15(6)(c). But from a legal perspective, that duty seems only to require the President to generate consensus among the European Council, not to require that that consensus be more integrationist.

<sup>106</sup> TEU art. 15(6).

role to perform the task in question, or to convey their own messages, which may be conflicting.<sup>107</sup> Therefore, this ambiguity weakens any legal obligation to represent the EU to the rest of the world, and, as discussed with regards to the High Representative's obligations in this regard, the mere fact of a spokesperson does not necessarily create a more integrated CFSP.

Ultimately, as scholars have suggested, the President of the European Council's impact on CFSP will come from the choices made by the individuals filling the role rather than on any legal obligations. This conclusion stands in some contrast to the analysis of the High Representative, who will have some legal, albeit mitigated, obligations to create a more integrated CFSP and will certainly have significant opportunities to do so. This difference in approach to the different roles vis-à-vis CFSP may represent another example of a functionalist approach to integrating CFSP by first creating one integrative role, i.e., the High Representative, and then after that role has become established, revising another role, i.e., the President of the European Council, to be more integrative. Though this conclusion can only be tentative and will depend on future revisions of the TEU.

#### **V. Permanent Structured Cooperation (PSCoop)**

The Treaty of Lisbon also provided specific innovations in the field of CSDP, and its most significant contribution in that field may be PSCoop. PSCoop, governed by TEU Articles 42 and 47, is a mechanism by which a certain group of Member States, based on criteria to be determined, can cooperate on matters of security and defense policy.<sup>108</sup> The Treaty of Lisbon explicitly states that participation in PSCoop is entirely voluntary and that Member States can

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<sup>107</sup> Gaspers has made this argument in his analysis of the relationship between the High Representative and the President, concluding that this overlap could give "rise to severe inter-institutional tensions and thus an environment that nourishes EU foreign policy-making inconsistencies." Gaspers, *supra* note 34 at 30.

<sup>108</sup> *Id.* at arts. 42(6), 46.



withdraw from it at anytime.<sup>109</sup> Several academics have pointed to PSCoop as one of the major innovations in Lisbon; however, from a legal perspective, it does not provide much in the way of affirmative progress other than creating a voluntary legal framework for integration, except that it does remove the requirement for unanimous decision-making in an area of CFSP.

Scholars have been relatively consistent in their assessments of the impact on PSCoop, focusing on the potential for further integration, dependent on the will on Member States. For example, Sven Biscop argues that PSCoop has “enormous potential” because it provides a means for Member States to pool defense resources which is the “only way to achieve the quantum leap this is necessary.”<sup>110</sup> Biscop qualifies this enthusiasm by later characterizing PSCoop as a “window of opportunity” that depends on Member States’ actions.<sup>111</sup> Antonio Missiroli is also optimistic about PSCoop’s potential, but he raises a different concern, focusing on the fact that the criteria for participation in PSCoop have yet to be set which he argues will be determinative of the ultimate impact of PSCoop.<sup>112</sup>

PSCoop, by its voluntary nature, does not provide any substantive legal requirements for a more integrated CFSP. The Treaty of Lisbon is very explicit about the fact that joining PSCoop must be a deliberate choice by Member States, requiring that any Member States that “wish to participate” have to “notify their intention to the Council and to the High Representative.”<sup>113</sup> PSCoop is, thus, an opt-in program, further affirming it as purely voluntary. And as a voluntary organization, it would be impossible for it to legally require anything of

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<sup>109</sup> *Id.* at art. 46.

<sup>110</sup> Sven Biscop, *Permanent Structured Cooperation for a Permanently Capable ESDP, in THE LISBON TREATY AND ESDP: TRANSFORMATION AND INTEGRATION* 11, 11 (Sven Biscop & Franco Algeri, eds. 2008), available at [www.egmontinstitute.be/paperegm/ep24.pdf](http://www.egmontinstitute.be/paperegm/ep24.pdf).

<sup>111</sup> *Id.* at 16. Some scholars are not as optimistic about Member States’ willingness to take this window of opportunity; for example, Jan Gaspers argues that the need for PSCoop indicates that “not all member states are whole-heartedly in favour of an ever-closer Union in the realm of security and defence.” Gaspers, *supra* note 34 at 46. See also Dagand, *supra* note 21 at 8.

<sup>112</sup> MISSIROLI, *supra* note 40, at 16.

<sup>113</sup> TEU art. 46(1).

Member States as Member States. In fact, this feature may end up further segmenting the EU's CFSP rather than integrating it. Sophie Dagand raises the issue in her analysis that PSCoop may "create a two-speed Europe," thus "creating an exclusive club over the long term."<sup>114</sup> This concern is very plausible, especially given the criteria for PSCoop admission are still to be determined, and if they are set too high, it will prevent many of the smaller Member States from joining. And if PSCoop creates this two-speed Europe in the field of CFSP, the possibility for a fully integrated CFSP across the EU would be farther away rather than closer.

However, from a functionalist perspective, PSCoop does represent an innovation toward integration by requiring only a qualified majority vote to approve PSCoop's criteria rather than unanimity.<sup>115</sup> This shift in decision-making in the area of CFSP is significant, as the default remains unanimity for all decisions regarding CFSP.<sup>116</sup> Therefore, it seems that the Treaty of Lisbon is inserting qualified majority voting in a non-essential area of CFSP, PSCoop, with the possibility that that mode of decision-making will creep its way into other areas of CFSP as the functionalist analysis would suggest. Then, if CFSP were to be under the qualified majority voting procedures, it would represent a significant step toward an integrated CFSP, as it would prevent single Member States from vetoing decisions, thereby creating a more effective and coherent approach.

Thus, from a purely substantive analysis, PSCoop does not represent any legal obligation for a more integrated CFSP and, in fact, may represent a step backward in that regard with the possibility of a two-speed Europe arising from PSCoop. However, in looking at its procedural innovation in only requiring qualified majority voting, PSCoop, as a functional matter, may represent an important step toward a more coherent and integrated CFSP.

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<sup>114</sup> Dagand, *supra* note 21 at 8.

<sup>115</sup> TEU 46(2).

<sup>116</sup> *Id.* at 24(1).

## VI. Conclusion

As a legal document, the Treaty of Lisbon represents progress in certain areas of CFSP by requiring Member States and certain institutional actors to do more to create an integrated CFSP. However, these obligations are mitigated by certain factors, in particular the lack of enforcement mechanism. These mitigating factors are certainly problematic in the present, as they impede the creation of a coherent and unified CFSP. However, they may be necessary as part of the functionalist evolution of CFSP, by allowing this process to be more gradual in order to retain the support and participation of all Member States.

Ultimately, the legacy of the Treaty of Lisbon regarding CFSP may not come from these legal functionalist steps but from the framework it has created for future integration. As noted throughout this paper, the Treaty of Lisbon provides Member States numerous opportunities to come together and forge a more integrated CFSP. In particular, the High Representative and PSCoop provide a robust and flexible skeleton upon which Member States can begin to create a coherent CFSP. This analysis is in keeping with a functionalist analysis of EU evolution, so that now, Member States can begin to further integrate CFSP piece by piece with the frameworks that the Treaty of Lisbon has provided.

This dichotomy between the more limited legal obligations and the fairly expansive legal opportunities seems to suggest a EU that wants to keep its options open with regards to CFSP. The Treaty of Lisbon closes few doors on the future direction of CFSP, and it opens several avenues for significant integration, while allowing for the possibility for the EU to continue with a much more limited CFSP. This tension will have to be resolved at some point, and probably sooner rather than later as the EU becomes a more prominent international entity, and the

approach taken by Member States to these opportunities created by the Treaty of Lisbon will provide a good indication of the ultimate direction of CFSP.

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