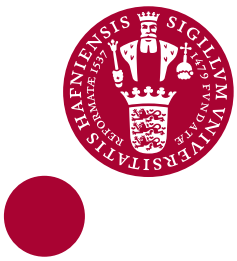

EU DEVELOPMENT POLICY

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8

EU Development Policy

Central Issues

- EU development policy is as old as the European integration project itself. Objectives in this policy area have evolved from associating EEC Member States' colonies with a focus on trade and aid to a progressively broader development agenda incorporating human rights, sustainable development, and most recently links to common foreign and security policy. EU development policy can be defined through the three C's which are expressly incorporated into the competence conferring provisions of the TFEU: complementarity, coherence and coordination.
- Complementarity implies that the exercise of EU and Member State competences shall complement and reinforce each other. From the perspective of the nature of the EU's development competence, it means that EU action does not pre-empt Member State action, thereby making coherence and coordination between the two levels crucial.
- Coherence is composed of three aspects: first, coherence of EU development cooperation with the more general principles and objectives of EU external relations; secondly, poverty reduction as the primary policy objective, providing intra-policy focus as to how diverse development initiatives cohere with the central goal; thirdly, the obligation to take account of development objectives in other policies which are likely to affect developing countries.
- Coordination entails that EU and Member States must proactively collaborate and consult in order to ensure complementarity and coherence of their respective EU development policies. Article 210 TFEU gives the Commission a central role in ensuring coordination of EU and Member State development cooperation initiatives.

I. The Three C's of EU Development Policy: Complementary, Coherent and Coordinated

Article 208 TFEU

1. Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. The Union's development cooperation policy and that of the Member States *complement* and reinforce each other.

   Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. *The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries*.
2. The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.

Article 210 TFEU

1. In order to promote the *complementarity* and efficiency of their action, the Union and the Member States shall *coordinate* their policies on development cooperation and shall consult each other on their aid programmes, including in international organisations and during international conferences. They may undertake joint action. Member States shall contribute if necessary to the implementation of Union aid programmes.
2. The Commission may take any useful initiative to promote the *coordination* referred to in paragraph 1.

Article 211 TFEU

Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations.

[emphasis added]

The essential features of EU development policy are traditionally captured in the so-called *three C's*: complementarity, coherence and coordination.[1] They imply

[1] For the results of the EU initiative evaluating the three C's of EU development policy, see www.three-cs.net.

'(1) that the policy *vis-à-vis* developing countries and other policies must be coherent, (2) that Union policy and Member State policies in the area of development cooperation must be complementary, and (3) that the Union and the Member States are obliged to coordinate their efforts in the field of development cooperation'.[2] The three C's have legal significance since the articles conferring development competence on the EU have been drafted incorporating them as fundamental legal and policy dimensions of EU development cooperation:

- *Complementarity:* Article 208(1) TFEU expresses that EU and Member State competences shall complement and reinforce each other. This provision is closely linked to Article 4(4) TFEU which states that in the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; but that the exercise of that competence shall not result in Member States being prevented from exercising theirs. In other words, complementarity to a large extent concerns the *nature* of EU competence in the areas of development policy (and humanitarian aid) and more generally views the EU and national levels as positively and mutually reinforcing. Complementarity is different from subsidiarity because, in the case of complementarity, the two levels are equally appropriate to exercise competences in the same area simultaneously.
- *Coherence:* Article 208(1) and (2) TFEU both express the need for coherence in different ways: it makes a link to the general principles and objectives of EU external action (eg, Article 21 TEU) states that other EU policies likely to affect developing countries must take account of development policy, and Article 208(2) requires that the EU and its Member States 'shall' take account of objectives approved at the UN and other competent international organisations. Defining coherence in the abstract is notoriously difficult as much depends on the perspective of the viewer.[3] In general, it may be seen as avoidance of conflicts and creation of positive synergy within EU development policy itself, between development and other policies, and between all relevant norms actors and instruments active in these domains.[4]
- *Coordination:* Article 210 TFEU lays down the obligation of coordination between the EU and Member States in the implementation of their development policies, with a specific right of initiative for the Commission to attain this objective. Coordination is the action-oriented dimension towards ensuring coherent and complementary policies, and can be defined as 'activities of two or more development partners that are intended to mobilise aid resources or to harmonise their policies, programmes, procedures and practices so as to maximise the development effectiveness of aid resources'.[5] The coordination dimension thus focuses on

[2] M Broberg, 'What is the Direction for the EU's Development Cooperation after Lisbon? A Legal Examination' (2011) 16 *European Foreign Affairs Review* 539, 543.

[3] B Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (Abingdon, Routledge, 2012) 289.

[4] Ibid, 69.

[5] P Hoebink (ed) *The Treaty of Maastricht and Europe's Development Co-operation, Studies in European Development Co-operation Evaluation No 1* (Amsterdam, Aksant Academic Publishers, 2005) 5.

various forms of consultation, cooperation and collaboration at all levels, from the international to the sub-national in setting out priorities, good practices, policies etc.

The objectives of EU development policy are explicit in the second indent of Article 208(1) TFEU. It states that the primary objective is to reduce and, in the long term eradicate, poverty. Prior to the Lisbon Treaty, the objectives of EU development policy were actually formulated more elaborately in Article 177 of the EC Treaty.[6] The objectives of EU development policy that were previously found in Article 177 EC Treaty have now been moved to Article 21 of the TEU, namely 21(2) paragraphs (b), (d), (e), and to a certain extent paragraph (f). These textual interventions in EU primary law were made exactly because of the increased emphasis on coherence. On the one hand, placing poverty reduction at the centre of EU development policy provides coherence by focusing on one single target, rather than a more diffuse set of 'issues which are all important'. On the other hand, placing objectives such as sustainable development and incorporation of developing countries into the world economy into the general provision of Article 21 TEU implies that the EU must not only pursue them through development cooperation, but through all its policies, including common commercial policy, transport policy, agricultural policy, and so on.

The principles, scope and substance of EU development policy have grown and evolved organically over the past six decades, and a brief historic introduction starting from the Treaty of Rome is indispensable to understand the operation of the 3 C's in EU development policy today.

II. A Brief History of EU Development Policy

A. A Succession of Treaties and Conventions: Rome, over Yaoundé, to Lomé and Cotonou

The Schuman Declaration of 9 May 1950 underlined that the proposed integration project had a calling in the field of development cooperation. It stated that the pooling of coal and steel would free up resources which would allow the Community 'to pursue the achievement of one of its essential tasks, namely, the development of the African continent'. Whereas the subsequent Treaty on the European Coal and Steel Community had no such provisions, the 1957 Rome Treaty – under French pressure, which viewed France and its colonies as a cultural unity ('Eurafrica'[7]) – stated in Article 3(r) that one of the activities of the Community was 'the association of

[6] M Broberg and R Holdgaard, 'EU Development Co-operation Post-Lisbon: Main Constitutional Challenges' (2015) 3 *European Law Review* 349, 351.

[7] L Bartels, 'The Trade and Development Policy of the European Union' in M Cremona (ed) *Developments in EU External Relations Law* (Oxford, Oxford University Press, 2008) 130; M Broberg, *The EU's Legal Ties with its Former Colonies – When Old Love Never Dies*, DIIS Working Paper 2011/01, 10.

the overseas countries and territories (OCTs) in order to increase trade and promote jointly economic and social development'. Subsequently, the gradual elimination of duties and quantitative restrictions which characterised the creation of the common market was largely applied to the associated entities as well.[8] Beyond the trade aspect of the relationship, the Member States made commitments in the field of investments and notably the provision of development aid. In terms of its scope, development cooperation in the early years had a highly narrow focus on trade and aid.[9]

Decolonisation of the African continent took place in the years immediately following the entry into force of the Rome Treaty. As a consequence, relations with the newly sovereign nations could no longer be conducted on the basis of Part IV of the Rome Treaty, but would be founded on a succession of multilateral framework treaties instead.

M Broberg, *The EU's Legal Ties with its Former Colonies – When Old Love Never Dies*, DIIS Working Paper 2011/01, 10

… in the years following the creation of the EEC most of these [Overseas Countries and Territories (OCTs)] gained independence requiring a redefinition of the framework regulating the relationship between the former colonies and the EEC. Hence, in 1964 the first Yaoundé Convention came into force. This was followed, first, by the second Yaoundé Convention and, subsequently, by the so-called Lomé Conventions. In 2000, the fourth Lomé Convention was replaced by the Cotonou Partnership Agreement which will remain in force until 2020. Since the first Yaoundé Convention the number of (non-European) countries covered by the legal scheme has grown from 18 originally to 79 today. The majority are former French and British colonies in Africa, but former colonies in the Caribbean and the Pacific are also parties to the Agreement – hence the name African, Caribbean and Pacific countries (widely referred to as ACP countries).

The first and second Yaoundé Conventions were based on two fundamental principles: free trade[10] and 'financial and technical co-operation' (eg, development aid).[11] In Title I concerning trade, it was made clear that the first Yaoundé Convention continued the direction taken with the Rome Treaty on customs duties and quantitative restrictions, with specific treatment for coffee, bananas and the Common Agricultural Policy.[12]

[8] Bartels (n 7) 133.
[9] Broberg (n 7) 540.
[10] Title I Yaoundé Convention.
[11] Title II Yaoundé Convention. See Commission of the European Communities, *The Second Yaoundé Convention – Great Possibilities for Private Investment in Africa* (Commission Working Document, 1971) 5.
[12] See First Yaoundé Convention, Arts 2 and 11. Art 2(3) of the First Yaoundé Convention reads: 'Imports from third countries of unroasted coffee into the Benelux countries on the one hand, and of bananas into

L Bartels, 'The Trade and Development Policy of the European Union' in M Cremona (ed) *Developments in EU External Relations Law*, (Oxford, Oxford University Press, 2008) 137

One of the striking features of these trade arrangements [Yaoundé] was their emphasis on reciprocal trade liberalization. In modern times, reciprocity in trade relations is justified on both economic and political economy grounds: put simply, it gives the country granting the trade concessions a means of extracting trade concessions from the other party … At the time of the Yaoundé Conventions, however, the main reasons given for reciprocity were ideological. First, it was said that only with mutual obligations could Africa negotiate as an 'equal' with Europe; second that these obligations went 'beyond' more contractual relations; and third, that these obligations were essential to ensure that Africa did not fall under the sway of a (non-French) economic power … A practical effect to these preferences … was to benefit the (mainly) French exporters, who tended to be monopolists, and therefore able to keep prices high despite their low exports costs. [Reciprocity] was a concept hard to identify in practice.

In an institutional sense, the first Yaoundé Convention set up an Association Council,[13] a Parliamentary Conference[14] and a Court of Arbitration.[15] Development aid commitments were carried out through the first European Development Fund (EDF), to which the Member States provided the necessary funds[16] and the European Investment Bank (EIB) undertook to provide loans out of its own resources.[17] All economic sectors could benefit from aid under these instruments but funds were primarily directed at industry, tourism, agriculture, socio-economic infrastructure (schools, roads, hospitals etc.) and export promotion.[18] Development cooperation under the Yaoundé regime was still very much characterised by a 'government-to-government' nature, which would slowly change in subsequent conventions in line with evolving perceptions of development policy and cooperation.[19]

the Federal Republic of Germany on the other hand, shall be subject to the terms set out respectively, as to unroasted coffee, in the Protocol this day concluded between the Member States and. as to bananas, in the Protocol concluded on 25 March 1957 between the Member States and in the Declaration annexed to this Convention.'

[13] Ibid, Arts 39–49.

[14] Ibid, Art 50.

[15] Ibid, Art 51. No case was ever decided before this tribunal. See Bartels (n 7) at 135.

[16] The EDF was kept separate from the EC budget because of lack of enthusiasm on the part of other Member States to fund French former colonies. In principle, the EDF allows each Member State to decide how much it is willing to contribute under the applicable convention (see further Section IV below). To the EDF, France and Germany contributed roughly one-third each. See Commission of the European Communities, *The Second Yaoundé Convention – Great Possibilities for Private Investment in Africa* (Commission Working Document, 1971) 7.

[17] First Yaoundé Convention, Art 16.

[18] Commission (n 16) at 7.

[19] Ibid, 18.

The two Yaoundé Conventions were subsequently replaced by four consecutive Lomé conventions entering into force in 1975, 1981, 1986 and 1990 which, like Yaoundé, were concluded as mixed agreements. The backdrop to these new agreements is important: the first EEC enlargement which included the United Kingdom and thus a new perspective on international development, the oil crisis which created a fear of shortages of raw materials, all combined with a desire to hold on to valued overseas markets and a sense of responsibility for the colonial past.[20] In terms of market access, the central change with the preceding Yaoundé legal regime was the inclusion of the principle of *non-reciprocal* trade preferences, mainly under the pressure of the 27 other nations joining the Yaoundé associates, of which 21 were Commonwealth nations due to the UK's accession to the EEC.[21]

European Commission, *Information Note, Development and Cooperation*, 1975, 99/75 F (Translated from French)

… Title I of the Convention concerning commercial cooperation has certainly posed the most arduous problems to the negotiators, with the EEC and ACP countries being each other's primary commercial partners … The diversity of situations, traditions and wishes of the different partners, including that of the Community, seemed a priori in opposition. In the end the negotiators succeeded in surmounting these difficulties and to base – in spite of everything – their future commercial relations on a just and certain basis, with the needed flexibility for ensuring an application without ambiguity of the provisions of the Convention.

1. The non-reciprocity of the commercial obligations.

This principle has been one of the major innovations of the Lomé Convention. Justified by the different levels of development, it implies that the ACP Countries are not held to subscribe to obligations corresponding to those of the Community in relation to products originating in the latter … Nevertheless, the ACP Countries, as regards their commercial relations with the Community, have committed to not discriminate between the Member States, and to accord to the Community a treatment not less favourable to that which they give to the most favoured nation … However, the Community has accepted that MFN [Most Favoured Nation principle] shall not apply between the ACP nations, or between them and other developing nations. For example, when a Caribbean Country concludes an agreement with a Latin American Nation, it is free to accord commercial advantages which it does not provide to the Community.

[20] European Commission, *Green Paper on Relations between the EU and the ACP Countries on the Eve of the 21st Century – Challenges and Options for a New Partnership*, COM(96) 570 final, Brussels, 20 November 1996, 9.

[21] Bartels (n 7) 147. Certain East African countries had already entered into an agreement with the EEC in 1968.

Non-reciprocity therefore means that with Lomé, the Community demanded that it be treated equally to other non-developing nations, but that no obligations of reciprocity existed as regards other developing nations. Under Lomé, the Community continued to provide financial and technical assistance to the ACP countries on the basis of EDF and EIB funding.[22] The list of types of projects which could be covered by Community aid had a similar focus to that under Yaoundé[23] but was, in fact, wider and more diverse: rural development, industrialisation, energy, mining, tourism, socio-economic infrastructure, structural improvement to agriculture, technical cooperation, sales promotion, support to SME's, and grassroots micro projects. institutionally, Lomé reformed the previous governing bodies into an EEC-ACP Council of Ministers, a Committee of Ambassadors, and a Consultative Assembly.[24]

Between Lomé I and II little changed, but a notable shift occurred in Lomé III and IV: the incorporation of human rights into EEC relations with the ACP countries, and a general broadening of development cooperation beyond trade and aid. Compared to Lomé II, the third Lomé Convention now included a reference to human rights in the preamble: 'Reaffirming their adherence to the principles of the [UN Charter] and their faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.' Lomé III was also different in the sense that its first part was no longer trade, followed by investment, technical cooperation etc. Instead, it had an introductory part which described in more general terms the political objectives and underlying principles of cooperation.[25] Article 1 of Chapter 1 of Lomé III thus made explicit that the agreement was to promote and expedite the economic, cultural and social development of ACP states. Both elements were indicative of a broadening scope of development cooperation beyond trade and aid, and towards a broader notion of sustainable development which implied focus on areas such as environmental protection and debt relief.[26] Lomé IV continued that re-orientation, in particular with its new Article 5 which stated that 'cooperation shall be directed towards development centred on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of all human rights'. In 1995, Lomé IV bis was the result of a review of the earlier agreement, placing further emphasis on political, security and social content as well as cooperation in a decentralised fashion with a greater role for civil society.

By the mid-1990s, it was argued that the various agreements which regulated the EC-ACP relationship for around 35 years were mostly significant in principle rather than in practice.[27] In particular, as regards trade, the significance of these agreements was progressively diminished through successive tariff reductions following from

[22] Commission of the European Communities, *Information Note, The Convention of Lomé, Europe/Africa, Caribbean, Pacific*, 1976, No. 129/76, 31; Commission of the European Communities, *Information Note, The ACP-EEC Convention of Lomé: One Year after its Entry into Force*, Brussels, March 1977, 6 (on the Stabex system, which was meant to stabilise export earnings and which was introduced with the Lomé Conventions).

[23] Lomé Convention, Art 46.

[24] Commission of the European Communities (n 22) 69.

[25] Commission of the European Communities, *Information Note, The Third Lomé Convention – Improvements and Innovations in Relation to Lomé II*, Brussels, November 1984, 1.

[26] Broberg (n 2) 542.

[27] M Sissoko, L Osuji and W Cheng, 'Impacts of the Yaoundé and Lomé Conventions on EC-ACP Trade' (1998) 1 *The African Economic and Business Review* 21.

multilateral GATT negotiations. The Cotonou agreement, which replaced Lomé IV, was signed in 2000 and was concluded between the Union and its Member States and 77 ACP countries for a period of 20 years.[28] Disappointed in the results of Lomé and due to a host of other reasons, the EU clearly sought a radical change to what existed beforehand.[29] This was initially not well received by ACP countries. Even if most still belonged to the category of 'Least-Developed Countries' after decades of Lomé, most ACP States argued that they would have been worse off without Lomé cooperation.[30]

K Arts, 'ACP-EU Relations in a New Era: The Cotonou Agreement' (2003) 40 *Common Market Law Review* 95, 96

The end of the Cold War, the creation of the World Trade Organization (WTO), a stronger emphasis on privatization, liberalization and on the need to allow for full participation of non-State actors in development (cooperation) processes, the challenges posed by the concept of sustainable development, and the outburst of armed conflict and humanitarian crises in a considerable number of ACP countries drastically changed the (largely external) environment within which ACP-EU cooperation found itself … For the European Union, the combination of the disappointing Lomé performance record until then, the changes in the external environment … and a number of internal circumstances provided strong incentives in favour of drastic modification of the traditional Lomé arrangements. These internal circumstances included, most notably: the overall declining political priority for maintaining a highly favourable package for the ACP, given the enlargement process and security and migration challenges closer to home in Central and Eastern Europe and around the Mediterranean; a certain degree of 'aid fatigue' in traditional donor countries; and the serious managerial and competence problems in the European Commission …

The Cotonou agreement entailed significant changes in at least four important areas:

1. It further strengthened the political dimension of the new partnership which among others led to a strengthened conditionality and the incorporation of broader objectives such as peace and stability and a stable and democratic environment.[31]
2. Poverty alleviation was made the cornerstone of the new partnership. Legally this involved entrenching the wider focus on sustainable development (as reflected in

[28] Cuba was an ACP member country in 2000 but did not sign the Cotonou Agreement. Timor Leste became an ACP member country in 2003 and subsequently acceded to the Cotonou Agreement.

[29] Commission Communication, *Guidelines for the Negotiation of New Cooperation Agreements with the African, Caribbean and Pacific (ACP) countries*, COM (97) 537 final, Brussels, 29 October 1997, 3–5.

[30] K Arts, 'ACP-EU Relations in a New Era: The Cotonou Agreement' (2003) 40 *Common Market Law Review* 95, 96.

[31] Cotonou Agreement, Art 98.

the new EU development competence introduced by the Maastricht Treaty[32]) by including social, human, and environmental objectives alongside the more traditional focus on trade and aid.

3. This certainly did not diminish the importance of trade in the relationship with ACP, but a qualitative change did take place. As a consequence of the limited impact of Lomé to stimulate economic development, and due to the WTO-incompatibility of the EU's unilateral preferential trade regime for ACP countries, Cotonou was based on a new footing of progressive re-introduction of reciprocal preferences for all but the least-developed ACP's.[33] Cotonou would function as the framework agreement, and the ACP's were expected to negotiate free trade-oriented Economic Partnership Agreements with the Community.[34]
4. Cotonou would introduce a considerable element of geographical differentiation. This reflected an acceptance that there were significant differences among the 77 ACP nations, combined with an EU-centric view that regional integration is key to stimulating long-lasting and stable economic growth. As a consequence, so-called Economic Partnership Agreements (EPA's) would be negotiated with specific regional groupings. However, large question marks existed over the ACP countries' institutional capacity to support such comprehensive trade agreements. Furthermore, there has been significant disagreement between EU and ACP countries as to the link between trade liberalisation and the need for financial aid in these agreements. Finally, the EU has been subject to significant critique for its artificial creation of regional groupings which do not necessarily reflect actual reality as regards regional integration.[35]

The Cotonou agreement was negotiated for a period of 20 years, with a revision every five years. It was set to expire in February 2020. Therefore, already in 2015 the Commission and the High Representative initiated a process of reflection leading to a Joint Communication in November 2016 on the EU-ACP partnership post-Cotonou.[36] According to this Joint Communication the new partnership shall build upon the UN Sustainable Development Goals (SDGs), on the Global Strategy for the European Union's Foreign and Security Policy (see Chapter 9) and on the New European Consensus on Development.[37] Negotiations between the ACP group and the European Union began in September 2018, but since the new Agreement would not be ready to be applied by the expiry date in February 2020 the parties decided to adopt transitional measures to extend the application of the provisions of the Cotonou Agreement.

[32] EC Treaty, Art 177.

[33] The Least Developed Countries (LDCs) are a group of particularly vulnerable developing countries identified by the United Nations. The list of LDCs is revised every three years. As of June 2019, it contains 47 countries.

[34] Arts (n 30) at 111.

[35] M Meyn, 'Economic Partnership Agreements: An "Historic Step" towards a 'Partnership of Equals'?' (2008) 26 *Development Policy Review* 515, 519.

[36] Joint Communication to the European Parliament and the Council, A renewed partnership with the countries of Africa, the Caribbean and the Pacific, JOIN(2016) 52 final.

[37] The New European Consensus on Development 'Our World, Our Dignity, Our Future', Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the European Commission [2017] OJ C210/1. The New European Consensus on Development is discussed in Section IV.B below.

GR Olsen, 'Coherence, Consistency and Political Will in Foreign Policy: The European Union's Policy towards Africa' (2008) 9 *Perspectives on European Politics and Society* 157, 167

… the motives and reasons for launching the ideas to establish the EPAs were closely related to a political wish of the EU to be in line with the WTO and to be in agreement with its aim to promote trade liberalisation. WTO compliance is 'at the very centre of the present post-Lomé negotiations because the EU puts them there … [T]he use of the WTO is a "strategic attempt by the EU to externalise responsibility for its own policy"'. On the other hand, the European Union sees the regional trade arrangements as a mechanism to promote development via trade liberalisation. It is an assumption that trade liberalisation will result in more trade and thus contribute to increase economic growth, which may lead to reduced poverty. At least, it is worth noting that one of the topics which were dealt with during the negotiations on establishing the EPAs was exactly how to promote development by means of trade. So if the future will show that the EPAs and free trade promote development, it is possible to argue that the trade policy of the Union buttresses the aim of its development aid policy. If on the other hand, the critics show to be right in their negative evaluation of the possible consequences of the EPAs, it is necessary to conclude that the trade policy is inconsistent and incoherent with the aims of several of the other policy instruments.

The historical overview is important to keep in mind when analysing the legal aspects of the three C's in EU development cooperation policy. In the preceding paragraphs, we have highlighted the intimate linkage between development and trade. However, as time progressed, the scope of development policy became progressively wider to include human rights, social and environmental concerns. The objectives of EU development policy and the instruments to implement them have evolved significantly: the oscillation of reciprocal and non-reciprocal trade arrangements, the shift in focus from governments to civil society, and so on. Finally, the relationship with the Member States is important too: the Member States upload their interests to the EU level while they simultaneously maintain their own individual development policies. To this day, these and other concerns are captured by the notions of complementarity, coherence and coordination.

B. Complementarity of EU Development Policy: Position of the Member States

As indicated in Chapter 3, non-pre-emptive and complementary shared competences are the exception and their effect is defined in Article 4(3) TFEU for research, technological development and space policy and, in Article 4(4) TFEU for development and humanitarian aid. The difference between these provisions is that the latter indicates that the EU can develop a 'common policy and carry out activities'

whereas Article 4(3) TFEU merely points to 'carrying out activities'. In both cases, these paragraphs indicate that 'the exercise of that competence shall not result in Member States being prevented from exercising theirs'. In the sphere of development policy and humanitarian aid respectively, Articles 208(1) and 214(1) TFEU define this co-existence in a more positive, constructive fashion as 'complementing and reinforcing' each other. The purpose of defining these policy areas in this fashion is that there is a 'bias towards action', or even a 'the more the better' approach in these fields. The consequence of this peculiar legal nature of EU external competence – sometimes referred to as a 'parallel competence' – is that EU and Member State co-existence in development takes on a form rather different from that in pre-emptive shared competences. This is specifically reflected in the approach taken by the Court of Justice to EU and Member State action in this policy domain. In *Bangladesh* and *EDF*, the Court expressly exhibited a tolerant approach to the interconnection between intergovernmental and supranational approaches to organising and exercising the complementary competences of the Union and the Member States.

In *Bangladesh*, Parliament sought the annulment of an act adopted by the Council which was to grant special aid to Bangladesh[38] and of the means adopted by the Commission for the implementation of that act. This had not been adopted by the Council as an institution of the Union, but as 'the Member States meeting in Council', even though they decided 'on the basis of a Commission proposal' to grant aid to Bangladesh, which it would execute 'under a Community action'.[39] This meant that the Member States were not acting in their capacity as members of the Council, but as representatives of their governments collectively exercising the powers of the Member States.[40] The European Parliament submitted that the act really constituted an act of the Council since the document was entitled 'Council conclusions' and since all foreign ministers were present when the document was adopted. Therefore, it infringed the budgetary prerogatives conferred on Parliament. Parliament submitted several arguments to underline the 'Community'-nature of the act, which the Court all refuted. The CJEU founded its reasoning upon the nature of the competence as complementary, and gave the Member States and institutions a good amount of freedom to organise development policy:

Cases C-181/91 and C-248/91 *Parliament v Council and Commission (Bangladesh)*, ECLI:EU:C:1993:271

16 … it should be pointed out that the Community does not have exclusive competence in the field of humanitarian aid, and that consequently the Member

[38] This case concerned what is presently Art 214 TFEU, the EU's competence in humanitarian aid, as no distinct competence existed at the time of that judgment. Given the identical complementary nature of EU development and humanitarian competencies, the findings apply equally to the former competence.

[39] Cases C-181/91 & C-248/91 *Parliament v Council and Commission (Bangladesh)*, ECLI:EU:C:1993:271, para 2.

[40] Ibid, para 12. The Council argued that therefore the action was inadmissible, but the Court maintained that an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects. See para 13 and Case 22/70 *Commission v Council (ERTA)*, ECLI:EU:C:1971:32.

States are not precluded from exercising their competence in that regard collectively in the Council or outside it.

17 In support of its application, Parliament relies firstly on the reference made in the contested act to the Commission's proposal. In its opinion, that reference shows that, in view of the procedure which led to the act's adoption, it was the Council, not the Member States, which acted in this case.

18 That argument is not conclusive. Not all proposals from the Commission necessarily constitute proposals within the meaning of Article 149 of the Treaty [now Article 293 TFEU]. Their legal character must be assessed in the light of all the circumstances in which they were made. They may just as well constitute mere initiatives taken in the form of informal proposals.

19 Secondly, Parliament observes that, according to the description of the act, the special aid was to be administered by the Commission. According to the fourth indent of Article 155 of the Treaty [now Article 17 TEU], however, powers of implementation may be conferred on the Commission only by a decision of the Council.

20 That argument cannot be accepted either. The fourth indent of Article 155 of the Treaty does not prevent the Member States from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council.

The objective of the Parliament's arguments was to more fully 'communautarise' action in development policy and thereby ensure its own (budgetary) role in the process. In this case, the Commission had made a proposal on aid to Bangladesh and Member States could either choose to provide contributions to the EC which the Commission would then administer or to provide contributions bilaterally to Bangladesh. The Court found that such a proposal does not necessarily 'start up' a Union (legislative) process. They may also be informal policy proposals whose legal consequences ought to be assessed in their own right.[41] More generally, the Court found that the role of the Commission was not limited by the Treaty. It could function as an institution of the EU as a legal person, but the Treaties did not exclude that it provided services which were more akin to that of a 'secretariat of an international organization' being requested to support a collective of Member States. This approach of the Court can be seen as an expression of the idea of 'mutually reinforcing and complementary' EU and Member State competence, and the corollary need for coordination. The relevant actors are free to exercise and coordinate their respective powers on a supranational or intergovernmental basis as they deem most appropriate.

[41] For more on soft law and its role in developing EU external relations, see Chapters 4 and 13.

A few months after the *Bangladesh* judgment, in *EDF*, Parliament sought the annulment of a Financial Regulation of July 1991 applicable to development finance cooperation under the Fourth Lomé Convention.[42] To implement financing commitments under that Convention, the Member States meeting within the Council had adopted the instrument setting up a seventh European Development Fund (EDF)[43] which, in turn, would be implemented through a financial Regulation adopted according to a procedure which did not include Parliament. The latter institution thus sought a declaration from the Court that development aid under the Lomé Convention was Community expenditure and therefore had to be governed by financial regulations implemented according to the applicable EEC Treaty procedure which required consultation of Parliament.[44] In short, the Parliament argued that the institutional balance within the Treaties had been impinged. The Court tackled this question by first examining who had undertaken financial commitments towards third countries under the Lomé Convention (EC or Member States) and, secondly, who was subsequently responsible for the performance of those obligations. In both instances, the answer was essentially derived from the complementary nature of EU competence in the area of development cooperation. The EU and the Member States can choose which of them, or both jointly, undertakes an international commitment in this sphere and subsequently they can choose which of them, or both jointly, is responsible for carrying out their financing obligations. In this instance they chose to do so through the EDF.

Case C-316/91 *Parliament v Council (EDF)*, ECLI:EU:C:1994:76

21 The Parliament argues that it follows from the very words of Article 231 of the [Lomé Convention] that the Community as such has undertaken vis-à-vis the ACP States … an obligation of international law distinct from those undertaken by the Member States …

24 The question as to who has entered into a commitment vis-à-vis the ACP States must be dissociated from the question whether it is for the Community or its Member States to perform the commitment entered into. The answer to the first question depends on an interpretation of the Convention and on how in Community law powers are distributed between the Community and its Member States in the relevant field, while the answer to the second question depends only on how those powers are distributed.

25 It is appropriate first to consider the distribution of powers between the Community and its Member States in the field of development aid.

26 The Community's competence in that field is not exclusive. The Member States are accordingly entitled to enter into commitments themselves vis-à-vis

[42] Case C-316/91 *Parliament v Council (EDF)*, ECLI:EU:C:1994:76, para 1.
[43] Ibid, para 2.
[44] Ibid, para 4.

non-member States, either collectively or individually, or even jointly with the Community …

28 It is appropriate next to interpret the Convention in order to identify the parties which have entered into commitments.

29 The Convention was concluded, according to its preamble and Article 1, by the Community and its Member States of the one part and the ACP States of the other part. It established an essentially bilateral ACP-EEC cooperation. In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its Member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance.

30 Although Article 231 of the Convention, like Article 1 of the Financial Protocol, uses the phrase 'the Community's financial assistance', it is nonetheless the case that several other provisions use the term 'Community' in order to denote the Community and its Member States considered together …

33 It follows from the above that, in accordance with the essentially bilateral character of the cooperation, the obligation to grant 'the Community's financial assistance' falls on the Community and on its Member States, considered together.

34 As for the question whether it is for the Community or for its Member States to perform that obligation, it should be noted, as stated above at paragraph 26, that the competence of the Community in the field of development aid is not exclusive, so that the Member States are entitled collectively to exercise their competence in that field with a view to bearing the financial assistance to be granted to the ACP States.

III. Coherence in EU Development Policy: Evolving Scope and Links with other Policies

A. 'Policy Coherence for Development': Legal and Policy Dimensions

In development cooperation, coherence has significant legal and political implications. The principle has a firm footing in Article 208(1) TFEU. According to this provision there are three distinct aspects to coherence in this policy area: first, coherence of EU development cooperation with the more general principles and objectives of EU external relations (eg, linking to Article 21 TEU); secondly, poverty reduction as

the primary policy objective providing intra-policy focus as to how different initiatives cohere to the central goal; thirdly, the obligation to take account of development objectives in other policies which are likely to affect developing countries.

These legal obligations attract regular and significant attention in EU policy making through the process called 'Policy Coherence for Development (PCD)'.[45] PCD was formalised in the 2005 European Consensus[46] as a way of strengthening work towards achieving the Millennium Development Goals (MDGs).[47] In 2017 the first consensus was replaced by the 'New European Consensus'.[48] These 'consensuses' particularly focus on linkages between development and other EU policies since 'the impact of EU non-aid policies on developing countries should not be underestimated, and neither should their potential to make a positive contribution to the development process in these countries. EU policies in areas such as trade, agriculture, fisheries, food safety, transport and energy have a direct bearing on the ability of developing countries to generate domestic economic growth' as duly observed by the Commission.[49]

The New European Consensus on Development: 'Our World, Our Dignity, Our Future', Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the European Commission [2017] OJ C210/1

Policy coherence for development to achieve the SDGs

108. Sustainable development is at the heart of the EU project and firmly anchored in the Treaties, including for its external action. The EU and its Member States are committed to ensuring development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Ensuring policy coherence for sustainable development as embedded in the 2030 Agenda requires taking into account the impact of all policies on sustainable development at all levels – nationally, within the EU, in other countries and at global level …

111. Delivering on the new universal framework for sustainable development in the field of development cooperation is a shared responsibility of

[45] Communication from the Commission, *Policy coherence for Development – Accelerating progress towards attaining the Millennium Development Goals*, COM (2005) 134 final, Brussels, 12 April 2005.

[46] 'The European Consensus, Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union [2006] OJ C46/1.

[47] In 2015 the MDGs were replaced by the Sustainable Development Goals (SDGs). After 2015, PCD continues to play a significant role given the breadth in scope of current-day development policy.

[48] The New European Consensus on Development: 'Our World, Our Dignity, Our Future'. The New European Consensus on Development is treated in Section IV.B below.

[49] Communication from the Commission, *Policy Coherence for Development – Accelerating Progress towards Attaining the Millennium Development Goals*, COM (2005) 134 final, Brussels, 12 April 2005, 3–4.

> all stakeholders. Sustainable development requires a holistic and cross-sector policy approach and is ultimately an issue of governance which needs to be pursued in partnership with all stakeholders and on all levels. The EU and its Member States will therefore promote whole-of-government approaches and ensure political oversight and coordination efforts at all levels for SDG implementation. In order to better support policy formulation and decision-making, they will ensure the evidence base of policy impacts on developing countries through consultations, stakeholder engagement, ex-ante impact assessments and ex-post evaluations of major policy initiatives. Ongoing EU action towards sustainable global supply chains, such as in the timber and garment sectors, illustrate the added value of pursuing a coherent approach …

The main legal implications of PCD are found in the scope of EU competence and the choice of legal basis. In Chapter 3 we have seen that in the Treaty of Rome, the EEC was only conferred two substantive competences in the external field, namely CCP[50] and Association agreements.[51] As the nature of international trade relations began to change, the EEC sought to incorporate development concerns into its international trade policies which led to early case law on the scope of CCP, and the expansive approach of the Court of Justice. With new competences being conferred from the Single European Act onwards, the CJEU more carefully worked towards a 'balance of competences'. In Chapter 3 we examined the intricate relationship between diverse competence conferring provisions, the scope of these competences, the obligation to take into account objectives from other policy areas and the challenges with regard to establishing the appropriate legal basis. In the following subsections, we will build on this knowledge, and highlight two legal aspects of coherence as they apply in relation to development policy: First, the incorporation of human rights conditionality in development policy and secondly, the relationship between development policy and security (CFSP) concerns.

B. EU Development Policy and Human Rights Conditionality

Human rights represent an important aspect of the EU's external action (see Chapter 10), including in the context of development policy. In the succession of treaties from Yaoundé over Lomé to Cotonou, a progressive dynamic of politicisation and broadening the scope of the agreements beyond aid and trade has taken place. The inclusion of human rights first happened in 1986 with their addition to the preamble of Lomé III, subsequently included in the body of Lomé IV in Article 5 in 1990. With the Maastricht Treaty, respect and promotion of human rights was made one of

[50] TEC, Art 113 TEC (original Rome Treaty version).
[51] Ibid, Art 238.

the general objectives of the EU's development cooperation policy (Article 130u TEC (Maastricht version)).[52]

This treaty-based obligation served as foundation to the Commission's efforts to elevate the respect for human rights by the parties to its international agreements to an essential element of that agreement. The 'essential' reference was taken from Article 60(3)(b) of the Vienna Convention on the Law of Treaties, which lays down that '[t]he violation of a provision essential to the accomplishment of the object or purpose' of a given treaty constitutes a material breach of that treaty. A 'material breach' of a bilateral treaty by one party 'entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part'. In other words, if a developing country breaches a human rights clause in a treaty with the European Union and this clause is an 'essential element' of that treaty, the EU will be empowered to terminate or suspend the operation of whole or parts of the treaty. The European Union's development of 'essential element clauses' meant that effective observance of human rights and real progress towards democracy became a pre-condition for commitments contained in that EU trade or association treaty with the third country.[53] It is therefore generally referred to as 'conditionality'.[54] The question then arose as to whether that meant that the EU *de facto* pursued 'an external human rights policy' through incorporation of such clauses, or whether the incorporation of human rights into external development instruments could indeed be said to simply be an element of EU development competence.

The inclusion of essential element clauses in agreements which could be used to suspend the other provisions it contains, gave rise to the 1994 *Portugal v Council* case.[55] Portugal argued that the EC–India Partnership and Development Agreement, which had been founded on trade and development legal bases, required the inclusion of the flexibility clause (current Article 352 TFEU) because the development competence allegedly did not suffice to support the inclusion of human rights as an essential element of the agreement. Portugal considered that respect for human rights could at most be a general objective of the cooperation agreement if based on the development competence alone. Conversely, the Council argued that action could be taken without using the flexibility clause provision. The Court sided with the Council, drawing on an argument that reflects the coherence rationale of EU development policy as embedded in the Treaties. The fact that respect for human rights in development must be 'taken into account' (ex Article 177(2) TEC, current Article 208(1) TFEU) entails that it is possible for the EU to give substantive meaning to that provision without needing recourse to the flexibility clause. As we have seen in Chapter 3, the Court's approach

[52] See M Cremona, 'Human Rights and Democracy Clauses in the EC's Trade Agreements' in D O'Keeffe and N Emiliou (eds) *The European Union and World Trade Law: After the GATT Uruguay Round* (Chichester, Wiley, 1996).

[53] Ibid, 64. The European Union's human rights clauses have undergone extensive developments over the years so that a distinction is made between the 'basic clause', the 'essential elements clause', the 'Baltic clause' and the 'Bulgarian clause'. See further N Hachez, 'Essential Elements' Clauses in EU Trade Agreements: Making Trade Work in a Way that Helps Human Rights?' (2015) 53 *Cuadernos europeos de Deusto* 81.

[54] A method which is now more generally applicable in EU external relations, extending beyond fundamental rights.

[55] Case C-268/94 *Portugal v Council*, ECLI:EU:C:1996:46.

was one of seeking to guarantee the *effet utile* of the competences conferred upon the EU: it would not make sense for the drafters of the Treaties to refer to human rights in the competence conferring provision, if no real-world action could be taken on their basis.

Case C-268/94 *Portugal v Council*, ECLI:EU:C:1996:461

23 By declaring that 'Community policy (…) shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms', [current equivalent is Article 21 TEU] requires the Community to take account of the objective of respect for human rights when it adopts measures in the field of development cooperation.

24 The mere fact that Article 1(1) of the Agreement provides that respect for human rights and democratic principles 'constitutes an essential element' of the Agreement does not justify the conclusion that that provision goes beyond the objective stated in [Article 208 TFEU]. The very wording of the latter provision demonstrates the importance to be attached to respect for human rights and democratic principles, so that, amongst other things, development cooperation policy must be adapted to the requirement of respect for those rights and principles.

In Chapter 3 we have seen that there is a fine line between 'taking into account' a given policy objective and pursuing such an objective in its own right which requires a separate legal basis. We have seen that the Court approaches this question both in the context of establishing the scope of a given EU competence and in the closely related issue of 'correct legal basis'. In EU development policy, the Court has been faced with this question most recently in the context of the security-development nexus.

C. The Relationship Between Development and Security Policy

M Broberg, 'EU Development Cooperation and the CFSP: Mutual Encroachment?' in S Blockmans and P Koutrakos (eds) *Research Handbook on the EU's Common Foreign and Security Policy* (Cheltenham, Edward Elgar, 2018) 274

Even though the Lisbon Treaty has made poverty eradication a primary objective of the Union's development cooperation policy, … in practice other objectives are attributed very considerable weight in the development cooperation policy;

> this is particularly so with regard to security and migration. To some extent this may be explained by the Lisbon Treaty's revamping of the European Union's external relations framework; in particular the streamlining of objectives provided by Article 21 TEU and the creation of the High Representative/the EEAS. In other words, in the fields of security and migration, the EU development cooperation policy encroaches upon the CFSP …
>
> Similarly … the European Union's CFSP pursues objectives that in principle fall within the development cooperation objectives – both at the general level and when we turn to the implementation of the CFSP. This is particularly so in the areas of security and migration, where the CFSP is used to further objectives that also have a clear development or humanitarian aspect.
>
> In other words, it is clear that there is mutual encroachment of the European Union's development cooperation policy and its CFSP – first of all with regard to security and migration.

The security-development nexus has a policy and a legal dimension. From the policy side, the question revolves around the two-way relationship between a safe and secure environment and long-term progressive socio-economic development. From a legal perspective, the security-development relationship raises the question as to whether the EU ought to adopt a given initiative within the context of CFSP or its development competence – each with significantly different EU institutional structures, financial resources and diverse roles for the Member States. To summarise, stabilising or preventing armed conflict in the short term is commonly addressed through the EU's CFSP (see Chapter 9), whereas longer-term socio-economic development falls within the realm of Article 208 TFEU. Quite evidently, however, initiatives that stimulate security will aid long-term development; initiatives that support development will aid security in a given region. In light of this need for coherent development initiatives (PCD), the question which arises is similar to that on human rights above: to which extent do security initiatives fall within the scope of EU development competence? In pre-Lisbon case law, the Court of Justice has affirmed the wide scope of EU development policy in relation to a dispute on a border management project in the Philippines[56] and in a case concerning EU support to ECOWAS to combat the illegal dissemination of small arms and weapons (see also Chapters 3 and 9).[57] In these cases of 2007 and 2008, the Court of Justice confirmed that development cooperation has developed to a very broad policy field which meant that security-oriented measures could also be adopted by the Union under its development competence, as long as they were focused on the socio-economic objectives of EU development policy, in particular the eradication of poverty.

[56] Case C-403/05 *Parliament v Commission (Philippine Border Mission)*, ECLI:EU:C:2007:624.
[57] Case C-91/05 *Commission v Council (Small Arms/ECOWAS)*, ECLI:EU:C:2008:288.

With the *Philippine Border Mission* Case, the Parliament sought to annul the Commission Decision approving a project concerning the security of the borders of the Philippines. The contested Decision was based on Regulation No 443/92 organising financial and technical cooperation with the Asian and African countries, predating the entry into force of the Maastricht Treaty by little over a year. This regulation was subsequently replaced by Regulation (EC) 1905/2006.[58] The 2006 regulation stated that the old Regulation continued to apply for legal acts and commitments of the pre-2007 budget years and the contested decision was to be financed from the 2004 budget. As regards objectives, the contested decision clearly stated that 'the overall objective of the proposed project is to assist in the implementation of the UNSCR 1373 (2001) in the fight against terrorism and international crime'.[59] Parliament submitted that the Commission exceeded its implementing powers because the reasons for that decision were clearly based on considerations connected with the fight against terrorism and international crime, thereby going beyond the framework set out by Regulation No 443/92 which served as its basis.[60] The Commission made two counter-arguments: one as regards the specific objective of the instrument,[61] and one as regards the general scope of EU development policy. For present purposes the second is solely pertinent.

Case C-403/05 *Parliament v Commission (Philippine Border Mission)*, ECLI:EU:C:2007:624

45 Relying on the general framework and evolution of development policy over recent years the Commission then explains that the strengthening of institutions, which is one of the horizontal aspects essential to sustainable development, henceforth forms an integral part of Community cooperation policies. That follows also from a reading of Articles 177 EC [current Article 208 TFEU] and 181a EC [current Article 212 TFEU], in which the terms employed show that assistance may be given in fields not expressly referred to, such as, in particular, mine-clearance or the decommissioning of light weapons.

46 Whilst recognising that it has no independent powers in respect of anti-terrorism, the Commission points out that Regulation No 443/92 is a financial instrument at the service of a global policy, so that, in determining its scope, it

[58] Regulation 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation [2006] OJ L378/41. Regulation 1905/2006 has since been replaced by Regulation 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020 [2014] OJ L77/44.

[59] Case C-403/05 *Parliament v Commission (Philippine Border Mission)*, ECLI:EU:C:2007:624, para 16. United Nations Security Council Resolution 1373 (2001) of 28 September 2001 was adopted immediately in the wake of the 9/11 terrorist attacks.

[60] Case C-403/05 *Parliament v Commission (Philippine Border Mission)*, ECLI:EU:C:2007:624, para 39.

[61] See paras 43 and 44. Essentially, the Commission sought to argue that combating international terrorism was not the dominant aim of the contested Decision, but combating trafficking in drugs and human beings, which more generally creates conditions conducive to economic development. It thereby sought to steer the objectives of the instrument away from a predominant 'security-focus' to ensure that the instrument remained within the scope of Regulation 443/92.

is appropriate to show a certain flexibility and to take account, in particular, of the general policy framework.

The Court thus had to answer the question whether the scope of EU development policy of the early 2000's had developed and widened to the extent that EU development measures can support and 'take into account' international efforts combating terrorism.

Case C-403/05 *Parliament v Commission (Philippine Border Mission)*, ECLI:EU:C:2007:624

55 In order to rule upon the Parliament's action, it is appropriate, therefore, to determine whether an objective such as that pursued by the contested decision, relating to the fight against terrorism and international crime, comes within the scope of Regulation No 443/92.

56 Admittedly, Articles 177 EC to 181 EC [current Articles 208 to 211 TFEU], inserted by the EU Treaty and dealing with cooperation with developing countries, refer not only to the sustainable economic and social development of those countries, their smooth and gradual integration into the world economy and the campaign against poverty, but also to the development and consolidation of democracy and the rule of law, as well as to respect for human rights and fundamental freedoms, whilst complying fully with their commitments in the context of the United Nations and other international organisations.

57 In addition, it follows from the Joint statement of the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy entitled 'The European Consensus' (OJ 2006, C 46, p. 1) that there can be no sustainable development and eradication of poverty without peace and security and that the pursuit of the objectives of the Community's new development policy necessarily proceed via the promotion of democracy and respect for human rights.

58 The Community legislature thus decided … to strengthen the development policy framework in order to improve its effectiveness. In that respect, Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 establishing an Instrument for Stability (OJ 2006 L 327, p. 1) establishes Community assistance, complementary to that provided for under external assistance, by contributing, among other things, to preventing the fragility of the States concerned. Under the sixth recital in the preamble to that regulation, account must be taken of the European Council Declaration on Combating Terrorism of 25 March 2004, in which it called for counter-terrorist objectives to be integrated into external assistance programmes …

> 59 The fact remains that it is common ground that Regulation No 443/92 contains no express reference to the fight against terrorism and international crime. In that same respect, it must be pointed out that the proposal for amendment of Regulation No 443/92, presented by the Commission in 2002 (COM 2002/0340 final of 2 July 2002) and intended to insert in the scope of that regulation, among other things, the fight against terrorism, failed. …
>
> 68 It follows from all the foregoing that the contested decision pursues an objective concerning the fight against terrorism and international crime which falls outside the framework of the development cooperation policy pursued by Regulation No 443/92, so that the Commission exceeded the implementing powers conferred by the Council in Article 15 of that regulation.

The Court starts from the observation that the competences inserted into the EC Treaty in Maastricht are quite broad. They also include objectives relating to democracy, rule of law and human rights although the connection of development to security is not explicit in EU primary law as it stood in 1992. Given that the contested instrument was adopted in the implementation of the old Regulation based on the Treaties as they stood then, the scope of EU development policy should be read in light of its specific point in time, and security objectives did not fall within the scope of EU development competence. It is then important that the CJEU expressly accepts that the scope of EU powers has since developed. In the excerpt above, it supports this evolutive interpretation of the scope of EU development powers with reference to a number of political and legal developments. Importantly, the CJEU does not accept that the Commission, as an implementing institution, can independently establish the evolving scope of EU development powers. Instead, this clearly falls to the EU legislative bodies. Although the Lisbon Treaty has since reshuffled the objectives of EU external relations (see Chapter 1), the principle still stands: EU development policy is wide in scope, and can take into account security-related initiatives in function of eradicating poverty (Article 208 (1) TFEU).[62]

In the *ECOWAS* (or *Small Arms and Light Weapons – SALW*) judgment, the Court was again faced with having to establish the scope of EU development policy, confirming its wide scope established in the Philippine Border Mission case. The case nonetheless deserves attention, since it was a politically high-profile clash between the Member States on the one hand, and the Commission and Parliament on the other.

The dispute originated between the Commission and the Council concerning financial and technical assistance to the Economic Community of West African States (ECOWAS). From a policy perspective, the objective was to legally formalise into a binding treaty, a pre-existing moratorium on the trade of small arms and light weapons. The Council adopted a Decision providing funds to ECOWAS with that objective

[62] See also Case C-377/12 *Commission v Council (Philippines)*, ECLI:EU:C:20141903 and the examination of this ruling in M Broberg and R Holdgaard, 'Demarcating the Union's Development Cooperation Policy after Lisbon: *Commission v. Council (Philippines PCFA)*' (2015) 52 *Common Market Law Review* 547.

in mind and did so on a CFSP legal basis. However, the Commission was of the opinion that such action fell within the sphere of development cooperation. In *ECOWAS*, the Court similarly defined the broad scope of EU development policy, utilising the (old) European Consensus,[63] a statement of the Development Council on the threat of small arms to global stability, and a statement of the European Council on combating the illicit spread of small arms and light weapons.[64]

Case C-91/05 *Commission v Council (Small Arms/ECOWAS)*, ECLI:EU:C:2008:288, para 69

For example, on 21 May 1999, the 'development' Council of the European Union adopted a resolution on small arms in which it presented the proliferation of those weapons as a problem of global proportions which, in particular in crisis zones and countries where the security situation is unstable, has been an obstacle to peaceful economic and social development. More recently, in the European Union strategy to combat illicit accumulation and trafficking of small arms and light weapons adopted by the European Council on 15 and 16 December 2005 (Council document No 5319/06 PESC 31 of 13 January 2006), the European Council referred, among the consequences of the illicit spread of small arms and light weapons, in particular to those relating to the development of the countries concerned, that is, the weakening of State structures, displacement of persons, collapse of health and education services, declining economic activity, reduced government resources, the spread of pandemics, damage to the social fabric and, in the long term, the reduction or withholding of development aid, while adding that those consequences constitute, for sub-Saharan Africa, the region principally affected, a key factor in limiting development.

In delineating CFSP from EU development policy, the Court thus found that the intimate relationship between socio-economic development and security and stability of developing nations means the following: a concrete measure aiming to combat the proliferation of small arms and light weapons may be adopted by the Union under its development cooperation competence, if that measure by virtue both of its aim and its content falls within the socio-economic objectives of development policy and it does not pursue a security objective in itself (see also Chapter 9).[65]

While the broadening scope of development cooperation stands, the Treaty of Lisbon has made significant changes to the Treaty structure which also impact EU development competence. We refer to Chapter 3 for the analysis of how Lisbon has

[63] Case C-91/05 *Commission* v *Council (Small Arms/ECOWAS)*, ECLI:EU:C:2008:288, para 66.
[64] Ibid, paras 69–70.
[65] Case C-91/05 *Commission* v *Council (Small Arms/ECOWAS)*, ECLI:EU:C:2008:288, para 71.

reoriented established case law on scope and choice of legal basis, including on the possibility of using a dual legal basis. Notably, the Lisbon Treaty placed greater emphasis on coherence by linking various external objectives in Article 21 TEU (see Chapter 1), aiming to avoid competence conflicts and instead focus energy on the substance of policy making.

Evidently, the question of legal basis is but a narrow aspect of the security-development nexus in EU development cooperation. The fact that dual legal bases may be utilised for an international instrument implies a policy connection between development and security matters. Still, the present treaty-basis is likely to continue to constitute a challenge to EU policy makers as well as to institutions and the judiciary.

H Merket, *The EU and the Security-Development Nexus: Bridging the Legal Divide* (Leiden, Brill/Nijhoff, 2016) 356–65

The Union's gradual constitutional changes followed the rhythm of pragmatics rather than grand design, successively adding new layers and subsystems; new dividing lines and bridges across them. The complex system that ensued, sets out the legal boundaries within which the rising commitment to the security-development nexus has matured. While the challenges of insecurity, fragility, poverty and development are ruthlessly cross-cutting, the Union's means to cut across the competence boundaries between them are regulated and restricted by primary law. This makes efforts to align and integrate EU security and development policies legally complex as it requires difficult choices of legal basis between divided policy toolboxes. At the same time, it raises administrative challenges as these choices have to be made across very distinct policy-making communities. These are moreover politically sensitive as they affect the division of competences and balance of power between EU institutions. …

In sum, the EU's commitment to enhance the security-development nexus has incited an impressive activation of instruments, expansion of institutions and unceasing embracement of new spheres of action. However, largely due to the decades-old constitutional insulation of the CFSP, this is not the result of a unified endeavour, but of separate and often independent development cooperation and CFSP/CSDP efforts …

In essence, the [development-CFSP] integration-delimitation paradox implies that the last word with regard to the enhancement of coherence between development cooperation and CFSP/CSDP was not said with the entry into force of the Lisbon Treaty. Its drafters ensured that the balance with delimitation would develop on its own pace … If the current trends endure, this could gradually flatten out many differences between the policy, institutional and legal regimes of CFSP and development cooperation. This will, however, change nothing to the Treaty-rooted delimitation itself, which will continue to challenge EU policy-makers, institutions and the judiciary, and require them to come up with innovative solutions.

IV. Vertical and Horizontal Coordination in EU Development Policy

A. Introduction

Coordination is the operative arm of the other two C's: complementarity and coherence. The conferral of a complementary EU development competence implies that the Member States remain fully competent to deploy initiatives in this domain alongside the EU, without one excluding the other. This 'bias towards action' makes vertical coordination of EU and Member State action all the more imperative. It is for that reason that Article 210 TFEU contains an explicit obligation to coordinate and consult, with a distinct role for the Commission to promote complementarity and efficiency of EU and Member State action. The notion of coherence then overlaps with complementarity in that it evidently implies positive synergies between the EU and national levels. Coherence is, however, more than that, as it also has an important horizontal component. As we have seen, the scope of EU development policy is wide and legal obligations exist to take into account objectives from other EU policies as well. Thus, intra-EU coordination between different institutions and bodies or within institutions is crucial. This includes a range of relationships such as the Council-Commission-Parliament relationship in legislative work (Article 209 TFEU) but, most crucially, the Commission-EEAS relationship at the implementing level and also intra-organisational relations such as those between Commission DG's (eg, DG Trade – DG DEVCO). In sum, complementarity and coherence in practice requires coordination between all actors involved. We will examine the vertical and horizontal dimensions by looking at the way EU development policy is financed and implemented in practice.

B. Multi-Track Financing of Development Cooperation: EDF and EU Budget

The challenge to coordinate EU and Member State efforts is best illustrated through the important non-legally binding document from 2017 known as the New European Consensus on Development. The full name of this soft legal document is: '*Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: The New European Consensus on Development 'Our World, Our Dignity, Our Future.'*[66] The stated objective of this document is to provide the framework for a common approach to development policy that will be applied by the EU institutions and the Member States while fully respecting each other's distinct roles and competences. From a legal perspective, the title of the document indicates that

[66] Title as quoted [2017] OJ C210/1.

the Member States participated as the Council – an institution of the EU – as well as sovereign nations exercising their retained competence. They signed up to the New European Consensus to set out a common vision together with the Commission and European Parliament as institutions of the EU as an international organisation. By rising above legal dividing lines, this document meant to coordinate the three dominant streams of development assistance that make up *European* (as opposed to EU) development cooperation: funds from Member State budgets disbursed in accordance with national rules and policy priorities; funds from the EU budget disbursed in accordance with EU development policy priorities (208 TFEU); funds from the Member State budgets which are pooled in a 'European Development Fund' (EDF) and disbursed in accordance with the priorities jointly agreed in the Cotonou Agreement with the ACP countries.

M Broberg, *Governing by 'Consensuses' – On the Legal Regulation of the EU's Development Cooperation Policy*, DIIS Working Paper 2010/23, 6–7

As a rule, the Union's expenses are financed via its budget. Such expenditure presupposes the prior adoption of a legally binding Union act forming the legal basis for the expenditure in accordance with the Union's financial regulation. However, the Union's development cooperation policy only partially follows this scheme, since to a large extent, development assistance to the ACP countries is financed via the European Development Fund (EDF) instead of via the Union's budget. There are historical reasons for this and on several occasions the Commission has proposed integrating all development assistance in the budget. Such integration would lead to a different allocation of the Member States' financing of assistance to the ACP countries and would give the Commission greater power in this field. Perhaps this is part of the explanation why the EDF continues to exist. The EDF is financed by the Member States, has its own financial rules and is governed by a special committee. The continuing existence of the EDF means that the European Union's development assistance flows via two main channels, namely the budget and the EDF.

The EDF is funded outside the EU budget, consisting of financial contributions by the EU Member States proportionally to contribution keys which represent a certain percentage of the entire value of the EDF. For example, the eleventh EDF for 2014–2020 amounts to €30.5 billion,[67] of which Germany contributes about 20 per cent, and Bulgaria contributes around 0.2 per cent.[68] The funds are provided

[67] With an additional €2.6 billion that will be made available by the European Investment Bank in the form of loans from its own resources.

[68] Cf Article 1 of Internal agreement between the Representatives of the Governments of the Member States of the European Union, meeting within the Council, on the financing of European Union aid under the multiannual financial framework for the period 2014 to 2020, in accordance with the ACP-EU Partnership Agreement, and on the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the Treaty on the Functioning of the European Union applies [2013] OJ L210/1.

on an intergovernmental basis, yet the Commission has a significant role; it is responsible for administering the Fund in line with an implementing Regulation which is adopted for each EDF period. The Member States play a role in EDF governance through a committee which consists of representatives of the Member States set up at the Commission. This EDF committee is chaired by a Commission representative and, for each EDF it adopts rules of procedure, which specify when it meets and renders decisions in line with the pertinent implementing Regulation.[69] While the EDF has been in existence since the early days of the EEC, incorporation into the EU budget has been on the agenda for some time. The first EDF was launched in 1959, with the eleventh and possibly last EDF running until 2020. With respect to the negotiations for the 2021–2027 multi-annual financial framework, the Commission has proposed to integrate the EDF into the EU budget ('EDF budgetisation').[70] This would then coincide with the expiry of the Cotonou Agreement. However, at the time of writing, the outcome of these negotiations are not clear.

The second channel through which the EU provides financing for its development policy is the EU budget. Here the EU adopts a set of legally binding instruments via the ordinary legislative procedure (Article 209 TFEU), through which funds are administered in accordance with the general budgetary rules of the EU's Financial Regulation.[71] These legally binding acts – usually Regulations – are adopted for the duration of the seven-year multi-annual financial framework (MFF) (eg, 2014–2020)[72] in parallel to the EDF. In their scope of application and objectives for which funds are allocated, a distinction is made between geographic and thematic instruments. For the present MFF, the EU has adopted the following instruments:[73]

- *Geographic*: Development cooperation Instrument (DCI), Instrument for Pre Accession Assistance (IPA II), Instrument for Greenland (IfG), and European Neighbourhood Instrument (ENPI).
- *Thematic*: European Instrument for Democracy and Human Rights Worldwide (EIDHR), Instrument contributing to Stability and Peace (IcSP), Instrument for Nuclear Safety Cooperation (INSC) and the Partnership Instrument (PI).

[69] For the eleventh EDF: Council Decision 2015/355 of 2 March 2015 adopting the rules of procedure for the European Development Fund Committee [2015] OJ L61/17.

[70] Proposal for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027, COM(2018) 322 final.

[71] M Broberg, *Governing by 'Consensuses' – on the Legal Regulation of the EU's Development Cooperation Policy*, DIIS Working Paper 2010/23, 6–7.

[72] Regulation 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014–2020 [2013] OJ L347/884.

[73] Regulation 233/2014 of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014–2020 [2013] OJ L77/44; Regulation 232/2014 of 11 March 2014 establishing a European Neighbourhood Instrument [2014] OJ L77/27; Regulation 231/2014 of 11 March 2014 establishing an Instrument for Pre-Accession Assistance (IPA II) [2014] OJ L77/11; Regulation 230/2014 of 11 March 2014 establishing an Instrument contributing to Stability and Peace (IcSP) [2014] OJ L77/1; Regulation 235/2014 of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide [2014] OJ L77/85; Council Regulation 237/2014/Euratom of 13 December 2013 establishing an Instrument for Nuclear Safety Cooperation, [2014] OJ L77/109; Regulation 234/2014 of 11 March 2014 establishing a Partnership Instrument for cooperation with third countries [2014] OJ L77/77; and Council Decision 2014/137 of 14 March 2014 on relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other (IfG) [2014] OJ L76/1.

These instruments illustrate how coordination, coherence and complementarity are intertwined in the day-to-day practice of EU development cooperation.

Joint Communication of the Commission and High Representative, *Global Europe: A new Approach to Financing EU External Action*, COM(2011) 865 final, Brussels, 7 December 2011

The emphasis for the post-2013 period will be on adapting the EU's methods of designing, programming and delivering external assistance to the new political, economic and institutional realities while building on what has proven to be successful so far. Addressing short-, mid- and long-term challenges on a variety of issues and mobilising a mix of external instruments at EU and Member State level will require particular efforts ensuring overall policy coherence in our engagement with our partners in the pursuit of a comprehensive EU approach. The proposed revision of the programming process will ensure greater consistency between the different areas of EU external action and a more result-driven approach, while allowing flexibility to respond to political priorities.

The new generation of external instruments will facilitate political dialogue, negotiations and implementation of existing and future agreements with our partners in support of an overall political strategy for that country. In this framework, policy coherence for development remains a key priority …

The EU must seek to target its resources where they are needed most and where they could make the most difference. A more differentiated approach to partnerships and aid allocation driven by the country context is a core principle of this proposal. The EU should continue to recognise the particular importance of supporting development in its own neighbourhood and in Sub-Saharan Africa. On the other hand, many countries are graduating from EU development assistance because they are capable of funding their own development. Assistance will be allocated on the basis of country needs, capacities, commitments, performance and potential EU impact. The specific needs of countries in vulnerable, fragile, conflict-affected and crisis situations will be a priority …

Overall, EU external instruments will take greater account of human rights, democracy and good governance when it comes to allocating external assistance to partner countries. With enlargement and neighbouring countries, country allocations and delivery of assistance should be more closely linked to progress in implementing reforms. For developing countries, the EU will strengthen mutual accountability in respect of commitments and the fulfilment of objectives as agreed with partner countries … In line with the Lisbon Treaty provisions, the new instruments will implement new mechanisms to ensure more

democratic debate on EU external assistance through a stronger involvement of the European Parliament. An example of this is the use of delegated acts, which can increase the flexibility of external instruments. Democratic scrutiny over the European Development Fund (EDF) will also be improved by bringing it into line with the Development Cooperation Instrument, while taking into account the specificities of the instrument.

C. Executing EU Development Policy: Commission and EEAS

The financing instruments to support EU development are adopted for a seven-year window covering the multi-annual financial framework. Thereafter, the Union must utilise these macroscopically oriented financing instruments to set more specific policy priorities and targets with shorter timespans. In turn, these are to be concretised and implemented through on-the-ground projects. This process of EU development policy making encompasses three phases: (1) management, (2) programming and (3) implementing EU development policy. In the pre-Lisbon context, the Commission oversaw this process. In the post-Lisbon era, a complex division of tasks exists between the EEAS and the Commission (specifically the Directorate-General for International Cooperation and Development (DevCo)). This is based on their respective roles as laid down in Articles 17 and 27(3) TEU, and has been specified in Article 9 of the Council Decision establishing the European External Action Service (see also Chapter 1).

Article 9, Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service [2010] OJ L201/30

1. The management of the Union's external cooperation programmes is under the responsibility of the Commission without prejudice to the respective roles of the Commission and of the EEAS in programming as set out in the following paragraphs.

2. The High Representative shall ensure overall political coordination of the Union's external action, ensuring the unity, consistency and effectiveness of the Union's external action, in particular through the following external assistance instruments:

– the Development Cooperation Instrument,
– the European Development Fund,
– the European Instrument for Democracy and Human Rights,

– the European Neighbourhood and Partnership Instrument,
– the Instrument for Cooperation with Industrialised Countries,
– the Instrument for Nuclear Safety Cooperation,
– the Instrument for Stability, regarding the assistance provided for in Article 4 of Regulation (EC) No 1717/2006.

3. In particular, the EEAS shall contribute to the programming and management cycle for the instruments referred to in paragraph 2, on the basis of the policy objectives set out in those instruments. It shall have responsibility for preparing the following decisions of the Commission regarding the strategic, multiannual steps within the programming cycle:

(i) country allocations to determine the global financial envelope for each region, subject to the indicative breakdown of the multiannual financial framework. Within each region, a proportion of funding will be reserved for regional programmes;
(ii) country and regional strategic papers;
(iii) national and regional indicative programmes.

In accordance with Article 3, throughout the whole cycle of programming, planning and implementation of the instruments referred to in paragraph 2, the High Representative and the EEAS shall work with the relevant members and services of the Commission without prejudice to Article 1(3). All proposals for decisions will be prepared by following the Commission's procedures and will be submitted to the Commission for adoption.

[The article continues to set out specific modi operandi for each listed instrument.]

In the three execution phases of development policy, the Commission is responsible for the 'management' of external development cooperation, whereas the EEAS and Commission share roles in the 'programming' phase. The 'implementation' phase again falls to the Commission. The line between management and programming can be difficult to draw, whereas implementation is perhaps the most straightforward to delineate: The implementation phase concerns the actual delivery of aid in an efficient and effective way, usually through a project or sector approach,[74] or straightforward budget support. The line between management and programming, and the role of the EEAS and Commission therein, is explained in the extract below.

[74] The project approach entails funding projects of civil society or private actors with a clearly specified objective in a given time period. The sector approach is broader by focusing on working with partner governments and other donors or stakeholders to coordinate longer term outcomes and financing for a given sector.

S Blockmans et al, *EEAS 2.0 – A Legal Commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service*, SIEPS Working Paper 2013/1, 92–93

In the context of (business) administration, 'management' is the process of dealing with or controlling things or people; the responsibility for and control of a company or organisation. Management in all business and organisational activities is the act of getting people together to accomplish desired goals and objectives using available resources efficiently and effectively. Management comprises designing, planning, organising, staffing, leading or directing, and controlling an organisation (a group of one or more people or entities) or effort for the purpose of accomplishing a goal.

According to Article 9(1) [of the Council Decision establishing the EEAS], the management of the EU's external cooperation programmes is 'under' the responsibility of the Commission 'without prejudice to the respective roles of the Commission and of the EEAS in programming'. Thus, the Commission retains overall responsibility for dealing with and controlling the Union's external cooperation programmes, whereas it shares the role of 'programming' ie designing, scheduling or planning the EU's external cooperation programmes (only an element of the wider concept of 'management') with the EEAS. In short, the basic prescript, namely that during the whole process of planning and implementation both parts of the organisation should work together and that all proposals for decision have to be prepared through the Commission procedures and submitted to the Commission (Article 9(3) [of the Council Decision establishing the EEAS]), has remained unchanged … In its contribution to the Union's external cooperation programmes, the EEAS is expected to work towards ensuring that the programmes fulfil the objectives for external action as set out in Article 21 TEU, in particular in paragraph (2)(d) thereof, and that they respect the objectives of the Union's development policy in line with Article 208 TFEU.

Programming is the decision-making process whereby strategy, budget and priorities for spending aid in non-EU countries is drawn up. During the MFF 2014–2020 this occurred through three kinds of instruments: first, the general strategy papers per country or region covering the whole period of seven years; second the more detailed indicative programmes (national or regional); and third the detailed annual action programmes for each year of the programming period. Looking to the 2014–2020 MFF and new development cooperation instruments, the joint EEAS-Commission Instructions for the Programming of the 11th European Development Fund (EDF) and the Development Cooperation Instrument (DCI) – 2014–2020, has made a number of proposals to strengthen the three C's throughout the forthcoming programming cycle.

Instructions for the Programming of the 11th European Development Fund (EDF) and the Development Cooperation Instrument (DCI) – 2014–2020, Brussels, 15 May 2012, 4–7

2.2 Programming process

A simplified process

One of the main purposes of the present instructions is to simplify the process of programming the EU's bilateral development cooperation with partner countries and regions, making use, wherever possible, of existing national or regional policy documents as the main reference documents for the programming process. Consequently, the multiannual indicative programme should become the central document of the programming process and EU specific strategy papers) should in most cases no longer be needed and should only be used where no other option is available. Instead, the existing national or regional development plans (or their equivalents) should from now on be used as the point of departure for the programming process, and as the main basis for coordination and dialogue with EU Member States and other donors. …

A second element of simplification is the aim to have succinct programming documents. In the same spirit, there will no longer be a standard obligation for EU Delegations to prepare various technical annexes to the programming documents on specific issues (such as migration).

[at p. 7 under the heading 'Comprehensiveness and coherence' the Instructions continue by observing:]

Such a vision also should be the basis for a greater coherence at four levels:

- between the country programmes and the regional programmes which are managed by/in cooperation with regional bodies within the context of specific regional cooperation or integration frameworks (such as ASEAN or COMESA);
- between these country and regional programmes, on the one hand, and HQ managed regional multi-country programmes (eg, EDF Intra-ACP) and DEVCO- or FPI- managed thematic programmes (DCI) and instruments (EIDHR, Instrument for Stability, Nuclear Safety, and Partnership Instrument), on the other;
- between development and other cross-cutting or sectoral EU policies and programmes (eg security, disaster risk reduction, migration, environment, climate change, energy, trade, agriculture, fisheries, drugs) to ensure an effective EU external action and promote Policy Coherence for Development (PCD);
- between policies, instruments and actions of the EU, and those of EU Member States and/or the EIB and other European Development Finance institutions.

The previously discussed security-development nexus provides good insight into the impact of the EEAS on policy making in EU development cooperation policy as is reflected in the excerpt below.

H Merket, *The EU and the Security-Development Nexus: Bridging the Legal Divide* (Leiden, Brill/Nijhoff, 2016) 176 and 200

While the optimisation of the security-development nexus may not have shaped the debate on the creation of the EEAS, its aims of enhanced effectiveness and consistency indirectly raise hopes for this particular interface …

In sum, as a central policy interlocutor with a heterogeneous composition the EEAS could finally put the rhetoric of coordination across the security-development nexus in practise. Its setting enables a decentralised and cross-fertilising exchange of experience-based knowledge in a network of security and development-oriented actors. Yet, as with the High Representative, the EEAS' design gives the impression of a halfway solution that is still in an experimental phase. In spite of all the faith put in this new body, its 'hands are tied to the competences attributed to the political masters it is supposed to serve'. Consequently, the old challenges of delimitating CFSP and development cooperation seeped through in the EEAS' constellation. This causes considerable hurdles of duplication, coordination, accountability and institutional solidarity, which at present prevent the EEAS from collecting the full gains in terms of efficiency and coherence. Besides the challenges of delimitation there are also risks attached to increased integration of both policy fields. The development-related responsibilities of the EEAS have intensified the long-standing concern about the potential instrumentalisation of aid. However, the fears that this would lead to an increased exposure to short-term political and economic pressures appear unfounded at this stage. Ironically, this is less due to a commonality of objectives than to the limited interest of the EEAS to make its imprint on development cooperation.

V. The Broader Picture of EU External Relations Law

EU development policy is a mature policy field as old as the European integration process itself. As a result, the legal principles, institutions and instruments that underpin it have been progressively shaped through the interaction between European integrative processes, concrete policy needs, and law as a structuring element. The complementary nature of EU development policy is exemplary of this interaction and the broader context of EU external relations law. During the early years of the Treaty of Rome, mainly France pushed its development interests through the

supranational level in the form of associating certain third States with the EEC. This did not pre-empt Member State development initiatives and EU development policy's complementary nature created the basis for 'the other two C's', namely the need for coherence and coordination between the two levels. The European Development Fund soon became an interesting peculiarity of EC development cooperation exhibiting all three C's: funds of the Member States were being pooled on an intergovernmental basis (complementarity), with a central management role for the Commission (coordination), with jointly agreed policy objectives but without actually integrating the funds into the EU budget (coherence). In the early 1990s Parliament sought to push 'budgetisation' through judicial means, which would also have extended its role in EU budgetary matters over (the quantitatively significant) EDF funds. However, the Court was unreceptive and expressly confirmed the complementary nature of this competence. Eventual 'budgetisation' is likely however. During the negotiations on the 2014–2020 multi-annual financial framework, the Commission certainly would have wished to propose the integration of EDF funding into the EU budget structures, arguing that this would streamline funding procedures, ease coordination efforts and substantive coherence between initiatives and increase transparency in the provision of EU development aid, but chose not to make such a proposal at that time. Therefore, only in 2018 the Commission has put forward a proposal for the budgetisation of the EDF funding in connection with the revision of the Cotonou agreement.

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