

2017

Do the Decision-Making Mechanisms in the EU Undermine Member States' National Interest?: A Case Study of the Sanctions Regime

Melanie C. Papadopoulos

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/eilr>

Recommended Citation

Melanie C. Papadopoulos, *Do the Decision-Making Mechanisms in the EU Undermine Member States' National Interest?: A Case Study of the Sanctions Regime*, 31 Emory Int'l L. Rev. 553 (2017).
Available at: <https://scholarlycommons.law.emory.edu/eilr/vol31/iss4/3>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory International Law Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

DO THE DECISION-MAKING MECHANISMS IN THE EU UNDERMINE MEMBER STATES' NATIONAL INTEREST?: A CASE STUDY OF THE SANCTIONS REGIME

ABSTRACT

Following the shocking results of the Brexit referendum in June 2016 and the Greek referendum rejecting austerity measures in 2015, many believe that the European Union (EU) is undergoing a legitimacy crisis. The most vocal Eurosceptics claim that the EU threatens individual Member State sovereignty, with the chief concern being that the EU's decision-making mechanisms are leaving certain Member States overruled in major decisions. While it is too early to tell whether this is the first of many similarly named "exits," it is clear that what were previously rumbles of discontent have now swelled to an outcry. This Comment will therefore explore the decision-making mechanisms employed at the supranational level of the EU, with a particular focus on the EU's sanctions regime, revealing the heart of the struggle between efficiency in decision-making and preservation of national sovereignty. Legally, the founding treaties of the EU—the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) set rules for the decision-making mechanisms in an effort to balance these two aims. But how effective are these mechanisms? This Comment will ultimately conclude that the safeguards in place in the founding treaties are flawed, but there are solutions available to improve the decision-making process in the sanctions regime. Though the treaties aim to preserve individual Member State autonomy, the criticisms directed toward the system may indicate that the execution in practice does not preserve that autonomy as much as the drafters intended.

INTRODUCTION

Ahead of the famous "Brexit" referendum, Boris Johnson—now the UK Secretary of State for Foreign and Commonwealth Affairs—¹wrote an opinion

¹ *Secretary of State for Foreign and Commonwealth Affairs*, GOV.UK, <https://www.gov.uk/government/ministers/foreign-secretary> (last visited Feb. 27, 2017).

imploring the British people to vote to leave the European Union (EU).² In this opinion, he cited, among other reasons, “a hurried expansion in the areas for Qualified Majority Voting” which left Britain overruled more and more often.³ Following the June 23, 2016 referendum where British citizens voted to leave the EU, Vox Magazine listed the seven most important arguments in favor of Britain leaving the EU.⁴ The two arguments that topped this list were: 1) “[t]he EU threatens British sovereignty” and 2) “[t]he EU is strangling the UK in burdensome regulations.”⁵ This is not the first time that a Member State politician has expressed concern about the voting methods employed in EU institutions.⁶ While it is too early to tell whether this is the first of many similarly named “exits,”⁷ it is clear that what were previously rumbles of discontent have now swelled to an outcry. Is this outcry truly indicative of a clandestine “legal colonisation,” as Mr. Johnson claims?⁸

This Euroscepticism was not confined to UK borders—Nigel Farage, UK Independence Party Leader and vocal Eurosceptic,⁹ implored Greece to leave the EU and “take back control of your country.”¹⁰ Farage made these statements ahead of Greece’s controversial referendum in July 2015.¹¹ The referendum asked the Greek people to choose to either reject or accept the latest round of austerity measures in response to its economic crisis.¹² In the

² Boris Johnson, *Boris Johnson Exclusive: There Is Only One Way to Get Change We Want – Vote to Leave the EU*, TELEGRAPH (Mar. 16, 2016, 5:48 PM), <http://www.telegraph.co.uk/opinion/2016/03/16/boris-johnson-exclusive-there-is-only-one-way-to-get-the-change/>.

³ *Id.*

⁴ Timothy B. Lee, *Brexit: The 7 Most Important Arguments for Britain to Leave the EU*, VOX (June 25, 2016, 9:32 AM), <http://www.vox.com/2016/6/22/11992106/brexit-arguments>.

⁵ *Id.*

⁶ Associated Press, *The Latest: Hollande Complains of Slow EU Decision-Making*, BUS. INSIDER (Apr. 6, 2016, 1:17 PM), <http://www.businessinsider.com/ap-the-latest-hollande-complains-of-slow-eu-decision-making-2016-4>. For a discussion of voters’ concerns about the voting methods used in the EU, see Peter Roff, *Brexit Was About Britain*, U.S. NEWS & WORLD REP. (June 30, 2016, 11:25 AM), <http://www.usnews.com/opinion/articles/2016-06-30/poll-shows-brexit-vote-was-about-british-sovereignty-not-anti-immigration>.

⁷ See Kate Lyons & Gordon Darroch, *Frexit, Nexit or Oexit? Who Will Be Next to Leave the EU*, GUARDIAN (June 27, 2016, 3:30 AM), <http://www.theguardian.com/politics/2016/jun/27/frexit-nexit-or-oexit-who-will-be-next-to-leave-the-eu>.

⁸ See Johnson, *supra* note 2.

⁹ See Julia Hartley-Brewer, *Britain’s Eurosceptics Need Nigel Farage*, TELEGRAPH (Sept. 1, 2015, 1:08 PM), <http://www.telegraph.co.uk/news/politics/ukip/11836633/Britains-Eurosceptics-need-Nigel-Farage.html>.

¹⁰ UKIP MEPs, *Your Moment Has Come, Mr. Tsipras, Take Back Control of Your Country – UKIP Leader Nigel Farage*, YOUTUBE (July 8, 2015), <https://www.youtube.com/watch?v=94UcyJnRcGU>.

¹¹ Ian Traynor, *Greek Crisis: European Leaders Scramble for Response to Referendum No Vote*, GUARDIAN (July 6, 2015, 1:06 AM), <https://www.theguardian.com/world/2015/jul/06/greek-crisis-european-leaders-scramble-for-response-to-referendum-no-vote>.

¹² *Id.*

weeks and months leading up to the referendum, those who urged the Greek populace to vote to reject the new austerity measures—and by extension leave the Eurozone—raised similar grievances of a lack of representation.¹³ When the Greeks voted to reject the austerity measures, it exposed what a writer for the Independent called a gaping hole in the EU—“it’s lack of genuine legitimacy.”¹⁴ Though Greece ultimately remained in the European Union, this “no” vote sent a clear message from the Greek people to the European elite—“democracy cannot be blackmailed.”¹⁵

In the eyes of Greek Prime Minister Alexis Tsipras, however, this vote was less a vote to leave the EU and more an endorsement from the Greek people to their leaders to strengthen their negotiating position in the EU institutions. In April 2016, Tsipras told Russian lawmakers that Greece “had played an active role in preventing an expansion of European Union sanctions against Russia earlier this year.”¹⁶ The European Council, a supranational EU entity composed of the heads of state of each Member State,¹⁷ is the supranational entity charged with deciding whether to impose or renew sanctions on a third country. The European Council must decide by unanimous vote,¹⁸ which means Greece had a right to exercise a veto in the vote to renew the EU’s sanctions on Russia for its annexation of Crimea.¹⁹ Pundits and politicians

¹³ Ian Traynor & Helena Smith, *Syriza’s Historic Win Puts Greece on Collision Course with Europe*, GUARDIAN (Jan. 26, 2015, 3:58 AM), <https://www.theguardian.com/world/2015/jan/25/syriza-historic-win-greece-european-union-austerity>.

¹⁴ Rupert Cornwell, *Greece Crisis: Referendum Exposes a Gaping Hole at the Heart of the European Union – Its Lack of Genuine Legitimacy*, INDEPENDENT (July 4, 2015), <http://www.independent.co.uk/voices/comment/greece-crisis-referendum-exposes-a-gaping-hole-at-the-heart-of-the-european-union-its-lack-of-10366240.html>.

¹⁵ Ian Traynor, John Hooper & Helena Smith, *Greek Referendum No Vote Signals Huge Challenge to Eurozone Leaders*, GUARDIAN (July 5, 2016); Ian Traynor, *Three Days That Saved the Euro*, GUARDIAN (Oct. 22, 2015, 1:00 PM), <https://www.theguardian.com/world/2015/oct/22/three-days-to-save-the-euro-greece>. The Greek energy minister at the time stated “if the Greek people say no, it is going to be impossible for those who wield power not to take note unless democracy no longer exists.” *Id.* See also Lefteris Papadimas & Renee Maltezou, *Greeks Defy Europe with Overwhelming Referendum ‘No’*, REUTERS (July 5, 2015, 7:13 P.M.), <http://www.reuters.com/article/us-eurozone-greece-idUSKBN0P40EO20150705>.

¹⁶ Laura Mills, *Tsipras Tells Russia Greece Helped Prevent Broader EU Sanctions*, WALL STREET J. (Apr. 9, 2015, 1:57 PM), <http://www.wsj.com/articles/tsipras-tells-russia-greece-helped-prevent-broader-eu-sanctions-1428577645>.

¹⁷ PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS 47 (Oxford University Press 5th ed. 2011). The European Council and its functions are governed by Article 15 of the Treaty on the European Union (TEU). *Id.*

¹⁸ *Adoption and Review Procedure for EU Sanctions*, EUR. COUNCIL, <http://www.consilium.europa.eu/en/policies/sanctions/adoption-review-procedure/> (last updated May 11, 2016).

¹⁹ Clara Portela, *Member States Resistance to EU Foreign Policy Sanctions*, 20 EUR. FOREIGN AFF. REV. 39, 41 (2015).

alike speculated about the likelihood that Greece, a small Member State, would attempt to exercise its power and trade favors with Moscow: a veto of further EU sanctions on Russia in exchange for financial assistance from Russia.²⁰ This power to veto a decision would seem to suggest that individual Member States are represented in at least one area: decisions made under the Common Foreign and Security Policy (CFSP).

CFSP decisions are among the most controversial.²¹ The decision to impose sanctions on Russia most closely aligned with British interests. Now that Britain has decided to leave the EU, experts predict that the EU sanctions policy will be substantially weakened.²² The UK has fought for EU sanctions on Russia since the Russian military annexed Crimea.²³ Many commentators believe that the United Kingdom represented the United States' foothold in the EU and is the driving force behind the EU's persistent renewal of sanctions on Russia.²⁴ Greece stands in opposition to the UK-backed sanctions on Russia, which hurt an already crippled Greek economy. This Comment will explore the competing concepts of unanimous decision-making and representativeness in the European Council. It will use the sanctions regime as the lens for this analysis. Although there is a strong argument that Member States interests are not adequately represented in the European Council, this Comment argues that the situation is not as dire as is suggested by Eurosceptics. The United Kingdom is at one side of the ideological spectrum with regard to Russian sanctions, with Greece at the other. Both countries, however, claim that their interests are underrepresented in EU policy decisions. This Comment will reveal that both Member States have more clout than they think they do, and the process, though flawed, is not fated to fail.

This Comment will explore decision-making at the supranational level of the EU, revealing the heart of the struggle between efficiency and national

²⁰ Andrew Higgins, *EU Agrees to Extend Economic Sanctions Against Russia*, N.Y. TIMES (June 17, 2015), http://www.nytimes.com/2015/06/18/world/europe/eu-agrees-to-extend-economic-sanctions-against-russia.html?_r=0. See Joshua Keating, *Could China or Russia Bail Out Greece if Europe Won't?*, SLATE (July 2, 2015), http://www.slate.com/blogs/the_slatest/2015/07/02/could_china_or_russia_bail_out_greece_if_europe_won_t.html.

²¹ See *Common Foreign and Security Policy*, POLITICS.CO.UK, <http://www.politics.co.uk/reference/common-foreign-and-security-policy> (last visited Feb. 27, 2017).

²² Erica Moret, *What Would Brexit Mean for EU Sanctions Policy?*, EUR. COUNCIL FOREIGN REL. (Mar. 23, 2016), http://www.ecfr.eu/article/commentary_what_would_brexit_mean_for_eu_sanctions_policy6046.

²³ Dan De Luce & Paul McLeary, *Brexit Is Good News for Russia but a Headache for NATO*, FOREIGN POL'Y (June 26, 2016), <http://foreignpolicy.com/2016/06/26/brexit-is-good-news-for-russia-but-a-headache-for-nato/>.

²⁴ *Id.*

sovereignty. Legally, the founding treaties of the EU—the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)²⁵—lay out the decision-making mechanisms for EU institutions, in an effort to balance the two aims mentioned above.²⁶

This analysis is inspired by a search for answers to the following questions: How can the EU efficiently legislate but still account for the needs of twenty-eight²⁷ different Member States? How does individual Member State resistance change when it comes time to vote?²⁸ What happens when an EU sanctioning policy runs counter to the national interests of an individual Member State? Can this type of decision-making truly reflect the will of each of the Member States of the Union? How efficient has this decision-making mechanism been at preserving the national interests of each Member State? Do the voting methods employed infringe on national sovereignty of individual Member States?

This Comment will proceed as follows. Part I of this Comment will provide a basic introduction to the EU sanctions regime. This Part will also analyze how the sanctions regime developed within both the Common Commercial Policy (CCP) and the CFSP, highlighting the legal and political inconsistencies that arose in an effort to promote efficiency and coherence. Part II of this Comment will explore the decision-making mechanisms used in the European Council and the Council of the European Union when the EU sets its CFSP.²⁹

²⁵ This Comment will refer to provisions found in the Treaty of Lisbon, which became effective on December 1, 2009. CRAIG & DE BÚRCA, *supra* note 17, at 26. The Treaty of Lisbon contains two constituent parts: the Treaty on the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU). *Id.* at 25. Although “[t]here was. . . a conscious decision to excise the ‘C’ word, constitution” from the Treaty of Lisbon when it was being drafted, the Treaty of Lisbon is, for all intents and purposes, the “constitution” of the European Union. *Id.* The TEU and TFEU are therefore the founding treaties of the European Union and have equal value in the hierarchy of sources of EU law. *Id.*

²⁶ *EU Treaties*, EUROPA.EU, https://europa.eu/european-union/law/treaties_en (last visited Feb. 27, 2017).

²⁷ *EU Member Countries*, EUROPA.EU, https://europa.eu/european-union/about-eu/countries/member-countries_en (last visited Feb. 27, 2017). This Comment will proceed with pre-Brexit numbers of EU membership, as the logistics of what Brexit will mean for the EU are yet to be determined. See Bryony Jones, *Brexit Challenge: UK Supreme Court Hears Appeal on Article 50*, CNN (Dec. 5, 2016, 3:00 PM), <http://www.cnn.com/2016/12/05/europe/brexit-article-50-court-challenge/>.

²⁸ *Seven EU Countries Oppose New Anti-Russian Sanctions at Summit*, SPUTNIK INT’L (Mar. 18, 2015), <http://sputniknews.com/europe/20150318/1019648159.html>.

²⁹ This Comment will refer to both the European Council and the Council, which are two distinct EU institutions. The European Council refers to the heads of government of each EU Member State who convene at quarterly summits to set policy. *Council of the European Union*, EUROPA.EU, http://europa.eu/about-eu/institutions-bodies/council-eu/index_en.htm (last updated Jan. 16, 2017). The Council refers to the institution consisting of the ministers of each EU Member State, depending on the policy area to be discussed. *Id.*

It will critically analyze the balance of power within the European Council, exploring whether, and to what extent, the national interests of individual Member States are impinged upon when the European Council imposes sanctions on trading partners vital to particular Member States. It will then explore how the decision-making procedures for the sanctions regime arose out of the CCP and the CFSP. It will critically analyze the two-step decision-making procedure, which employs both unanimous and qualified majority voting.

Part III of this Comment will turn to the degree of power left to Member States to implement sanctions. This Part will consider whether decision-making in the sanctions regime is becoming increasingly centralized, and it will assess how much the EU has compromised national autonomy over foreign policy in favor of efficiency. This Part of the Comment finds that, legally, the procedural safeguards enumerated in the Constitutional Treaties can protect Member State sovereignty in foreign policy decision-making. In practice, however, the ability of Member States to take independent action in the sanctions regime has been limited. The case law of the Court of Justice of the EU (ECJ) in this area has considered whether Member States can affirmatively adopt restrictive measures that run counter to European Community regulations.³⁰ However, the ECJ has not yet considered a case where a Member State has abstained from voting and is therefore not subject to the regulation. This Comment will consider the hypothetical scenario of a Member State abstention from the vote on sanctions and whether the procedural safeguards to national sovereignty do allow Member States to retain autonomy in foreign and security policy. This Comment will ultimately

³⁰ Case C-124/95, *The Queen, ex parte Centro-Com v. HM Treasury and Bank of England*, 1997 E.C.R. I-81. This Comment will refer both to the European Community and the European Union. The group of European states we now refer to as the European Union first identified itself as a series of Communities, or the European Community. ALINA KACZOROWSKA, *EUROPEAN UNION LAW 2* (Routledge Publishing 3d ed. 2013). The Treaty of Maastricht (now referred to as the TEU) renamed the European Economic Community to the European Community and also set out the European Union for the first time in 1993. *Id.* at 18. The Treaty of Lisbon then integrated the European Community into the European Union in 2009. *Fact Sheets on the European Union*, EUROPA.EU, <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html> (last visited Feb. 27, 2017).

It is also important to note here that the Court of Justice of the European Union (CJEU) is composed of three courts: the Court of Justice (informally referred to as the ECJ), the General Court, and the Civil Service Tribunal. *Competences of the Court of Justice of the European Union*, EUR. PARLIAMENT, http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.3.10.html (last visited Feb. 27, 2017). The ECJ has jurisdiction to hear proceedings brought against EU Member States for allegedly failing to fulfill their obligations and proceedings against EU institutions. This Comment will refer to the case law of the ECJ—that is, the one constituent part of the greater CJEU.

conclude that these safeguards are flawed, but there are solutions available to improve the decision-making process in the sanctions regime. The text of the constitutional treaties aims to preserve individual Member State autonomy; however, the criticisms directed toward the system may indicate that the execution in practice does not preserve that autonomy as much as the drafters intended, but the system reflects an adequate compromise.

I. THE SIGNIFICANCE OF THE EU SANCTIONS REGIME

The European Union as an entity “defies classical definitions”³¹ because it is not merely an intergovernmental organization like NATO or the United Nations, and yet the institutions that make up the EU have not risen to the requisite level of unification to create a federal “state.”³² In one of its most famous decisions concerning the supremacy of EU law, the Court of Justice declared: “the European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields”³³ The European Union is “the only non-state actor that participates in certain international functional regimes on equal footing with states.”³⁴ The question of how to define the European Union has been discussed by myriad experts,³⁵ and while it is certainly an intriguing question, this Comment will not attempt to provide an answer to it. Instead, it will analyze the interplay between two historically supranational and intergovernmental realms of EU policy-making in the sanctions regime.

This Comment will therefore operate under the notion that the EU is a system containing both intergovernmental and supranational characteristics.³⁶

³¹ René Smits, *The Crisis Response in Europe’s Economic and Monetary Union: Overview of Legal Developments*, 38 *FORDHAM INT’L L.J.* 1135, 1137 (2015).

³² E.g., Christina Eckes, *How the European Parliament’s Participation in International Relations Affects the Deep Tissue of the EU’s Power Structures*, 12 *INT’L J. CONST. L.* 904, 904 (2014); KACZOROWSKA, *supra* note 30, at 26.

³³ Case 26/62, *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, 1963 *E.C.R.* 1.

³⁴ Eckes, *supra* note 32, at 904.

³⁵ See, e.g., Roger J. Goebel, *Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union After the Treaty of Lisbon*, 20 *COLUM. J. EUR. L.* 77, 77 (2013) [hereinafter Goebel, *Supranational? Federal? Intergovernmental?*]; Stephen C. Sieberson, *Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon*, 50 *VA. J. INT’L L.* 919, 923–30 (2010); Aurel Sari, *The Conclusion of International Agreements by the European Union in the Context of ESDP*, 57 *INT’L & COMP. L.Q.* 53, 53 (2008).

³⁶ Sieberson, *supra* note 35, at 930.

Some policy areas are seen as more intergovernmental, requiring unanimity of all Member States in voting, while other policy areas are almost completely supranational, where EU institutions hold the primary right of initiative.³⁷ To be sure, “[t]he balance between intergovernmental and supranational elements determines the influence of EU Member States within the system, and it does impact their national sovereignty.”³⁸ The relevant treaty provisions theoretically attempt to limit this impact on Member State sovereignty, but an analysis of current events reveals a growing fear that these legal provisions do not protect Member State national interests in practice.

This Comment will analyze the voting methods used by EU institutions to make decisions under the CFSP. Having established the voting methods, this Comment will then explore whether EU decision-making is becoming more supranational; it will do so by looking primarily through the lens of the sanctions regime, an area that combines the historically intergovernmental area of the CFSP and the supranational area of the CCP. As the EU finds itself in the thick of both an economic crisis and a post-Brexit legitimacy crisis, EU trade and foreign policy decisions will be heavily scrutinized for the impact they have on Member States’ economies.

II. EU SANCTIONS: AT THE CROSS-ROADS OF COMMERCIAL AND FOREIGN POLICY DECISION-MAKING

The sanctions regime of the EU provides an interesting legal case study because it reflects a tension between three competing policies: 1) the CCP, where the EU institutions have exclusive competence, 2) the CFSP, where the heads of Member States exercise more power, and 3) the Member States’ individual foreign policy.³⁹ Decision-making and voting procedures used by EU institutions depend on how much competence has been granted to the institution.⁴⁰ To effectively understand the decision-making and voting procedures used in the sanctions regime, one must understand both the background of CFSP and CCP and the competences associated with those policies.

³⁷ See Goebel, *Supranational? Federal? Intergovernmental?*, *supra* note 35, for a discussion of the institutional balance of power in the European Union.

³⁸ Sieberson, *supra* note 35, at 931.

³⁹ PIET EECKHOUT, *EU EXTERNAL RELATIONS LAW 502* (Oxford University Press 2d ed. 2011).

⁴⁰ *See id.* at 506–09.

This Part will provide a background on the development of the sanctions regime. It will then provide an analysis of the role of the sanctions regime in the CFSP, and lay out how the decision-making mechanisms apply to the sanctions regime. This Part will then analyze the unique position of the sanctions regime between CFSP and CCP, and how that position showcases the inherent struggle between the two policies.⁴¹ This analysis will demonstrate the progression of the EU from a system protecting Member State sovereignty toward one where Member States have relinquished some decision-making power to allow for a more coherent and efficient decision-making process. Lastly, this Part will analyze the EU treaty law governing sanctions, particularly the decision-making mechanisms employed by the European Council.

A. *EU Sanctions: A Background*

The sanctions regime developed in the space where CCP and CFSP overlap, emerging as a hybrid of trade and foreign policy.⁴² Sanctions interrupt the import and export of goods to force a state to modify its behavior, which means that any trade policy interests become secondary to a more important foreign policy goal.⁴³ Thus, economic sanctions “are specific trade policy *instruments* which are exclusively employed for foreign policy *objectives*.”⁴⁴ The sanctions policy therefore vacillates between the treaty provisions governing CFSP and those of the CCP. The history behind these two policies provides a foundation for understanding how the integration project of the European Union has reached even those policy areas that previously fell exclusively within the competence of individual Member States.⁴⁵

⁴¹ Some scholars argue that the sanctions regime should be classified as a tool used in crisis management under CSDP. See generally Julia Schmidt, *The High Representative, the President, and the Commission—Competing Players in the EU’s External Relations: The Case of Crisis Management*, in EU EXTERNAL RELATIONS LAW AND POLICY IN THE POST-LISBON ERA 161, 161 (Paul James Cardwell ed., 2012).

⁴² EECKHOUT, *supra* note 39, at 501. Maja Brkan, *The Role of the European Court of Justice in the Field of Common Foreign and Security Policy After the Treaty of Lisbon: New Challenges for the Future*, in EU EXTERNAL RELATIONS LAW AND POLICY IN THE POST-LISBON ERA 97, 105 (Paul James Cardwell ed., 2012).

⁴³ EECKHOUT, *supra* note 39, at 501.

⁴⁴ *Id.* at 502.

⁴⁵ See generally CRAIG & DE BÚRCA, *supra* note 17, at 15–16, for a discussion of the decline of “variable geometry” (i.e., differentiation and flexibility) in favor of integration and cohesion in the European Union. The authors point out that:

While the disadvantages of variable geometry may be a perceived lack of unity and increasing fragmentation . . . the advantages of providing a means for accommodating difference and reaching consensus in the face of strong divergence, for permitting progress in crucial areas *such*

This Comment will deal primarily with economic sanctions against third countries.⁴⁶ The European Council Guidelines on Implementation and Evaluation of Restrictive Measures promote the Union-wide practice of imposing targeted sanctions, otherwise known as “smart” sanctions, which target specific individuals who are “responsible for the policies or actions that have prompted the EU decision to impose restrictive measures.”⁴⁷ The European Council will impose sanctions if they are necessary “to bring about a change in policy or conduct by the targeted country, part of a country, or its government, or entities or individuals with a view to promoting the objectives of the CFSP.”⁴⁸ It further stipulated that “[s]anctions should be used as part of an integrated and comprehensive policy approach involving political dialogue, complementary efforts and other instruments.”⁴⁹

The signing of the Maastricht Treaty in 1992 marked a watershed moment in the development of the EU sanctions regime.⁵⁰ Not only did the Maastricht Treaty set out the Common Foreign and Security Policy for the first time,⁵¹ it also tipped the balance of power between Member States and the EU within

as *EMU or foreign policy* which might otherwise be deadlocked, are evidently considered sufficient to outweigh the former.

Id. at 16 (emphasis added).

⁴⁶ See Consolidated Version of the Treaty on the Functioning of the European Union art. 215, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU]. Other types of sanctions include those that the EU as a supranational body imposes on a Member State for not complying with an EU directive or regulation, also referred to as a penalty. *Id.* art. 260. The EU can also impose sanctions on individuals by using smart/targeted sanctions. EECKHOUT, *supra* note 39, at 502. Therefore, the phrase “sanctions on third countries” refers to economic sanctions on a non-EU Member State. *Id.* at 503.

⁴⁷ Council of the European Union, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy*, 17464/09, PESC 1746 FIN 576 (Dec. 3, 2003), amended by Council of the European Union, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy*, 11205/12 PESC 716 FIN 425 (June 15, 2012) 8 [hereinafter 2012 *Council Guidelines on Restrictive Measures*].

⁴⁸ *Adopting EU Restrictive Measures – Sanctions*, EUR. COUNCIL, <http://www.consilium.europa.eu/en/policies/sanctions/> (last updated Aug. 11, 2016). For the purposes of this Comment, the term “sanctions” will be synonymous with the term “restrictive measures,” which is the term used by official EU documents. *Id.* The definition of restrictive measures, however, “is almost identical to the definition used by individual member states and other sanctioning organisations like the United Nations.” Joakim Kreutz, *Hard Measures by a Soft Power? Sanctions Policy of the European Union 1981-2001*, 4–5 (Bonn Int’l Ctr. for Conversion, Working Paper No. 45, 2011), <https://www.bicc.de/publications/publicationpage/publication/hard-measures-by-a-soft-power-sanctions-policy-of-the-european-union-211/>.

⁴⁹ 2012 *Council Guidelines on Restrictive Measures*, *supra* note 47, at 44.

⁵⁰ Court E. Golumbic & Robert S. Ruff III, *Symposium Article: Who Do I Call for an EU Sanctions Exemption? Why the EU Economic Sanctions Regime Should Centralize Licensing*, 44 *GEO. J. INT’L L.* 1007, 1017 (2013).

⁵¹ Kreutz, *supra* note 48, at 11.

the sanctions regime.⁵² Before the Treaty, EU institutions had a passive role—they were responsible for implementing UN sanctions—while the Member States themselves could impose their own sanctions in any manner they saw fit.⁵³ The Maastricht Treaty severely limited the Member States' ability to impose individual sanctions, stating that the Member States “shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.”⁵⁴

The Maastricht Treaty was the result of an EU integration project which aimed to centralize decision-making mechanisms in foreign policy to combat inconsistencies. The 1970s and 1980s saw much inconsistency and disparity from Member States in the area of CFSP, as a series of European Community agreements promoted joint action by the Member States in foreign policy, but retained individual Member State autonomy over security policy.⁵⁵ Due to a lack of clarity, Member States remained divided and decision-making stagnated when the time came to impose sanctions.⁵⁶ The signing of the Maastricht Treaty therefore marked the first in a series of steps away from the decentralized CFSP regime in order to achieve efficient, coherent results. The Treaty of Lisbon also broadened the scope of EU competence under the CFSP, and the discussion of the decision-making procedures in Part III below expands on these changes.

B. The Rise of the Sanctions Regime in the Overlap Between CCP and CFSP

The CCP governs EU trade policy with non-EU countries and the World Trade Organization.⁵⁷ The CCP dominates EU policy because it predates the CFSP⁵⁸ and is part of the origin story of the EU, which means that it lies within the “exclusive competence” of the EU.⁵⁹ “Exclusive competence” confers on supranational EU institutions the power to adopt legal acts that are automatically binding on Member States and become the supreme law

⁵² Golumbic & Ruff, *supra* note 50, at 1017–18.

⁵³ *Id.*

⁵⁴ Treaty on European Union art. J.1 § 4, Feb. 7, 1992, 1992 O.J. (C 191) [hereinafter Treaty of Maastricht].

⁵⁵ Kreutz, *supra* note 48, at 9. The first (failed) step toward foreign policy integration came in 1970 with the creation of the European Political Cooperation (EPC). Golumbic & Ruff, *supra* note 50, at 1015.

⁵⁶ See Golumbic & Ruff, *supra* note 50, at 1015. This period of stagnation has been referred to as the time of “Eurosclerosis.” KACZOROWSKA, *supra* note 30, at 13.

⁵⁷ Sieberson, *supra* note 35, at 983.

⁵⁸ Note that the CCP has its origins in the EEC Treaty while the CFSP was first defined in the Maastricht Treaty in 1993. Sieberson, *supra* note 35, at 947.

⁵⁹ ECKHOUT, *supra* note 39, at 35.

throughout the European Union, invalidating pre-existing national laws.⁶⁰ The CCP is a supranational policy, decided by a combination of qualified majority voting and unilateral initiatives taken by the Commission. Any decision to restrict or hinder trade must be agreed upon by a unanimous vote of the Council.⁶¹

The decision to impose economic sanctions on a third country implicates both trade policy and foreign policy considerations.⁶² Trade policy falls under the umbrella of the CCP while foreign policy is referred to as the CFSP. Each policy requires different levels of decision-making. Historically, the CCP fell exclusively within EU competence, while the CFSP honored an individual Member State's autonomy over foreign policy.⁶³ Any broad decision made under the CFSP requires unanimous votes within the European Council;⁶⁴ in the CCP, however, the EU retains exclusive competence and EU institutions set the policy without Member State input.⁶⁵ The confluence of these two policies in the sanctions regime "exemplif[ies] the difficulties associated with achieving consistency in the EU's external relations" and further analysis "may reveal the extent to which fears of encroachment upon the *acquis communautaire* and supranational integration mechanisms are warranted."⁶⁶

Ultimately, the sanctions policy has come to reside within the realm of the CFSP. The EU Constitutional Treaties grant the European Council the power to make decisions and enact laws to impose sanctions under the CFSP.⁶⁷ Article 215 TFEU governs the EU's sanctions regime.⁶⁸ Article 215(1) TFEU sets out the process by which the EU can impose sanctions on a third country, while Article 215(2) TFEU governs the adoption of restrictive measures against natural or legal persons or non-state entities.⁶⁹ Article 215 TFEU

⁶⁰ *Id.* See generally CRAIG & DE BÚRCA, *supra* note 17, at 180–217.

⁶¹ Sieberson, *supra* note 35, at 978.

⁶² The Union can also sanction one of its own Member States, which is not the subject of the discussion here. CRAIG & DE BÚRCA, *supra* note 17, at 16.

⁶³ EECKHOUT, *supra* note 39, at 502.

⁶⁴ Consolidated Version of the Treaty on European Union art. 24(1), Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

⁶⁵ EECKHOUT, *supra* note 39, at 439.

⁶⁶ *Id.* at 502. *Acquis communautaire* refers to all EU law that has been developed since 1958 until the present. VAUGHNE MILLER, HOUSE OF COMMONS LIBRARY, THE EU'S ACQUIS COMMUNAUTAIRE 2 (Apr. 26, 2011). "The Court of Justice has ruled that the EU *acquis* takes precedence over national law if there is a conflict, and that the *acquis* may have direct effect in the Member States." *Id.*

⁶⁷ *Id.*

⁶⁸ TFEU, *supra* note 46, art. 215.

⁶⁹ *Id.*

provides, in relevant part, that where a CFSP decision “provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries” the Council will adopt “the necessary measures.”⁷⁰ The term “economic and financial relations” is broad, encompassing any trade or investment, the transfer of certain or any financial assets or the freezing of the assets of the target state, and transport sanctions, which can include flight bans.⁷¹ Thus, the European Council comes to a CFSP decision, which expresses the will of the Union authorizing a regulation or legislative measure imposing sanctions on third countries.⁷² The procedure governing the decision-making authorized by Article 215 will be explored in greater detail in Part III, *infra*.

III. DECISION-MAKING AND LEGISLATION UNDER THE SANCTIONS REGIME

Part III.A will first explore the balance of power in CFSP decision-making. Part III.B will then set up the various voting and decision-making procedures employed by EU institutions under the CFSP, with particular focus on the balance of power within the European Council between individual Member States. Part III.C and Part III.D will present the arguments for and against the voting methods employed at the different stages of CFSP and the sanctions regime, respectively.

A. *Balance of Power in CFSP Decision-making: The European Council and the High Representative*

The Treaty of Lisbon made three important institutional changes to the decision-making make-up of the European Council. It introduced 1) a permanent Presidency for the European Council, 2) the High Representative for Foreign Affairs and Security Policy, and 3) the European External Action Service.⁷³ Thus, the European Council is now composed of the heads of state or government of each EU Member State, the President of the European Commission, and the High Representative.⁷⁴ For the purposes of this

⁷⁰ *Id.*

⁷¹ PANOS KOUTRAKOS, *EU INTERNATIONAL RELATIONS LAW* 504 (Sam Parsons & Ben-Jacob Couch-Diewitz eds., Hart Publishing 2d ed. 2015).

⁷² *Id.* at 505.

⁷³ Skander Nasra, *EU Foreign Policy After Lisbon: What Role for Small State Diplomacy?*, *E-INTERNATIONAL RELATIONS* (Aug. 14, 2011), <http://www.e-ir.info/2011/08/14/eu-foreign-policy-after-lisbon-what-role-for-small-state-diplomacy/>.

⁷⁴ *European Council*, EUROPA, http://europa.eu/about-eu/institutions-bodies/european-council/index_en.htm (last visited Feb. 27, 2017).

discussion, it is important to note that TEU requires that the European Council makes any CFSP decision “acting unanimously.”⁷⁵ Historically, the European Council was an “intergovernmental” EU institution.⁷⁶ The heads of government met largely informally in the first years of the Union,⁷⁷ and the meetings were subsequently institutionalized first in the Single European Act and then in the TEU.⁷⁸ There is a two-part rationale behind institutionalizing the European Council: 1) when Member State disagreement over a particular issue was severe, resolution was possible only when the heads of government intervened; and 2) there was a growing need for “a focus of authority at the highest political level” and for EU “response to broader world problems [to] be properly focused.”⁷⁹

The European Council therefore determines the EU’s CFSP and is the most important EU institution—symbolically and practically—for EU foreign relations.⁸⁰ The European Council therefore has a prominent role in setting the CFSP.⁸¹ Over time, the European Council’s “policy decisions have significantly furthered the progress of European integration, rather than acting as a brake on such integration.”⁸² Because the European Council is responsible for making the initial decision to impose or renew sanctions on a third country, its importance in this field is central to this discussion. Moreover, the dynamic between the heads of government of smaller and larger Member States within the European Council plays a vital role in how decisions like these are made.⁸³ Though the role of individual Member States will be discussed in greater detail below, the perceived legitimacy of the European Council depends on to what extent European citizens see the will of their elected governments expressed in European Council decisions.

⁷⁵ TEU, *supra* note 64, art. 24.

⁷⁶ Roger J. Goebel, *The European Council After the Treaty of Lisbon*, 34 *FORDHAM INT’L L.J.* 1251, 1255 (2011) [hereinafter Goebel, *The European Council After the Treaty of Lisbon*].

⁷⁷ CRAIG & DE BÚRCA, *supra* note 17, at 47.

⁷⁸ *Id.* at 49.

⁷⁹ *Id.* at 48.

⁸⁰ Eckes, *supra* note 32, at 907. Eckes provides further detail on the role of the European Council, which “authorizes the opening of negotiations, adopts negotiating directives, authorizes the signing of, and concludes, international agreements—acting in principle by the consensus of a qualified majority (subject to exceptions).” *Id.*

⁸¹ CRAIG & DE BÚRCA, *supra* note 17, at 47.

⁸² Goebel, *The European Council After the Treaty of Lisbon*, *supra* note 76.

⁸³ See Federico Fabbrini, *Austerity, the European Council, and the Institutional Future of the European Union: A Proposal to Strengthen the Presidency of the European Council*, 22 *INDIANA J. GLOBAL LEGAL STUD.* 269, 272 (2015); See generally MICHAEL KEATING, ET AL., *ECON. & SOC. RES. COUNCIL, THE ROLE OF SMALL STATES IN THE EUROPEAN UNION: LESSONS FOR SCOTLAND* (2014).

The European Union and Member States share the power to take legislative action.⁸⁴ The EU can have either exclusive competence, shared competence, or competence only to take supporting, coordinating, or supplementary action.⁸⁵ Article 3 of the TFEU defines when the EU has exclusive competence to legislate in a specific area.⁸⁶ The EU has exclusive competence, for example, in the monetary policy for the Member States whose currency is the Euro,⁸⁷ and also has exclusive competence: “for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.”⁸⁸ Article 24 TFEU governs the EU’s competence to carry out the CFSP, but does not specify the scope or nature of the Union’s competence.⁸⁹ The scope of EU competence to set CFSP is thus distinct from other competences and has developed through case law and the promulgation of rules by the EU.⁹⁰

Indeed, Article 2(4) TEU represented a “broadening of the Union’s foreign policy competences both in its objectives (which explicitly include defense) and in the means used to attain such goals (through the creation of the High Representative).”⁹¹ Now, the EU implements its foreign policy by making a series of decisions.⁹² The European Council decides on the strategic objectives and interests of the EU.⁹³ These objectives are then released via EU positions.⁹⁴ The ultimate manifestation of EU CFSP is the implementation of these objectives through EU External Action or operations.⁹⁵

The High Representative of Foreign Affairs exercises significant influence specifically in the sanctions regime and in CFSP at large. The dual nature of

⁸⁴ See *Division of Competences Within the European Union*, EUROPA, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:ai0020> (last updated Jan. 26, 2016) (“Competences not conferred upon the EU in the Treaties remain with the EU countries. The Treaty of Lisbon clarifies the division of competences between the EU and EU countries.”).

⁸⁵ CRAIG & DE BÚRCA, *supra* note 17, at 73.

⁸⁶ TFEU, *supra* note 46, art. 3.

⁸⁷ *Id.* art. 3(1)(c).

⁸⁸ *Id.* art. 3(2).

⁸⁹ KOUTRAKOS, *supra* note 71, at 417.

⁹⁰ *Id.* at 422.

⁹¹ Eric Engle & Tetiana Danyliuk, *Europe’s Common Foreign and Security Policy: Facing Crises in Ukraine and Syria*, 25 INDIANA INT’L & COMP. L. REV. 148, 153 (2015).

⁹² *Id.* at 154.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *id.* at 154–55.

the High Representative's position reflects two primary objectives.⁹⁶ The first objective of the High Representative is to put a face on the EU's External Action policy in an effort to "rais[e] its profile."⁹⁷ The second objective is to promote coherence in external policy,⁹⁸ and to "encourage vertical cohesion."⁹⁹ The result has been the creation of an "exceedingly powerful" office of the High Representative.¹⁰⁰ The post became powerful enough to merit the comment that "individual Member States will find it very difficult to resist the pressure" of the policy of the High Representative.¹⁰¹ The European External Action Service, the bureaucratic office that provides support to the High Representative, is responsible for developing, implementing, and monitoring EU sanctions.¹⁰² This consolidated the sanctioning regime, but (arguably) has not been as effective in unifying Member State action.¹⁰³

B. Decision-making Procedures Under CFSP

The EU makes decisions under the CFSP using a combination of unanimous voting and Qualified Majority Voting (QMV) (also referred to as double majority voting). The Council of the European Union makes decisions about CFSP unanimously, while measures implementing those decisions are more often made using QMV.¹⁰⁴ A summary of Professor Sieberson's analysis on the subject of voting in the EU provides useful context for this section.¹⁰⁵ Some scholars advocate for the use of unanimous voting because it supports the concept that the EU is an intergovernmental organization, as unanimity preserves the national sovereignty of each Member State within the greater organization.¹⁰⁶ QMV, on the other hand, supports the idea that the EU is an independent and powerful supranational government, and each Member State stands behind the decisions made by that government, sometimes at the expense of their national interest.¹⁰⁷ Consistent with its goals of coherence,

⁹⁶ KOUTRAKOS, *supra* note 71, at 428.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Marise Cremona, *Coherence in European Union Foreign Relations Law*, in EUROPEAN FOREIGN POLICY: LEGAL AND POLITICAL PERSPECTIVES 55, 57 (Panos Koutrakos ed., 2011).

¹⁰⁰ KOUTRAKOS, *supra* note 71, at 430.

¹⁰¹ *Id.*

¹⁰² Golumbic & Ruff, *supra* note 50, at 1029.

¹⁰³ *See id.* n.119.

¹⁰⁴ TEU, *supra* note 64, art. 31.

¹⁰⁵ *See generally* Sieberson, *supra* note 35.

¹⁰⁶ *Id.* at 923.

¹⁰⁷ *Id.*

consistency, and efficiency, the Treaty of Lisbon provided new circumstances under which the European Council would be able to make a decision using QMV.¹⁰⁸

Historically, unanimous voting was associated with inaction, because one Member State could exercise a veto and kill any action the EU wanted to take.¹⁰⁹ Proponents of QMV therefore advocated to expand the use of QMV in certain circumstances because it would make EU lawmaking more efficient.¹¹⁰ The logical counter to that argument, often made by QMV skeptics, was that increased use of QMV to make decisions “threatens the Member State sovereignty that unanimous voting would protect.”¹¹¹ As a result, the EU retained the unanimity requirements for CFSP measures.¹¹²

The Treaty of Lisbon retained the use of QMV, however, in two circumstances. First, when the European Council has already reached a unanimous decision relating to the EU’s “strategic interests and objectives,” the Council may use QMV to make a decision based on that unanimous decision.¹¹³ Second, when the European Council specifically requests that a Union action be defined, QMV may be used to define that action.¹¹⁴ Importantly, there is a safeguard built into Article 31(2) TEU, which allows a Member State to invoke national policy and refer a decision to a unanimous vote by the European Council.¹¹⁵ Article 31(2) provides:

If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The High Representative will, in close consultation with the Member State involved, search for a solution acceptable to it. If he does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a decision by unanimity.¹¹⁶

¹⁰⁸ *Id.* at 922.

¹⁰⁹ CRAIG & DE BÚRCA, *supra* note 17, at 131.

¹¹⁰ Sieberson, *supra* note 35, at 922.

¹¹¹ *Id.*

¹¹² Golumbic & Ruff, *supra* note 50, at 1031.

¹¹³ Sieberson, *supra* note 35, at 952.

¹¹⁴ *Id.*

¹¹⁵ TEU, *supra* note 64, art. 31(2).

¹¹⁶ *Id.*

A Member State also has the option to abstain from a Council vote and declare that it will not be bound by the Council's decision.¹¹⁷

C. *Decision-making Under the Sanctions Regime*

Together, Article 24 TEU and Article 215 TFEU provide the legal and procedural framework governing the EU sanctioning regime. The TFEU endows the EU with the power to impose sanctions on states, individuals, and legal persons.¹¹⁸ Article 215 TFEU governs the procedure whereby the EU can impose sanctions on states, and also gives the EU the express competence to impose sanctions.¹¹⁹ Article 215 TFEU defines the scope of sanctions as affecting "economic and financial relations" between the EU and "one or more third countries."¹²⁰ As mentioned in Part II.B., *supra*, "Economic and financial relations" covers trade, investment, transfer of certain or any financial assets or the freezing of the assets of a target state, and transport sanctions,¹²¹ as well as travel bans.¹²²

In practice, restrictive measures are imposed via a two-step procedure governed by Article 215 TFEU.¹²³ First, the European Council adopts a CFSP Decision in which it expresses its wish to interrupt or reduce relations with a third country in accordance with Chapter 2 of Title V of the TEU (or Article 24 TEU).¹²⁴ Article 24 TEU specifies that the EU's CFSP "shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise."¹²⁵ The second step involves the Council adopting the necessary measures to put that policy into force.¹²⁶ In this step, the High Representative of the Union for Foreign Affairs and Security Policy together with the Commission draft a joint proposal to implement those measures.¹²⁷ The Council then votes by QMV on whether to adopt that joint proposal.¹²⁸

¹¹⁷ *Id.* art. 31(1).

¹¹⁸ KOUTRAKOS, *supra* note 71, at 495.

¹¹⁹ *Id.*

¹²⁰ TFEU, *supra* note 46, art. 215.

¹²¹ KOUTRAKOS, *supra* note 71, at 504.

¹²² Kreutz, *supra* note 48, at 7.

¹²³ TFEU, *supra* note 46, art. 215.

¹²⁴ *Id.* art. 215(1).

¹²⁵ TEU, *supra* note 64, art. 24.

¹²⁶ TFEU, *supra* note 46, art. 215(2).

¹²⁷ *Id.* art. 215(1).

¹²⁸ *Id.* art. 231.

After the European Council unanimously decides to impose sanctions and the regulations implementing those sanctions are agreed upon, the regulations “automatically override all inconsistent national law” of EU Member States.¹²⁹ The relevant national authorities of each Member State then decide which activities fall within the scope of the Council regulations.¹³⁰ The Council Guidelines on Restrictive Measures specify that “where precision is needed to ensure that all measures are implemented in time, the CFSP instrument should indicate expressly how each measure or part of measure will be implemented.”¹³¹

D. Room for a Role for the European Parliament?

This Comment primarily addresses the complaints that EU decision-making undermines Member State policy at the head-of-state level; the European Parliament (EP), however, as a body representing the citizens of the European Union, has gained a more prominent role in CFSP that is worth mentioning.¹³² If the Member States are represented nationally in the European Council by the heads of state, the *citizens* of EU Member States directly elect Members of the EP (MEPs), who directly represent EU citizens in the EP.¹³³ Though voting statistics suggest that actual representation in practice is questionable at best,¹³⁴ the EP has the ever-growing potential to offer another check on the expansive authority of the EU Sanctions regime, and on decision-making in other areas where Member State competence has been reduced.

The EP does not have the right to be consulted or give its consent when an international agreement relates “exclusively to the CFSP.”¹³⁵ Under Article 218(6) TFEU, which governs the conclusion of international agreements, the Council shall consult with and receive the consent of the EP when concluding agreements “covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.”¹³⁶ The EP therefore does not have a formal role when

¹²⁹ ECKHOUT, *supra* note 39, at 504.

¹³⁰ KOUTRAKOS, *supra* note 71, at 505.

¹³¹ 2012 *Council Guidelines on Restrictive Measures*, *supra* note 47, ¶ 49.

¹³² *See* TFEU, *supra* note 46, art. 10(1)(2); *see also* Eckes, *supra* note 32, at 919.

¹³³ Eckes, *supra* note 32, at 918.

¹³⁴ *Id.* Election turnout for MEP elections has been increasingly low since its inception. *Id.* In her article, Cristina Eckes argues that citizens have an outlet to “*feel* better represented through the EP than through their national parliaments” in external relations. *Id.* at 919 (emphasis in original).

¹³⁵ TFEU, *supra* note 46, art. 218(6).

¹³⁶ *Id.* art. 218(6)(a)(v).

the European Union adopts sanctions against third countries.¹³⁷ The EP only has the right to be informed of the decision.¹³⁸

Recently, however, the EP has gained prominence in foreign policy decision-making following the introduction of the Treaty of Lisbon, and on its own accord in the rise of its parliamentary diplomacy.¹³⁹ Both the Lisbon Treaty and the Maastricht Treaty now require that the EP consent before certain international agreements can be concluded.¹⁴⁰ Article 218 TFEU also requires that the EP maintain a prominent role during negotiations for international agreements.¹⁴¹ However, granting the EP this prominent role has allowed it to reject two important agreements.¹⁴² While granting the EP this power might essentially suggest CFSP agreements are now more difficult to make, leading to more inefficiency, some scholars suggest that this change will ultimately be beneficial as it “give[s] EU citizens a voice that . . . draws on a source of democratic legitimation that is independent and separate from the EU member states.”¹⁴³

If individual citizens feel sufficiently represented in the EP at the supranational level, they may be less likely to view the EU as an institution that undermines Member State sovereignty. Granted, allotting power to the EP may not directly quell the discontent among Member State leaders. Although these elected leaders set their own state’s foreign policy, they often complain when those policies are undermined by EU decisions.¹⁴⁴ Yet, when the time comes for a referendum, more representation (or at least the illusion of more representation) in the EP may help the EU with the problem of growing Euroscepticism across the continent.

¹³⁷ GISELA GRIEGER, LIBRARY BRIEFING: LIBRARY OF THE EUROPEAN PARLIAMENT, SANCTIONS AS AN EU FOREIGN POLICY INSTRUMENT 2 (2013).

¹³⁸ *Id.*

¹³⁹ Eckes, *supra* note 32, at 907; see Daniel Fiott, *The Diplomatic Role of the European Parliament’s Parliamentary Groups*, SWEDISH INST. FOR EUR. POL’Y STUD. (Mar. 2015), http://www.sieps.se/sites/default/files/2015_3epa%20eng%20A4%20korr3.pdf.

¹⁴⁰ Eckes, *supra* note 32, at 908.

¹⁴¹ TFEU, *supra* note 46, art. 218.

¹⁴² Eckes, *supra* note 32, at 909.

¹⁴³ *See id.* at 906, 915 (arguing that the EP’s new role can serve to strengthen its link to EU citizens and, by extension, promote a feeling of “Europeanness” amongst EU citizens).

¹⁴⁴ *See* Johnson, *supra* note 2.

E. Jurisdiction of the ECJ in the Sanctions Regime

The ECJ has general jurisdiction to review all matters of EU law and it even has the authority to review actions taken by EU institutions.¹⁴⁵ Under Article 275 TFEU, however, the ECJ is generally excluded from reviewing decisions adopted by the Council under CFSP.¹⁴⁶ The treaty sources, therefore, do not allow the ECJ to review a CFSP decision by EU institutions, which includes the decision to impose sanctions on third countries. However, the sanctions regime consists of a two-step process, only the first of which involves a CFSP decision.¹⁴⁷ At the second step, where the Council “adopts the necessary measures,” an EU institution acts in its legislative capacity, as in the *Rosneft* case (discussed below) where the Council issued a regulation implementing sanctions against Russia.¹⁴⁸ There, the regulation was not a CFSP measure.¹⁴⁹ The regulations adopted to implement the sanctions decision are binding in their entirety on natural or legal persons and directly applicable to EU Member States.¹⁵⁰

Rosneft, a partially state-owned Russian oil company, brought suit against the UK and the UK’s Financial Conduct Authority challenging the legality of the EU’s sanctions against Russia.¹⁵¹ The UK High Court of Justice referred a series of preliminary questions to the ECJ on this case.¹⁵² One of the key questions in the High Court’s application to the ECJ in *Rosneft* is whether the ECJ has jurisdiction to hear the case.¹⁵³ Technically, all national courts of the Member States are EU courts, and those courts can refer a question to the ECJ, through a reference for a preliminary ruling.¹⁵⁴ In a report on the arguments by Rosneft and the UK before the Queen’s Bench Division of the High Court of England and Wales, the High Court justified its ability to refer the *Rosneft* case

¹⁴⁵ TEU, *supra* note 64, art. 19(3)(b).

¹⁴⁶ TFEU, *supra* note 46, art. 275. Note, however, that the CJEU does have jurisdiction to review the legality of decisions by the Council to impose targeted sanctions on natural or legal persons. *Id.*

¹⁴⁷ KOUTRAKOS, *supra* note 71, at 495.

¹⁴⁸ *See supra* Part II.D.

¹⁴⁹ Stian Oby Johansen, *EU Sanctions Against Non-EU Countries: The CJEU Will Soon Address Some Key Legal Issues*, EU LAW ANALYSIS (Feb. 26, 2016), <http://eulawanalysis.blogspot.com/2016/02/eu-sanctions-against-non-eu-countries.html>.

¹⁵⁰ TFEU, *supra* note 46, art. 215; TEU, *supra* note 64, art. 28(2). *See* Johansen, *supra* note 149.

¹⁵¹ OJSC Rosneft Oil Company v. HM Treasury & Others [2015] EWHC (Admin) 248 [5] (Eng.).

¹⁵² Case C-72/15, OJSC Rosneft Oil Company v. HM Treasury & Others, Reference for Preliminary Ruling from High Court of Justice (England & Wales), Queen’s Bench Division (Divisional Court) (Feb. 18, 2015).

¹⁵³ *Id.*

¹⁵⁴ Reference for a Preliminary Ruling, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A114552> (last updated Jan. 15, 2014).

to the ECJ on two provisions, albeit from different legal regimes.¹⁵⁵ The first was Article 6 of the European Convention on Human Rights, which enshrines the principle that any measure by the executive can and should be reviewed by a court.¹⁵⁶ Any exception to this fundamental right should be strictly construed.¹⁵⁷ The High Court then referred to a second provision, Article 19(1) TEU, which states that the ECJ shall ensure that the interpretation and application of treaty law is observed.¹⁵⁸ On these bases, the ECJ may agree that it has jurisdiction to review the decision of the EU to impose sanctions on Rosneft.

IV. MEMBER STATE AUTONOMY UNDER THE SANCTIONS REGIME

A. *Member States' Role at the CFSP Decision Stage*

EU heads of state representing individual Member States convene in the European Council and negotiate to come to the decision to impose sanctions.¹⁵⁹ Under Article 24(1) TEU, a CFSP decision made by the European Council cannot be legislative in nature.¹⁶⁰ The CFSP decision is “defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise.”¹⁶¹ The European Council’s CFSP decision puts forward a general political concept explaining why the EU is choosing to disrupt trade relations with a third country.¹⁶² Legislation follows in the form of regulations, which are decided by the European Council using QMV.¹⁶³ The regulations provide details for how the sanctions should be implemented by Member States.

At the first step in the sanctions process, the treaties require that the heads of state in the European Council vote unanimously to impose sanctions.¹⁶⁴ Historically, when a group of states enter into a treaty, they each expect to

¹⁵⁵ Stephen Vousden, *Case C-72/15, Rosneft – Challenging the EU’s Sectoral Sanctions Against Russia*, EU L. RADAR (Mar. 22, 2015), <http://eulawradar.com/case-c-7215-rosneft-challenging-the-eus-sectoral-sanctions-against-russia/>.

¹⁵⁶ Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 222.

¹⁵⁷ *Id.*

¹⁵⁸ TEU, *supra* note 64, art. 19(1).

¹⁵⁹ See CRAIG & DE BÚRCA, *supra* note 17, at 47.

¹⁶⁰ *Id.* art. 24(1).

¹⁶¹ *Id.*

¹⁶² TFEU, *supra* note 46, art. 215.

¹⁶³ *Id.*

¹⁶⁴ TEU, *supra* note 64, art. 24.

engage in unanimous decision-making under that agreement, i.e., they retain the power to exercise a veto when the group makes decisions.¹⁶⁵ In traditional treaty-type diplomatic conferences, two basic principles typically apply to voting: 1) every state has an equal say and 2) no state can be bound without its consent.¹⁶⁶ These two concepts are referred to as the doctrine of sovereign equality of states and the rule of unanimity, respectively.¹⁶⁷ The principle of autonomy over foreign policy decision-making, however, has ensured that any votes on foreign policy are unanimous.

The veto also represents political power for the heads of state. After blocking a vote to renew sanctions on Russia, for example, heads of state who exercised their veto can demonstrate that they respected the will of the people.¹⁶⁸ Indeed, Member States in the EU can and have exercised their veto power either to block a decision or to dilute the strength of the legislation in question.¹⁶⁹ As discussed earlier in this Comment, however, achieving a unanimous decision is inefficient and time-consuming, and it can lead to stalemates.¹⁷⁰ However, the unanimous vote preserves national sovereignty by promoting this intergovernmental method of decision-making.

B. Independent Action Left to Member States to Impose Regulations

The sanctions regime allows the Member States to retain a degree of autonomy in executing a decision to impose sanctions and giving effect to a regulation.¹⁷¹ The regulation is the second step of the two-step process by which the EU imposes sanctions,¹⁷² and it is not only binding on individuals subject to the EU's jurisdiction, but also imposes an obligation on Member States to enforce the regulations.¹⁷³ The Member States are expected to "provide for effective, proportionate, and dissuasive penalties, and they are generally required to take all measures necessary to make sanctions effective."¹⁷⁴

¹⁶⁵ Sieberson, *supra* note 35, at 932.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See Mills, *supra* note 16.

¹⁶⁹ Sieberson, *supra* note 35, at 932.

¹⁷⁰ See *supra* Part II.B, Part III.C.

¹⁷¹ KOUTRAKOS, *supra* note 71, at 505.

¹⁷² *Id.* at 495.

¹⁷³ Golumbic & Ruff, *supra* note 50, at 1038.

¹⁷⁴ EECKHOUT, *supra* note 39, at 541.

Individual Member States, in theory, are not required to implement the sanctions. Under Article 31(1) TEU, a Member State may abstain from a unanimous European Council vote and declare that it will not be bound by the decision.¹⁷⁵ Article 31(1) goes on, however, to prevent any Member State from taking “any action likely to conflict with or impede Union action based on that decision.”¹⁷⁶ According to this provision, a European Council member’s abstention does not prevent the European Council decision from coming into effect.¹⁷⁷ The national authorities of Member States are then left with two tasks: 1) authorize activities which fall within the scope of the regulations and 2) define any deviations that can be made from those regulations, under specific circumstances.¹⁷⁸ The power to abstain from a unanimous European Council vote, therefore, in practice does not give Member States any more autonomy. The Member States must still adhere to any prohibitions enumerated in the regulations preventing trade or interaction between EU citizens and the sanctioned country. Even the specific circumstances whereby a Member State can deviate are also limited.

The question of whether Member States can deviate from Community Law and impose their own sanctions came before the ECJ in *Commission v. Greece*. While the court was not obliged to deliver a judgment on the case, Advocate General Jacobs delivered an opinion.¹⁷⁹ Incidentally, this opinion is the only authority (albeit non-binding) on whether Article 347 applies.¹⁸⁰ Article 347 TFEU allows a Member State to deviate from Community law as long as it adheres to three conditions: 1) the Member State may deviate *only* in such circumstances that are laid down in Article 347; 2) the Member State that needs to act should consult with other Member States in order to adopt a common approach aiming to protect the internal market; and 3) the Commission is responsible for examining how national measures deviating from EU law can be adjusted to the rules laid down in the Treaties (from Article 348 TFEU).¹⁸¹ The Advocate General’s opinion stressed that while Member States have a better awareness of their own needs in terms of foreign and security policy, relying on Article 347 TFEU to impose economic sanctions against third countries would undermine the system set up under

¹⁷⁵ TEU, *supra* note 64, art. 31(1).

¹⁷⁶ *Id.*

¹⁷⁷ Goebel, *The European Council After the Treaty of Lisbon*, *supra* note 76, at 1258.

¹⁷⁸ KOUTRAKOS, *supra* note 71, at 505.

¹⁷⁹ Opinion of Advocate General Jacobs, Case C-120/94, *Comm’n v. Greece*, 1996 E.C.R. I-1513.

¹⁸⁰ *Id.*

¹⁸¹ KOUTRAKOS, *supra* note 71, at 507–08.

Article 215 TFEU.¹⁸² While the facts of this case leading to the opinion involved a Member State deviating by imposing its own embargo on a third country, the opinion reflected another limitation on potential independent actions taken by Member States: “there are . . . no judicial or manageable standards by which to judge these issues . . . the court would be in a judicial no-man’s land.”¹⁸³

A 1997 ECJ case, however, showed that there are limits to the independent actions Member States can take to make sanctions effective.¹⁸⁴ In *Centro-Com v. HM Treasury*, the ECJ held that Member States were not entitled to adopt measures that interfered with the operation of Community regulations imposing restrictive measures on Serbia and Montenegro.¹⁸⁵ *Centro-Com* concerned sanctions adopted by the EU on Serbia and Montenegro pursuant to a decree by the U.N. Security Council.¹⁸⁶ The regulation implementing the sanction provided an exception for medical supplies and food.¹⁸⁷ *Centro-Com*, an Italian company, exported medical supplies to Montenegro and subsequently requested payment for those sales through a bank account held by Yugoslavia with a bank in London.¹⁸⁸ The UK, however, refused payment due to a national policy permitting payment only for exports from the UK, a policy designed to prevent violation of the sanctions.¹⁸⁹ The UK argued that it had undertaken these measures under its national competence in the field of foreign and security law to implement UN sanctions.¹⁹⁰ The question came before the Court to consider whether the United Kingdom’s deviation from Sanctions Regulation was compatible with the CCP generally and the sanctions rules in this specific case.¹⁹¹

In its judgment, the ECJ clarified the difference between measures of foreign and security policy and those of the CCP.¹⁹² Additionally, the ECJ specified that although it accepted the United Kingdom’s argument that

¹⁸² Case C-120/94, *Comm’n v. Greece*, 1996 E.C.R. I-1513.

¹⁸³ *Id.*, at I-1527 (quoting *Buttes Gas & Oil Co. v. Hammer* [1982] A.C. 888 [938]).

¹⁸⁴ EECKHOUT, *supra* note 39, at 541.

¹⁸⁵ Case C-124/95, *The Queen, ex parte Centro-Com v. HM Treasury and Bank of England*, 1997 E.C.R.

I-81.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ KOUTRAKOS, *supra* note 71, at 500.

¹⁹² *Id.*; *see also* Case C-124/95, *The Queen, ex parte Centro-Com v. HM Treasury and Bank of England*, 1997 E.C.R. I-81.

Member States do retain their competence in the field of foreign and security policy, they are nonetheless obligated to exercise their power in a manner consistent with EU law.¹⁹³ The reasoning here was not only consistent with the Court's case law on the supremacy of EU law, but also reinforced the concept that a CFSP decision (or, at the time, a foreign policy decision) was made by the Member States acting unanimously and is a manifestation of the political will of each Member State.

Politically, the European Union needs to speak with a unified voice while simultaneously honoring the national interests of each Member State, especially when taking measures as strong as imposing sanctions on a non-EU state. A Gallup poll conducted from May–June 2015 revealed that forty-five percent of Greeks opposed EU sanctions on Russia, primarily because of the negative effects the sanctions were having on the Greek economy.¹⁹⁴ Since April 2015, other EU Member States have demonstrated their opposition to sanctions that have delivered a debilitating blow not only to Russia's economy, but also to the economies of Member States themselves.¹⁹⁵ Despite this opposition, the European Council renewed EU sanctions on Russia first in June 2015 and again in December of that year.¹⁹⁶

Each of these legal provisions and cases highlight an important prevailing principle: because the EU must speak with a unified voice, any independent Member State action reflecting a disagreement or opposition to EU policies undermines the strength and legitimacy of that voice. If we consider the hypothetical situation where, for example, a Member State like Greece refuses to honor the trade embargoes or food bans from Russia, the Commission could bring a case before the ECJ requesting Greek compliance with the sanctioning policy.¹⁹⁷ The ECJ would likely ask whether Greece went through the necessary procedural steps to avoid implementing the sanctions policy. The

¹⁹³ *Id.*

¹⁹⁴ Phillip Chrysopoulos, *Nearly Half of Greeks Oppose EU Sanctions Against Russia*, GREEK REP. (Aug. 26, 2015), <http://greece.greekreporter.com/2015/08/26/nearly-half-of-greeks-oppose-eu-sanctions-against-russia/>.

¹⁹⁵ *Some European Countries Want Russian Sanctions Lifted, McCain Says US to Decide*, RT (Feb. 3, 2016, 7:59 PM), <https://www.rt.com/usa/331111-sanctions-eu-mccain-usa/>.

¹⁹⁶ James Kanter, *EU to Extend Sanctions Against Russia, But Divisions Show*, N.Y. TIMES (Dec. 18, 2015), http://www.nytimes.com/2015/12/19/world/europe/eu-to-extend-sanctions-against-russia-but-divisions-show.html?_r=0.

¹⁹⁷ For background on enforcement actions against Member States, see CRAIG & DE BÚRCA, *supra* note 17, at 408–41.

next section will assess whether a Member State could, in practice, abstain from a vote using Article 31(1) or invoke national policy under Article 23.

C. Member State Opposition in Practice

The EU may impose two different kinds of sanctions: those that implement UN sanctions or autonomous EU sanctions.¹⁹⁸ At the time of this writing, there are no UN sanctions in place against Russia.¹⁹⁹ The EU sanctions against Russia are thus autonomous EU sanctions adopted pursuant to Article 215 TFEU. On March 3, 2014, the Council of the European Union's Foreign Affairs Council condemned "the clear violation of Ukraine's sovereignty and territorial integrity by acts of aggression by the Russian armed forces as well as the authorization given by the Federation Council of Russia on 1 March for the use of the Russian armed forces on the territory of Ukraine."²⁰⁰ The European Council then held an extraordinary meeting on March 6, 2014 where they agreed to prepare individual restrictive measures which involved freezing assets and imposing travel bans.²⁰¹

On March 17, 2014, the Foreign Affairs Council of the Council of the European Union adopted restrictive measures against twenty-one Russian officials, as well as the persons and entities associated with them, including travel bans and asset freezes which came into force immediately.²⁰² The EU also limited access to its "primary and secondary markets of [five] major Russian majority state-owned financial institutions and their majority-owned subsidiaries, as well as three major Russian energy and three defense companies."²⁰³ In response, the Russian Federation imposed a ban on food imports from the EU, the United States, Australia, Canada, and Norway.²⁰⁴

¹⁹⁸ GRIEGER, *supra* note 137, at 3.

¹⁹⁹ Maya Lester & Michael O'Kane, *Russia*, EUR. SANCTIONS BLOG, <https://europeansanctions.com/eu-sanctions-in-force/russia/> (last visited Feb. 27, 2017).

²⁰⁰ Press Release, The Council of the European Union, EU Condemns Russia's Actions in Ukraine, Calls for Dialogue and Remains Ready for Further Measures, Foreign Affairs Council Meeting, Council Conclusions on Ukraine (Mar. 3, 2014), <http://www.consilium.europa.eu/en/meetings/fac/2014/03/03/>.

²⁰¹ European Council, Statement of the Heads of State or Government on Ukraine (Mar. 6, 2014), <http://www.consilium.europa.eu/en/meetings/european-council/2014/03/06/>.

²⁰² *Council Condemns the Illegal Referendum in Crimea*, EUR. COUNCIL, COUNCIL OF THE EUR. UNION, (Mar. 17, 2014), <http://www.consilium.europa.eu/en/meetings/fac/2014/03/17/>.

²⁰³ *EU Restrictive Measures in Response to the Crisis in Ukraine*, EUR. COUNCIL, COUNCIL OF THE EUR. UNION (Mar. 11, 2014), <http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/>.

²⁰⁴ *Russia Extends Tit-for-Tat Sanctions Against West*, AL JAZEERA (June 24, 2015), <http://www.aljazeera.com/news/2015/06/russia-extends-tit-tat-sanctions-west-150624131713532.html>.

Moscow then extended that ban by presidential decree until August 2016.²⁰⁵ The EU continued to increase the pressure on Russia by expanding the restrictive measures and adding individuals to the list.²⁰⁶ At the time of this writing, “152 persons and 37 entities are subject to an asset freeze and a travel ban.”²⁰⁷

On December 18, 2015, the EU moved to extend Russian sanctions for another six months, while frustration grew over Germany’s plans to move forward with a gas pipeline project called Nord Stream 2.²⁰⁸ Italy, generally classified as a large Member State (and therefore one wielding more political power),²⁰⁹ was able to cause a one-month delay in the decision to renew the sanctions earlier in the month by exercising its veto.²¹⁰ Italy had a stake in another gas pipeline project called South Stream, which was cancelled earlier in the year, and the Italian farming and fishing industries suffered economic blows due to the sanctions.²¹¹

Despite Greece’s ever-warming relations with Russia,²¹² Hungarian and Slovakian opposition to further sanctions, and Italian frustration with the recent Russian gas pipeline decisions,²¹³ the European Council has continued to unanimously approve CFSP decisions, renewing EU sanctions on Russia. Italy, as a large Member State, could exercise some power, but there was no evidence of such use of power by any of the smaller states. The hypothetical question that follows and that this Comment has sought to address is what legal recourse could an individual Member State have when it opposes a CFSP decision?

A Member State could rely on Article 31 to abstain from voting on a CFSP decision in the European Council. Article 31 only invalidates a unanimous vote

²⁰⁵ See Chrysopoulos, *supra* note 194.

²⁰⁶ See *EU Restrictive Measures in Response to the Crisis in Ukraine*, *supra* note 203.

²⁰⁷ *Id.*

²⁰⁸ Kanter, *supra* note 196.

²⁰⁹ See KEATING et al., *supra* note 83, at 1.

²¹⁰ Peter Spiegel & James Politi, *Italy’s Renzi Joins Opposition to Nord Stream 2 Pipeline Deal*, FIN. TIMES (Dec. 15, 2015), <https://www.ft.com/content/cebd679c-a281-11e5-8d70-42b68cfae6e4>.

²¹¹ Barbara Lewis & Francesco Guarascio, *UPDATE 1-Italy Urges Europe to Have Courage to Block Nord Stream Gas Plan*, REUTERS (Dec. 18, 2015, 11:14 AM), <http://www.reuters.com/article/urkaine-crisis-nordstream-idUSL8N1472KQ20151218>.

²¹² See Mills, *supra* note 16 (“We are seeing that there is an unsymmetrical threat from the south, from jihadists. We cannot oppose this danger without Russia,” [Tsipras] said, expressing hopes that Greece could be a ‘bridge between the EU and Russia.’”).

²¹³ Gabriele Steinhäuser & Laurence Norman, *EU Moves to Extend Sanctions on Russia*, WALL STREET J. (Dec. 18, 2015, 2:56 PM), <http://www.wsj.com/articles/eu-moves-to-extend-sanctions-on-russia-1450468572>.

in the event that one-third or more of the Member States abstain from a CFSP decision,²¹⁴ so the risk of the stronger Member States pressuring those who are abstaining from the vote to join the majority may be lessened. However, any abstention would not serve the principles of coherence and efficiency. The EU would not speak with a unified voice through the sanctions, and it would appear weak in its decision. Any political pressure from the other members of the European Council would probably have the same effect on a possible abstention as it would on a veto.

At the second step of the process, when the Council votes by QMV on legislation to impose sanctions, opposing Member States could also invoke national policy under Article 23(1). This action forces referral of the Council decision on how to impose regulations to the European Council for a unanimous vote.²¹⁵ Because the regulation stage uses QMV, there is a legal safeguard in the Treaty giving Member States the ability to go through a second stage of unanimous voting to ensure that CFSP and national sovereignty principles were upheld.²¹⁶ However, this process is lengthy and could also subject foreign ministers to political pressure by other foreign ministers in the Council. Research has actually revealed that decision-making by the Council of Ministers is often ambiguous because the Council votes by consensus and does not publish the opposition to those votes.²¹⁷ Thus, a minister is unlikely to invoke Article 23(1) on behalf of his or her Member State in a proceeding like this one.

An analysis of the relevant treaty provisions reveals that although the Treaties legally provide safeguards that seemingly preserve national sovereignty in the realm of CFSP and, by extension, the sanctions regime, they are ineffectual in practice. Although the movement toward the use of more QMV in CFSP in the Treaty of Lisbon does not signal that the EU is becoming more centralized or supranational, it does reflect an overall shift favoring efficiency and coherence in CFSP decision-making at the expense of the national interests of individual Member States.

²¹⁴ TEU, *supra* note 64, art. 31(1).

²¹⁵ Sieberson, *supra* note 35, at 952.

²¹⁶ *Id.*

²¹⁷ Stéphanie Novak, *The Silence of the Ministers: Consensus and Blame Avoidance in the Council of the European Union*, 51 J. COMMON MKT. STUD. 1091, 1092 (2013).

CONCLUSIONS

This Comment primarily seeks to shed light on the recently criticized decision-making process in the EU and to argue that though the process is flawed and in need of amendment, it is not creating a process of “legal colonisation.”²¹⁸ The European Council, which in theory espouses these ideals of hegemony and national sovereignty, and the decision-making mechanisms it employs, provide an eye-opening case study. When individual citizens of a Member State see their government taking a strong stance against an EU policy, which nevertheless is agreed to after a unanimous vote, it is inevitable that they begin to question the European Council’s legitimacy. Though the qualms with the decision-making process are only few among many, they are important and underlie many of the chief complaints with the EU. Member States and their citizens feel disillusioned with how they are represented in the EU. There are methods, however, which can boost morale. Votes to leave the European Union are not the only solution.

The increased involvement of the European Parliament in CFSP decision-making and of the ECJ in hearing the cases challenging sanctions can provide a solution in the future. Both of these EU institutions have not only come to hold significant power, but provide a forum where both the Member State representatives as well as EU citizens can challenge supranational decisions. Though both of these checks can hinder the process of imposing sanctions, they are vital to restoring the faith of the EU citizenry in the European project.

Should the treaties be revised? The preceding paragraphs indicate that efforts have been made, legally speaking, to protect the national sovereignty of Member States in the realm of foreign policy by retaining unanimous voting at the policy-setting stage and allowing constructive abstentions. There is a logical inconsistency, however, when the Treaties provide that Member States can abstain from a vote and therefore not be obligated to enforce a regulation, but may not take any action that would compromise the overall aim of the policy. What then would happen if a Member State like Greece, struggling to rehabilitate its debt-stricken economy, chooses to reinstate trade relations with Russia? At every stage of the process assessed above, there is either a legal mechanism or a political force bringing any recalcitrant Member State back in line with the group. The European Parliament can provide another outlet for

²¹⁸ Johnson, *supra* note 2.

Member States and their citizens to assert their position and (at the very least) feel better represented.

MELANIE C. PAPADOPOULOS*

* Editor-in-Chief, *Emory International Law Review*; J.D. Candidate, Emory University School of Law (2017); B.A., *cum laude*, Tufts University (2012). The author would like to express her gratitude to Professor Magdalena Tulibacka and Vice Dean Robert B. Ahdieh for their mentorship and thoughtful advice in writing this Comment. The author is also immensely grateful to the staff of the *Emory International Law Review* for their meticulous editing efforts and friendship. Finally, the author would like to thank her family, Rom, Jeanette, Tony, and Apollo Papadopoulos for their love, patience, and unwavering support.