in the second half of 2007 and was keen that the matter should be concluded during its Presidency, in part because the President of the Commission was from Portugal, and in part because Portugal could then attach its name to the amending Treaty.

The 2007 IGC was power politics with a vengeance. We had grown accustomed to the fact that even traditional IGCs would be relatively open, with discussion papers available on the internet and time for the 'people' to form some view as to the planned reforms. This sense was fuelled by the more inclusive process used in relation to the Charter of Fundamental Rights and the Constitutional Treaty. The Lisbon Treaty was, by way of contrast, forged by the Member States and Community institutions, and there was scant time afforded for further deliberation. Thus the detailed version of the Reform Treaty of October 2007 allowed only two weeks before the Member States were required to signal their consent, and scant time for any one else to digest its detailed provisions.

The justification for this accelerated process was apparent when one perused the content of the Lisbon Treaty, but it was, for obvious reasons, a justification that those engaged in the IGC could not too openly avow, this being that the Lisbon Treaty was indeed the same in most important respects as the Constitutional Treaty. The issues had been debated in detail in the Convention on the Future of Europe after a relatively open discourse, and were considered once again in the IGC in 2004. There was therefore little incentive or appetite for those engaged in the 2007 IGC to reopen Pandora's Box.[116] This argument could not, however, be pressed too explicitly by those taking part in the 2007 IGC, since they would be open to the criticism that they were largely repackaging provisions that had been rejected by voters in two prominent Member States,[117] more especially given that key Member States sought to press forward with ratification of the Lisbon Treaty without recourse to any (further) referendum.

The 2007 IGC produced a document that was signed by the Member States on 13 December 2007,[118] although the appellation was changed to the Lisbon Treaty in recognition of the place of signature. It required ratification by each Member State. The hope that this stage of Treaty reform could be hastily concluded was dashed, however, when Ireland rejected the Lisbon Treaty in a referendum. This obstacle was overcome by a second Irish referendum in October 2009, after concessions were made to overcome Irish objections expressed in the earlier referendum. The final hurdle proved to be the reluctance

[116] G Tsebelis, 'Thinking about the Recent Past and Future of the EU' (2008) 46 JCMS 265.
[117] This was so regardless of the fact that the reasons for the 'no' vote in France and the Netherlands may have had relatively little to do with the new provisions contained in the Constitutional Treaty.
[118] Conference of the Representatives of the Governments of the Member States, Treaty of Amending the Treaty on European Union and the Treaty Establishing the European [illegible] December 2007, [2007] OJ C306/1.

of the Czech President to ratify the Lisbon Treaty, but he did so reluctantly after a constitutional challenge to the Treaty had been rejected by the Czech Constitutional Court.

5. Lisbon Treaty: Architecture and Structure

(a) Formal architecture

It is axiomatic that every Treaty has its own architecture, which serves to shape the ordering and placing of particular Treaty provisions, more especially when the amending Treaty makes significant institutional changes to the status quo ante. It would indeed be natural to denominate this in terms of 'constitutional architecture', but for the fact that the word 'Constitution' has been consciously excised from the Lisbon Treaty. It is nonetheless necessary to understand and evaluate the '(constitutional) architecture' of the Lisbon Treaty, since this is important in and of itself, and because it facilitates understanding of the more particular amendments that will be considered in later chapters.

So, let us be clear about the basics. The Lisbon Treaty amends the Treaty on European Union and the Treaty Establishing the European Community. The Lisbon Treaty itself has seven Articles, of which Articles 1 and 2 are the most important, plus numerous Protocols and Declarations. Article 1 contains the amendments to the Treaty on European Union, TEU, and contains some of the principles that govern the EU, as well as revised provisions concerning the Common Foreign and Security Policy and enhanced cooperation. Article 2 amends the EC Treaty, which is renamed the Treaty on the Functioning of the European Union. The EU is henceforth to be founded on the TEU and the TFEU, and the two Treaties have the same legal value.[119] The Union is to replace and succeed the EC.[120] The Lisbon Treaty contains an Annex with a Table of Equivalences for the revised Treaty as a whole. This provides the reader with the new numbering of Articles for the entire Treaty. A consolidated version of the Lisbon Treaty now contains the new numbering and references to the old provisions where appropriate.[121] These renumbered Treaty Articles will be used throughout the discussion of the Lisbon Treaty.

(b) Substantive architecture: general

The Constitutional Treaty had a pretty clear 'constitutional architecture', and this was so irrespective of what one felt about particular provisions thereof.

[119] Art 1 para 3 TEU.
[120] ibid.
[121] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/1, [2010] OJ C83/1.

Part I contained the important principles concerning the nature and operation of the EU legal order, even if reference to the substantive provisions of Part III of the Constitutional Treaty was necessary in order to understand the more detailed meaning of particular principles.

The Lisbon Treaty fares less well in this respect. The revised TEU functions to some extent as the repository of the constitutional principles for the EU. This is especially true in relation to Title I-Common Provisions, Title II-Democratic Principles, and Title III-Provisions on the Institutions. The Articles included within these Titles undoubtedly address matters of a constitutional nature, concerning, for example, the locus of legislative power within the EU and the establishment of the newly-expanded role of President of the European Council. There are nonetheless matters not included within the revised TEU, which had properly been in Part I of the Constitutional Treaty. Thus, for example, the rules concerning competence, aside from a brief mention in the TEU,[122] are to be found in the TFEU,[123] as are the provisions concerning the hierarchy of norms,[124] and the important principles relating to budgetary planning.[125]

This was perhaps inevitable, given the fate of the Constitutional Treaty and the political need to take forward the reforms in a manner that would be more in accord with the status quo. This explains the continued use of the basic divide between the TEU and the EC, albeit with the latter renamed as the TFEU. The framers of the Lisbon Treaty nonetheless also had to ensure that there was some difference to the 'naked eye' between what was contained in the revised TEU, and what had been included within Part I of the Constitutional Treaty. The drafters of the Lisbon Treaty were therefore caught in a dilemma: the natural desire to frame the revised TEU so as to embrace the EU's important constitutional principles had to be tempered by the political need to produce a document that did not simply replicate Part I of the Constitutional Treaty.

The Lisbon Treaty has, however, made improvements in the architecture of what will henceforth be the TFEU. It is divided into seven Parts. Part One, entitled Principles, contains two Titles, the first of which deals with Categories of Competence, the second of which covers Provisions having General Application. Part Two deals with Discrimination and Citizenship of the Union. Part Three, which covers Policies and Internal Actions of the Union, is the largest Part of the TFEU with 24 Titles.[126] The most noteworthy change in this respect is that the provisions on Police and Judicial Cooperation in Criminal Matters, the Third Pillar of the old TEU, have been moved into the new TFEU. They have been integrated with what was Title IV EC, dealing with Visas, Asylum etc, and is now

[122] Arts 4, 5 TEU.
[123] Arts 2–6 TFEU.
[124] Arts 288–292 TFEU.
[125] Art 312 TFEU.
[126] The Titles are as follows: I-Internal Market; II-Free Movement of Goods; III-Agriculture and Fisheries; IV-Free Movement of Persons, Services and Capital; Title V-Area of Freedom, Security and Justice; Title VI-Common Rules on Competition, Taxation and Approximation of Laws;

Title V of the TFEU, renamed the Area of Freedom, Security and Justice. Part Four of the TFEU covers, as before, Association of Overseas Countries and Territories. Part Five, by way of contrast, is new and deals with External Action by the Union, bringing together a range of subject matter with an external dimension.[127] Part Six of the TFEU is concerned with Institutional and Budgetary Provisions, while Part Seven covers General and Final Provisions.

(c) Substantive architecture: the pillar structure and the Common Foreign and Security Policy

The impact of the Lisbon Treaty on the Second and Third Pillar[128] will be considered in subsequent chapters.[129] The present focus is on the general approach in the Lisbon Treaty to matters that had hitherto been dealt with in the Second and Third Pillars.

The approach to the Common Foreign and Security Policy (CFSP) in the Lisbon Treaty largely replicates that in the Constitutional Treaty, subject to the change of nomenclature, discussed below, from Union Minister for Foreign Affairs to High Representative of the Union for Foreign Affairs and Security Policy. The distinctive nature of the rules relating to the CFSP means that in reality there is still a separate 'Pillar' for such matters. The rules relating to the CFSP remain distinct and executive authority continues to reside with the European Council and the Council. It is the European Council, acting unanimously on a proposal from the Council, which identifies the strategic interests and objectives of the CFSP.[130]

This is further emphasized by Article 24 TEU, which provides that: the CFSP is subject to specific rules and procedures; it is defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise; that the adoption of legislative acts is excluded;[131] and the CFSP is to be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties.

VIII-Economic and Monetary Policy; IX-Employment; X-Social Policy; XI-The European Social Fund; XII-Education, Vocational Training, Youth and Sport; XIII-Culture; XIV-Public Health; XV-Consumer Protection; XVI-Trans-European Networks; XVII-Industry; XVIII-Economic, Social and Territorial Cohesion; XIX-Research and Technological Development and Space; XX-Environment; XXI-Energy; XXII-Tourism; XXIII-Civil Protection; XXIV-Administrative Cooperation.

[127] The principal issues covered by Part Five are: the common commercial policy, cooperation with third countries and humanitarian aid, restrictive measures, the making of international agreements, and the EU's relations with third countries and international organizations.
[128] A valuable detailed analysis can be found in S Peers, *Statewatch Analysis of the EU Reform Treaty*, available at <http://www.statewatch.org/>.
[129] Chs 9 and 10.
[130] Art 22 TEU.
[131] Art 352(4) TFEU, which is the amended Art 308 EC, specifically precludes the use of this provision in relation to the CFSP.

Article 24 TEU also emphasizes the 'specific role' of the European Parliament and the Commission in this area as defined by the Treaties. The European Court of Justice (ECJ) continues to be largely excluded from the CFSP.[132] It does, however, have jurisdiction in relation to Article 40 TEU, which is designed to ensure that exercise of CFSP powers do not impinge on the general competences of the EU, and vice versa; the ECJ also has jurisdiction under Article 275 TFEU to review the legality of decisions imposing restrictive measures on natural or legal persons adopted by the Council under Chapter 2 of Title V TEU.

(d) Substantive architecture: the pillar structure and Police and Judicial Cooperation in Criminal Matters

The approach in the Lisbon Treaty to the CFSP can be contrasted with that in relation to the Third Pillar, which is moved from the TEU and merged with the provisions of what was Title IV EC, dealing with immigration, asylum and civil law. This forms a new Title V TFEU, the Area of Freedom, Security and Justice, which has five chapters dealing with: general provisions; policies on border checks, asylum, and immigration; judicial cooperation in civil matters; judicial cooperation in criminal matters; and police cooperation. The detailed provisions largely reflect those in the Constitutional Treaty, subject to some amendments mandated by the European Council in June 2007. The Lisbon Treaty has therefore largely followed the Constitutional Treaty in 'de-pillarizing' this aspect of EU law.

This development is to be welcomed, as is the fact that, subject to transitional provisions, the normal jurisdiction of the ECJ is generally applicable within this area. Thus the old Article 35 EU, which limited the ECJ's jurisdiction under the Third Pillar, is repealed by the Lisbon Treaty. The exception is Article 276 TFEU, which continues to preclude the ECJ from reviewing the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. Article 267 TFEU, the preliminary ruling procedure, is modified such that if the question raised by the national court relates to a person in custody, the ECJ must act with the minimum of delay.

Less welcome is the preservation of the various opt-outs and reservations to Justice and Home Affairs, which have been extended to cover the new Title V TFEU, and therefore embrace policing and criminal law.[133] This was part of the 'deal' negotiated by the UK in the 2007 negotiations concerning the Lisbon Treaty.

[132] Art 24 TEU, Art 275 TFEU.

[133] S Peers, *Statewatch Analysis, EU Reform Treaty Analysis No 4: British and Irish Opt-Outs from (JHA) Law*, 26 October 2007, available at <http://www.statewatch.

6. Reflections on Constitutional Reform

Norman has rightly emphasized that the negotiations that resulted in the Constitutional Treaty were in many ways 'a tale of the unexpected'.[134] He notes that the Constitutional Treaty handed to the Italian Presidency in July 2003 was 'in many ways an accidental Constitution',[135] in the sense that the Laeken Declaration envisaged a less ambitious final document. Norman is equally firm in his conclusion that there was nothing inevitable about other key stages within the Convention, such as the timing of the early draft Constitution in autumn 2002, the invasion of the foreign ministers, or the Franco-German paper on institutional reform that did so much to shape later discussion.[136] With this by way of background, we can consider some of the issues concerning content and process in this latest and most protracted round of Treaty reform.

(a) Content

In terms of content, some might argue that the reform agenda was too ambitious and that the focus should have been on the four 'discrete' issues set out in the Nice Declaration. We should be careful in this respect. The issues left open after Nice were not discrete, and if reform had concentrated solely on them there would have been a raft of criticism that it had failed to address deeper problems about the functioning of the EU. The negative referenda in France, the Netherlands, and Ireland spoke volumes about the need for the EU to engage with the people, and there were undoubtedly real concerns about aspects of the EU. The disenchantment and lack of engagement with the European project among certain sections of society is a serious concern and must be addressed. The reality is nonetheless that the rationales for the negative votes in these referenda, especially those in France and the Netherlands, had relatively little to do with the principal changes made by the Constitutional or Lisbon Treaties.

There is of course room for disagreement as to the resulting content of the Lisbon Treaty. Thus some have been critical about the further federalization which they believed to result from, for example, the further shift from unanimity to qualified majority in the Council. Others, by way of contrast, have been equally critical about what they saw as the increased intergovernmentalism in the Treaty, focusing on, for example, enhanced Member State influence in the provisions concerning the inter-institutional distribution of power, the creation of the long-term Presidency of the European Council and the like. There are also significant differences of view concerning particular provisions of the Lisbon Treaty. Thus some have applauded the distribution of competences, while others

[134] Norman (n 35) 313. [135] ibid 313. [136] ibid 313–315.

have been critical, arguing that the provisions were unclear and uncertain. There is a similar spectrum of views on matters such as the balance between the social and economic dimensions of the EU as reflected in the new Treaty. Such differences of view on these and other matters are inevitable and will be considered in detail in the subsequent chapters.

(b) Process

In terms of process, it might be tempting to think that the Convention process was defective, or that it had been oversold by way of comparison with traditional IGC techniques. We should be careful before subscribing to these conclusions.

The sentiments expressed by the key players between Nice and Laeken were genuine. There was disenchantment with the traditional IGC approach to EU reform, more especially after the experience with the discussions leading to the Nice Treaty. If this traditional process had been adhered to in relation to the broadened reform agenda there would have been criticism about the 'legitimacy and representativeness deficit' inherent in the classic IGC model. It has moreover been argued by Risse and Kleine that the Convention method fares better than the traditional IGC model in terms of input, throughput, and output legitimacy.[137]

It is true that the realization that the Convention might well produce a formal Constitutional Treaty led to some intergovernmentalization of the Convention process. This is exemplified by the way that certain Member States changed their representatives to the Convention, installing high profile players such as foreign ministers in place of their original members. It is apparent also in the way in which State actors intervened in a deliberate manner from outside the Convention in order to influence the proceedings therein.

These developments did not, however, make the Convention just another IGC in disguise. State actors were always part of the Convention. The fact that State players recognized that the Convention deliberations were more important than they initially believed, and therefore wished to have greater input, did not mean that they had a monopoly in the discursive process.

It is true also that the Convention process was overlaid by the traditional IGC model. This was however to be expected. It would have been possible in theory for the outcome of the Convention deliberations to be dispositive with no amending role for the IGC. The reality is that the Member States would not accept this, nor are they likely to do so in the foreseeable future. The process of EU reform is therefore likely to be a blend of the Convention model and the IGC.

[137] T Risse and M Kleine, 'Assessing the Legitimacy of the EU's Treaty Revision Methods'

There will doubtless also be continuing debate concerning the process that led to the Lisbon Treaty. For some, the decision to press ahead with the Treaty which replicated 90 per cent of what had been in the Constitutional Treaty was either illegitimate, or at the very least dangerous in ignoring the negative votes in referenda from two prominent Member States, more especially because there was scant opportunity to consider the Lisbon Treaty before signature or ratification. For others, the decision to press ahead with this Treaty was justified. They point to the fact that the changes introduced by the Lisbon Treaty played little part in the negative votes in France and the Netherlands, and that insofar as those votes were reflective of a deeper malaise with the EU, it was all the more important to put in place a decision-making structure that would better enable the EU to meet the challenges of the new millennium.

We shall return to these issues in the concluding chapter after considering the principal changes brought about by the Lisbon Treaty. The discussion begins by considering the impact of the Treaty on the inter-institutional distribution of power in the EU.