7

Unity and Pluralism in the EU's Foreign Relations Power

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INTRODUCTION

In the ambitious programme of vesting the European Union with a written constitution, the reform of the current system of foreign relations deserved a prominent place. One of the tasks assigned to the Convention, set up on the basis of the Laeken Declaration, was to make proposals concerning the simplification of the architectural structure of the Union and the definition of a unitary personality of the Union. Both of these objectives were plainly aimed at giving unity and comprehensiveness in the Union's external action, conceived as a necessary condition for a Constitutional legal order. Consistently with such an aim, the new Constitutional Treaty made a serious attempt—the most serious endeavoured thus far—to merge in a unitary set of rules the main provisions concerning the external aspects of European integration. Indeed, the achievement of these objectives—the 'de-pillarization' of the European construction, and the acknowledgement of the Union as a unitary international actor—seems to entail the re-unification of the vast array of powers and prerogatives which are currently distributed in a disorderly and random bundle of competences.

By no means, however, is such a task easy to accomplish. Quite the contrary, it is one of the most complex projects imaginable, as it entails untying knots which resulted hitherto in insurmountable hurdles towards the unity of the EU foreign affairs power. Indeed, the present, fragmented state of the EU system of foreign

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relations is not due to misfortune or to the failure of the architects of European integration. Rather, it is the result of the particular balance of power within the Union—with, on the one hand, the Member States constantly playing down the consequence of the transfer of competence to the EU/EC on the international plane; and, on the other, the European institutions tending to assert themselves as actors autonomous from the Member States.

To complicate the picture further, the legal regime of the European foreign relations system also suffers from the disorderly fashion in which it developed, with a continuous overlapping among provisions originally included in the Treaties, supervening revisions, case law of the ECJ and institutional practice, which create an intertwined situation which is difficult to disentangle even for the most gifted lawyers. The difficulty of construing these various elements in a consistent picture might have dissuaded the European scholarship from going beyond the technical difficulties and from inquiring more closely into the far-reaching implications of such a system.

All in all, the transfer of competence to the EU/EC has created a strange situation where no entity—neither the EU nor the EC or the Member States—possesses the plenitude of the foreign relations power, which is instead deeply segmented in a plurality of actors, objectives and decision-making procedures. This seems to be at variance with most contemporary experiences with federalism, in which the jealous defence of the powers and prerogatives of sub-state units on the internal plane goes hand in hand with the attempt to secure unity in external relations and to allow the federal entity to assert itself as a unitary actor in the international arena. Even for the most zealous custodian of the 'sovereign' rights of the component parts, the need for unity has represented the lighthouse for navigating the perilous waters of international relations: plurality inwards, but unity outwards.[1]

Not all of the questions arising out of this situation will be treated in the present chapter. Its objectives are less ambitious by far. It aims, first, at highlighting the internal fragmentation of the EU foreign relations power deriving from the distribution of competences between the EC and the EU, and second, at analysing the attempt to lend unity and coherence to the EU foreign relations power. Consistently with these narrow objectives, only the 'internal' fragmentation of the EU foreign affairs power, which results from the lack of unity within the EU system, will be considered in detail. Less attention will be devoted to the 'external' fragmentation, which results from the sharing of international powers and prerogatives between the Member States and the EU. Although this latter subject is highly interesting, and only rarely considered by the international literature, this aspect is logically autonomous and too broad, taken as a whole, to be squeezed into the quantitative terms of this chapter.[2] Beyond some cursory remarks, it must, in its comprehensiveness, remain outside the scope of the present analysis.

[1] See M. Farrell, 'EU External Relations: Exporting the EU Model of Governance?', *4 European Foreign Affairs Review* (2005), 451, at 453.

[2] To this topic, I have elsewhere devoted extensive analysis. See 'Fragmented Sovereignty', 18 *The Italian Yearbook of International Law* (2003), 35.

Turning now to describe more closely the structure of this contribution, it seems opportune to devote the first section to a preliminary look at the main models of organization of the foreign relations power. This inquiry can help to explain the theoretical implications of the different models and their constitutional dimension.[3]

The second and third sections will focus respectively on the external relations system of the EC and on the system of the CFSP of the EU. The main aim of these two sections, which touch upon fields covered by an extensive literature, is to highlight the difficulty of ensuring that the regime governing the foreign affairs power of the EC remains separate from the one governing the foreign policy of the EU. This will in turn pave the way for an analysis concerning the practical devices employed in order to achieve mutual communication between these two sub-systems. This analysis will constitute the fourth section of this contribution.

In a further section, closer inquiry will be devoted to the new provisions on the EU's external action incorporated in the Constitutional Treaty, which have the express aim of establishing a comprehensive system of external action for the Union. Although, at the time of writing, the entry into force of the Constitutional Treaty seems far from certain—indeed, it rather seems doomed to failure—a legal analysis of the new integrated system of the Union's external action is a useful exercise, as its importance goes beyond mere cultural relevance. Apart from its historical contingencies, the new provisions represent the most sophisticated attempt, thus far, to set up a new integrated system of external action that could remedy (at least partially) the current fragmentation and establish unity in the Union's foreign relations power. In spite of the many misgivings such a system provokes, its technical study is worthwhile precisely because it may offer some guidance for future elaboration.

UNITY AND PLURALISM OF THE FOREIGN RELATIONS POWER IN A COMPARATIVE OVERVIEW

It is interesting, at the outset, to dedicate a brief overview to the main models of organization of the foreign relations power in composite entities. The aim of this section is to provide an illustration of the conceptual evolution which occurred in

[3] On the constitutional dimension of the European foreign affairs system, and on the impact of that dimension on the works of the Convention, see B. de Witte, 'The Constitutional Law of External Relations', in Pernice and Poiares Maduro (eds), *A Constitution for the European Union: First Comments on the 2003—Draft of the European Convention* (2004), 95; M. Cremona, 'Values in the EU Constitution: the External Dimension', in M. Aziz, S. Millns (eds), *Values in the Constitution of Europe* (2005); Id., 'The Draft Constitutional Treaty: External Relations and External Action', 40 *CMLRev* (2003), 1347; R.A.Wessel, 'Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas and the New Constitution for Europe', in J.W. de Zwaan *et al*, (eds.), *The European Union—An Ongoing Process of Integration*, (Liber Amicorum Fred Kellermann (2004)), 123; E.-U. Petersmann, 'The 2004 Treaty Establishing a Constitution for Europe and Foreign Policy: a New Constitutional Paradigm?', in C. Gaitanides, S. Kadelbach, G.C. Rodriguez Iglesias (eds), *Europa und seine Verfassung: Festschrift für Manfred Zuleeg zum siebzigsten Geburtstag* (2005); M. Krajewski, 'Foreign Policy and the European Constitution', in 22 *Yearbook of European Law* (2003), 436.

this area, from the first examples, in which the sharing of competence in the internal sphere did not touch upon the unity of the entity in international affairs, to the most recent developments, in which the existence of a plurality of entities sharing powers and prerogatives in the international arena is more widely accepted.

In the classical process of federal integration, the organization of the foreign relations power has not generally been the subject of much dispute. The rights and prerogatives of the State in the international sphere were generally regarded as a corollary of sovereignty and even as an essential part of that notion. Consequently, they were considered to be indivisible and necessarily allocated in the governmental organs or entities which represented the State in its international relations.

Both elements, the unitary character of the foreign relations power and the need to assign it to the bearer of sovereignty, emerge clearly in the classical work on federalism which provided the theoretical foundation for the establishment of the US Federation. In Federalist Paper n. 42, Madison wrote:

> The second class of powers, lodged in the general government, consists of those which regulate the intercourse with foreign nations, to wit: to make treaties; to send and receive ambassadors, other public ministers, and consuls; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to regulate foreign commerce (. . .). This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations.

This statement does not explain in plain terms why those powers, instead of being shared among different level of government, are reserved for the federal administration. It simply says that this solution is obvious. The obviousness derives from the fact that the nation would not be 'one' *vis-à-vis* other nations if it did not have the plenitude of the foreign relations power. Consequently, it must have been seen by the author, and in fact it has consistently been seen by many readers, as self-explanatory.[4] The foreign relations power is the one that outwardly (and symbolically) depicts the essence of the nation. To split up the foreign affairs power would clearly have been inconsistent with the goal of national unity, and indeed could have resulted in the various units acting externally at cross-purposes.

The assignment of the foreign relations power in its entirety to the centralized unit creates a clear asymmetry between the internal and the external normative dimension. The internal sphere is dominated by an institutional pluralism and distinguished by the principle of distribution of powers among different organs and levels of governance. Conversely, the external sphere is dominated by the opposite principle of the preservation of the unity of the course of the 'nation'.[5]

[4] Besides the logical, and perhaps ideological, argument in favour of the unity of the foreign relations power, one can also find scattered around the Federalist papers other arguments of a more practical tenor. Generally, they refer to the need to establish authoritativeness and coherence in the governance of foreign affairs and to ensure that irresolute or inconsistent behaviour on the foreign relations front does not obstruct the taking of decisions for the good of the nation as a whole.

[5] This asymmetry has created, and in fact continues to create, overlaps and inconsistencies between internal and external action and is a recurrent cause of disharmony and conflicts. Indeed, in a system in

The US system represents one of the most coherent applications of a model which can be plausibly be named 'unitary'.[6] In this model, both the treaty-making power and the foreign policy are concentrated in the hands of the central unit.[7] The consequences for the decentralized units are obviously very heavy. Not only are they precluded from entering into any treaty or any other form of international compact, they must also accept that the treaties concluded by the federal entity are applicable within their legal order and that such treaties take priority over their internal acts. Furthermore, the ability of the decentralized units to enact internal legislation having an impact on the federal foreign policy is severely impaired. This is the far-reaching effect of the 'dormant foreign policy clause', which has been re-asserted even recently by the US Supreme Court to the detriment of the internal competence of the States.[8]

The unitary model, so well embodied by the US constitutional system, is thus one in which the foreign relations power is entirely entrusted to the centralized entity, and in which the latter's pre-eminence interferes in a variety of ways with the sharing of competences on the internal plane. It is thus rooted in the premise that the external sovereignty is unitary and must be 'unitarily' held and exercised—a conception which reigned in multiple forms over the legal thought of the nineteenth and the first half of the twentieth century.

which certain entities possess internal powers only, a concern arises with respect to maintaining untouched the principle of the internal distribution of competence, and to avoid any overlapping foreign relations powers that might jeopardise it. This concern also has historical importance. Indeed, the assignment to a sole entity of the foreign relations power tends inevitably to simplify, as far as international affairs are concerned, the rich articulation of competence on the internal plane and can even be seen as a threat to the internal balance of power, unless there are no adequate safeguards for the internal level of government. It is precisely the need to safeguard the sphere of competence recognized internally from the interference produced on the internal plane by the exercise of the foreign relations power which prompted the first theoretical elaborations that ultimately opened the way to the full-fledged dualistic conception of the relation between international law and municipal law. I have dealt with this topic in my study 'Trattato internazionale (adattamento al)', in *Enciclopedia del diritto*, vol. XLIV (1991), 1393.

[6] The obvious reference is to the classic work by L. Henkin, *Foreign Affairs and the United States Constitution* (2nd ed., 1997).

[7] The wording of Art. I, sec. 10 ('No State shall, without the Consent of Congress, (. . .) enter into any Agreement or Compact with another State, or with a foreign Power . . .') might appear to suggest that the Constitution intended to assign the treaty-making power to the states, subject to the consent of the Congress. However, the prevailing opinion in the literature and the well-settled stance in jurisprudence tend to uphold the view that in foreign affairs, the US is virtually a unitary State (see L. Henkin, *Foreign Affairs and the United States Constitution*, *supra*, n. 6; E. Stein (in collaboration with L. Henkin), 'Towards a European Foreign Policy? The European Foreign Affairs System from the Perspective of the United States Constitution; in M. Cappelleti, M. Seccombe and J. H. H. Weiler (eds.), *Integration Through Law: Europe and the American Federal Experience*. vol. 1, *Methods, Tools and Institutions* (1986), book 3.

[8] The Supreme Court held in *Garamendi*, (*American Insurance Association v John Garamendi, Insurance Commissioner, State of California*, 539 U.S. 396 (2003)), that, '[t]here is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place'. See also *Zchernig v Miller*, 389 U.S. 429 (1968).

In recent times, however, the monolithic nature of federal entities in international affairs seems to be increasingly questioned, with sub-state entities which tend to vindicate their autonomy not only on the internal plane, but also, albeit in limited forms, in international relations.

A small, but not insignificant, number of federal States (or other non-federal States that nevertheless exhibit some degree of decentralization) now tend to adopt a more liberal approach towards the external power of the sub-State units. The most limited application of this approach consists of assigning to such units the power to conclude treaties in some of the fields in which they have internal competence. This is an asymmetrical model of 'treaty-making power sharing'. Generally, this power to conclude treaties extends only to minor forms of international engagements, within limits strictly marked by the federal Constitutions and subjected to strict procedural restraints aimed at securing the consistency of the treaty-making power with the federal foreign policy.[9]

With different nuances, such a solution seems to have been adopted in various legal systems. Traditionally, in the Swiss federal system the Cantons enjoy a limited international capacity, which extends to the power to conclude treaties in specified fields.[10] The foreign relations power of the Cantons has been even enlarged by the 1999 Constitutional reform, as we will see soon. Recently, an analogous tendency is discernible in Austria,[11] Italy[12] and even France,[13] for centuries considered to be among the most visible examples of a unitary State.

[9] For a general reconsideration, see C. Tomuschat, 'Component Territorial Units of States under International Law', in L. Daniele (ed.), *Regioni e autonomie territoriali nel diritto internazionale ed europeo* (2005), 31. There is no need to trace back some famous historical examples of disguised autonomy assigned to sub-State units, deprived however of practical significance. It is well known that Ukraine and Belarus were among the original signatories of the UN Charter, despite the fact that their autonomy was in practice reduced to nil. For a study of these precedents, see K. Ginther, 'Article 4', in B. Simma (ed.), *The Charter of the United Nations. A Commentary* (1995) 158; H.-J Schütz, 'Membership', in R. Wolfrum (ed.), *United Nations: Law, Policies and Practice* (1995), 877.

[10] See L. Wildhaber, 'External Relations of the Swiss Cantons', in 12 *Canadian Yearbook of International Law* (1974), 211.

[11] See Art. 16, para. (1) of the Austrian Constitution according to which, '(I)n matters within their own sphere of competence the Laender can conclude treaties with States, or their constituent States, bordering on Austria'.

[12] See Art. 117, para. 9 of the Italian Constitution, as amended in 2003. Although this provision seems to attribute unequivocally a certain form of treaty-making power to the Regions, its impact has been severely curtailed by the corresponding implementing legislation, apparently without appreciable reactions by the Regions. It may be worthwhile to note that the Italian system tends to attribute primacy to treaties concluded by the Regions over national laws, so as to ensure that any inconsistency between a regional treaty and national law does not prevent the Region in question from observing its commitments. This would solve the problems experienced in other legal systems, such as Switzerland, where the primacy attributed to federal law over treaties concluded by the Cantons can make it difficult to find residual areas in which such treaties might be feasible. Indeed, supervening federal law could even make it impossible for the Cantons to comply with treaties already concluded. See *infra* n. 15.

[13] Such unusual treaties in the case of France relate to the activities of the *territoire d'autre-mer* (TOM) and of the *Départements d'autre-mer* (DOM). See various contributions collected in *Les*

It is more rare to find examples of a symmetrical share of competence, where, both the centralized unit and the decentralized units are assigned the power to conclude treaties corresponding to the full range of the competences they possess internally. Notoriously, the German Basic Law of 1949 contains a provision of the kind, although its implementation has been strongly influenced by political events.[14] Ultimately, the *s.c. Lindauer* agreement, concluded in 1957 by the Federation and the Länder, settled the respective views and established a *modus vivendi* which tends, on the one hand, to limit the competence of the Länder to conclude treaties and assigns, on the other hand, to them the power to veto the conclusion of treaties by the Federation which might affect their internal competence.

An example of the symmetrical share of the treaty-making power, one which apparently brings into harmony the internal and the external sphere of autonomy, is the current Swiss system. The 1999 revision of the Swiss Constitution radically transformed the Swiss system and assigned to the Cantons a treaty-making power that is symmetrical to that of the federal Government for all the matters which are assigned internally to the Cantons' competence.[15]

In spite of its symbolical character, the recognition of sub-State units as internationally active entities is generally not perceived as a threat to the comprehensiveness of the foreign relations power of the centralized entity. The reason for this is twofold. First, the power assigned to sub-State units is generally concurrent with that of the State, meaning that the latter maintains the power to intrude upon the prerogatives of those sub-units by concluding treaties in matters internally reserved to their

collectivités territoriales non-étatiques dans le système juridique international: journée d'études organisée avec le concours du Centre de Recherche sur les Pouvoirs locaux dans la Caraïbe de l'Université des Antilles et de la Guyane, Colloque de la Société française pour le droit international (2002).

[14] Art. 32, para. 3 of the German Basic Law provides that, '[i]nsofar as the Länder have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government'. However, the wording of this provision allows room for different views as to the scope of the power of the Länder to conclude and to implement treaties in the fields which are internally assigned to their competence. This difference of opinion has never been settled legally, but a mode of practice has been developed, in a way that is typical of German federalism, which allows both sides to hold their respective views without disturbing the conduct of business. See recently B. Fassbender, 'The Weight of Tradition and the Challenges of Political, Economic and Legal Convergence: The *Status* of the German *Länder* in International and European Law', in *Regioni e autonomie territoriali nel diritto internazionale ed europeo*, supra, n. 9, at 339.

[15] Art. 56 of the 1999 Swiss Constitution provides that:

'(1) The Cantons may conclude treaties with foreign countries within the scope of their powers.
(2) These treaties may not be contrary to the law nor to the interests of the Federation nor to the laws of other Cantons. Before concluding a treaty, the Cantons must inform the Federation.
(3) The Cantons may deal directly with lower ranking foreign authorities; in other cases, the relations of the Cantons with foreign countries are conducted by the Federation acting on their behalf.'

The system adopted by Switzerland provides an example of the difficulties entailed in the attribution of the sharing of the treaty-making power. In particular, the ambiguous wording of Art. 56, para. 3, makes it difficult to identify the entity which is the international party to a treaty concluded by the Federation on the Cantons' behalf.

competence. As already pointed out, in most, if not all, of these systems, the treaty-making power of sub-State units is conceived merely as an internal articulation of the unitary treaty-making power of that entity, which does not touch upon its unitary international actorship.

Second, and perhaps more importantly, even where the treaty-making power is vertically shared, foreign policy remains strictly in the hands of the Federation. The consistency between external activities of sub-State entities and the foreign policy of the State is secured through complex mechanisms which, in a variety of manners, tend to limit the autonomy of the non-sovereign entities. The presence of these mechanisms tends to assuage the impact of the sharing of the treaty-making power, which is not perceived as jeopardizing the Madisonian principle of the unity of the 'nation' in international affairs.[16]

All of this changes where an assignment of the treaty-making power is accompanied by guarantees of exclusivity, all the more so when that power is, expressly or impliedly, recognized as a political power which bestows on its bearer the quality of a political actor. Belgium is, to my knowledge, the only system in which not only is the treaty-making power symmetrically distributed, but the decentralized treaty-making power is also exclusive. Moreover, there seem to be no limits in the Belgian system as to the objectives which the sub-state units can pursue by concluding agreements, which, therefore, can be inspired also by purely political considerations.[17]

A further possible example is the unique position of Quebec in the Canadian legal system, where Quebec seems *de facto* to have acquired significant powers in the external sphere which, in practice, give it the possibility of carrying out its own foreign policy.[18]

[16] Thus, the assignment to sub-State entities of the power to conclude treaties in enumerated fields only seems to replicate, in a reverse form, the assignment to international organizations of the power to conclude treaties in some of the fields of competence assigned to them. Indeed, such a power is often conceived as the possibility to discharge the mission entrusted to these organizations by availing themselves of certain powers of action in the international sphere.

[17] Art. 167 of the Belgian Constitution reads:

'(1) The King manages international relations, without prejudice to the ability of communities and regions to engage in international co-operation, including the signature of treaties, for those matters within their responsibilities as established by the Constitution and in virtue thereof. [. . .]

(2) The King concludes treaties, with the exception of those described in §3. These treaties may take effect only following approval of the Chambers.

(3) Those Communities and Regional Governments described in Article 121 conclude, in matters that concern them, treaties regarding matters that are in the scope of the responsibilities of their Councils. These treaties may take effect only following approval by the Council.

See W. Pas, 'The Role of the Belgian Regions and Communities in International and European Law', in *Regioni e autonomie territoriali nel diritto internazionale ed europeo*, supra, n. 9, at 313.

[18] Regarding to the matter of treaty-making, Canadian Constitutional Law ... itself provides little guidance and has given rise to different interpretations (for an analysis of the relevant constitutional passages and their history, see I. Bernier, *International Legal Aspects of Federalism* (1973), at 51 ff.). Absent

It may be seen that we are now approaching the outer limits of federalism. While the attribution to sub-State units of limited forms of treaty-making power, appropriately depoliticized and concurrent with the national treaty-making power, does not jeopardise the comprehensiveness of the State's external unity, the flat-out sharing of the foreign relations power is clearly at variance with the essence of the State's sovereignty.

Beyond its limited practical impact, the growing tendency to accept the possibility of a shared external relations power shows the far-reaching implications of the issue. It reveals the existence of a number of possible models of distribution of that power, from a very restrictive one which tends to preserve the unity of the foreign relations power (considered to be the essence of statehood) to more permissive models which seem to allow for a distribution of powers that touches on the most intimate aspects of state sovereignty. Although one can readily see a certain logical development in the unfolding of the various models, it is not easy to foretell the outcome of this process. In particular, it is not easy to determine whether the expansive tendency can be regarded as transitory and destined to recede with the increasing difficulty of coping with a plurality of political actors expressing different voices in the international arena, or whether this tendency will instead gain momentum and further complicate the international landscape. If this is the case, this raises the question of how to coordinate the activities of a plurality of entities possessing powers of action on the external sphere. In turn, this might require an adaptation of a number of doctrines of international law which are premised on the principle of the unity of its international actors.

The previous pages offer a useful background for a closer inquiry into the EU foreign relations power and into the possible determination of its nature and its functioning, to which it is now time to turn our attention.

THE EC FOREIGN AFFAIRS POWER

I will now examine briefly the main lines of the development of the foreign relations power of the EC. Originally restricted to the power to conclude agreements in very limited fields, this power has undergone a complex and turbulent process of development in both quantitative and qualitative terms, right up to its current, highly unstable state.

explicit provisions in the Constitution, the Federal Government has defended the view that treaty-making power, as part of the executive power, was unitarily transferred to Canada by the Crown. But Quebec argues that there is no constitutional authority to support an exclusive federal treaty-making power, and since the late 1960s, has consistently asserted its competence to conclude treaties on matters falling within its legislative competence. Quebec's position has never been formally accepted by the federal government. Notwithstanding constitutional muddles, in practice Quebec concluded a number of agreements with foreign jurisdictions. The Federal Government generally made acquiescence to this practice, though sometimes expressing its approval to the conclusion of agreements by the Provinces (see P.W. Hogg, *Constitutional Law of Canada*[3] (1992), at 298; L. Di Marzo, *Component Units of Federal States and International Agreements* (1980), at 84.

This analysis will not claim to provide a comprehensive picture of this system, which is very complex indeed. Rather, I will look at the system from a particular angle: I will try to highlight the difficulties arising from the existence of an entity endowed with the treaty-making power in vast areas of competence but devoid of the foreign policy power (which, in the EU context, is not extended to the Community but reserved to the second pillar). In accordance with this very narrow purpose, I will eschew many of the questions which abound in this intricate field but which are unrelated to the purpose of the current study. Moreover, reference to the abundant literature and case law in this field must remain confined to what is strictly demanded by the argument. For a more thorough analysis of the EC system of external relations, and for more extensive and systematic references to case law and scholarly contributions, the reader can refer to the many excellent systematic treatises on this topic.[19]

The EC Treaty, when originally adopted (as the EEC Treaty), endowed the EC with broad competence in the internal sphere but with a very narrow class of powers on the external plane. The powers expressly assigned to the EC were basically limited to the fields of commercial policy and association agreements with third States. Other powers were referred to in sparse provisions of the Treaty, such as that of establishing and maintaining contacts with the UN and with other international organizations (IOs).[20] The Treaty also proclaims emphatically, in Article 281, that the EC has legal personality. Although this provision was probably drafted with only the internal personality in mind, it was to play a major role in the process of transformation of the EC treaty-making power.

Not unlike its internal powers, furthermore, the foreign power of the EC was restricted to the pursuit of enumerated purposes. Due both to the asymmetrical share of external power between the EC and its Member States and to the duty to exercise the few external powers originally put at its disposal for the objectives

[19] Just to indicate a few among the most recent contributions, see P. Koutrakos, *EU International Relations Law* (2006); J.-V. Louis, M. Dony (eds.), *Commentaire J. Mégret—Le droit de la CE et de l'Union européenne, Relations extérieures* vol. 12 (2005); I. Govaere, 'The External Relations of EU: Legal Aspects', in D. Malincke, A. Ambos and C. Reynolds (eds), *European Foreign Policy: from Rhetoric to Reality?* (2004); P. Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations* (2004); M. Knodt, S. Princen (eds.), *Understanding the European Union's External Relations* (2003); M. Cremona, 'External Relations end External Competence: The Emergence of an Integrated Policy', in P. Craig, g. De Búrca (eds), *The Evolution of EU Law* (1999). See also the contributions collected in H. Wallace, W. Wallace and M.A. Pollack (eds), *Policy-Making in the European Union* (2005); T. Tridimas, P. Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*, Vol. 1, Constitutional and Public Law, External Relations (2004); E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (2002); S. Griller, B. Weidel (eds), *External Economic Relations and Foreign Policy in the European Union* (2002); A. Dashwood, C. Hillion (eds), *The General Law of E.C. External Relations* (2000); M. Koskenniemi (ed.), *International Law Aspects of the European Union* (1998); I. Mcleod, I.D. Hendry, S. Hyett (eds), *The External Relations of the European Community* (1998).

[20] Art. 302 EC.

expressly stated in the Treaty, the international action of the EC represented the exception rather than the rule.

However, it is well known that this situation changed very rapidly by virtue of a resolute stance adopted by the European Court of Justice (ECJ), which radically altered the scope of the EC foreign power. As a result of this process of expansion, the EC passed from an entity possessing only enumerated powers to one having at its disposal an open catalogue of competences on the international sphere, corresponding to (although not necessarily limited by) its competences in the internal sphere. However, this momentous process of expansion has been limited to the *means of action* put at the disposal of the EC, without extending to the set of aims which it could pursue. In other words, this process of development of the EC competence was seen by the ECJ as a process by which the EC acquired more means to achieve the objectives assigned to it by the Treaty, but not as a process aimed at transforming the EC from an entity empowered to act only for enumerated purposes to one which can pursue an open catalogue of purposes. This process was made possible by the tacit acceptance of the Member States, which acquiesced in the expansion of the EC's means of action on condition that they remained the 'Lords' over the aims of that action.

Express Powers

In the original system of the Treaty, only few provisions referred expressly to external powers of the EC. Among them, a prominent role was to be acquired by Article 133 (originally Article 113), which conferred to the EC the power to adopt acts and to conclude treaties in the field of commercial policy. The provision was drafted so as to give the impression that the Member States still retained significant external competence in that field, whereas the competence of the EC was limited to 'uniform principles'. In Opinion 1/75, however, the ECJ held that the objective of the Treaty to secure the unity of the commercial policy was inconsistent with the Member States retaining significant powers in this area. In other words, the need to secure the unity of the EC actions would pre-empt the Member States from exercising powers in this area, and in particular from undertaking international obligations which could impair the objectives of the commercial policy.[21] In consequence

[21] Opinion 1/75, 'Understanding on a Local Cost Standard' [1975] ECR 1355. See the famous definition of exclusivity in the Opinion: 'the exclusive nature of the community's powers . . . depends, on the one hand, on the objective of the understanding in question and, on the other hand, on the manner in which the common commercial policy is conceived in the treaty. (. . .) Such a policy is conceived in that article in the context of the operation of the common market, for the defence of the common interests of the Community, within which the particular interests of the Member States must endeavour to adapt to each other. Quite clearly, this conception is incompatible with the freedom to which the member states could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the community' (para. 2).

of this 'functional' notion of exclusivity the Court concluded that the competence of the EC in the field of commercial policy was to be considered as exclusive.[22]

The scope of the EC commercial power was further expanded, first by shaping the idea that the presence of ancillary clauses in commercial agreements did not affect the characterization of the agreement. This means that the power of the EC under commercial policy may also extend to encompass provisions which, individually considered, would not fall within the EC trade competence, if their presence is instrumental to the functioning of the agreement.[23] This doctrine seemed to have come to an end in Opinion 1/78,[24] on the rubber agreement, where the ECJ failed to consider as ancillary the provisions concerning the financing of the system of stabilization set up by the agreement, and accepted that their financing by the Member States entailed their participation in the agreement, with the consequence that the agreement had to be concluded in mixed form.[25]

A fortunate doctrine employed in order to enlarge substantially the scope of the EC foreign power was that of the evolutionary interpretation of certain notions of the Treaty, in particular, the notion of commercial policy.[26] Although mainly

[22] This functional conception of exclusivity was applied, in its purity, only to the field of commercial policy and was probably due to the will of the ECJ to depart from the wording of Art. 113 in construing the foreign power of the EC in the field of commercial policy. If the ECJ also adopted an analogous definition in regard to purely internal powers, the nature of a vast part of the EC's competence on the internal plane would be transformed accordingly.

[23] See again Opinion 1/75, *supra* n. 22, para. 2, where one can read: 'It is of little importance that the obligations and financial burdens inherent in the execution of the agreement envisaged are borne directly by the Member States. The "internal" and "external" measures adopted by the Community within the framework of the common commercial policy do not necessarily involve, in order to ensure their compatibility with the treaty, a transfer to the institutions of the Community of the obligations and financial burdens which they may involve: such measures are solely concerned to substitute for the unilateral action of the Member States, in the field under consideration, a common action based upon uniform principles on behalf of the whole of the Community'. The Court did not have many other occasions for using such a theory in order to allocate competence between the EC and the Member States. Conversely, such a doctrine was amply used in order to allocate the EC competence among the various legal bases provided for by the Treaty. See, for a clear indication, Case C-268/94, *Portuguese Republic v Council* [1996] ECR I-6177 and Opinion 2/00 'Cartagena Protocol on Biosafety' [2001] ECR I-9713.

[24] See Opinion 1/78, 'International Agreement on Natural Rubber' [1979] ECR 2871. If one accepted that the scope of the EC external power extended to provisions of a treaty having an accessory character, it would seem logical to conclude that, correspondingly, the Member States have no competence. However, this would entail the impossibility to predetermine the borders of the EC competence. In a different perspective, it would not seem completely illogical to assume that the competence of the EC generated by the doctrine of the ancillary clauses is not exclusive. Indeed, the entire theory of the ancillary clauses is not among the most clear in the Court's jurisprudence.

[25] Opinion 1/78, 'International Agreement on Natural Rubber', *supra* n. 24, para. 60.

[26] Opinion 1/78, 'International Agreement on Natural Rubber', *supra* n. 24, para. 44. This paragraph reads: 'following the impulse given by UNCTAD to the development of this type of control it seems that it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to

referred to in the field of trade, this doctrine was also applied silently by the ECJ in other fields.[27] However, the expanding effect of this conception, which the Court never explicitly abandoned, was carefully delimited in the subsequent development of the jurisprudence. In particular, in Opinion 1/94, the effects of that doctrine were counter-balanced with the adoption of a strict approach to the scope of the EC competence.[28]

In the original setting of the Treaty, the only other provision which expressly assigned to the EC the power to conclude agreements was Article 310 (originally Article 238). The EC made large use of this power, and concluded a number of association agreements.[29] Due to the presence of provisions which fell indisputably within the competence of the Member States, these agreements have been concluded in mixed form.

The nature and the scope of the power conferred to the EC by Article 310 remained, thus, largely undetermined. Article 310 does not assign new fields to the competence of the EC and seems only to empower the EC to use the external competence it already possesses under the Treaty in order to set up institutionalized forms of cooperation with third States and with IO. Were it so, Article 310 could not be viewed as a provision assigning to the EC new means of action, as rather as one enlarging the gamut of the objectives for which the EC can make use of the external powers of which it disposes under the Treaty.

The ECJ took, however, a different course. In *Demirel*, it was asked to determine the scope of the respective competence of the EC and Member States under the Association agreement with Turkey. The Court said: 'Since the agreement in question is an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the community system, article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the treaty'.[30]

furthering the development of international trade. It is therefore not possible to lay down, for article 113 of the EEC Treaty, an interpretation the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms such as appear in the agreement envisaged. A "commercial policy" understood in that sense would be destined to become nugatory in the course of time.' Analogies can be drawn between this argument and the argument unfolded by the Court in Opinion 1/75 (*supra* n. 22) in order to determine the exclusive nature of the EC competence under Art. 113.

[27] A good example is Case C-268/94, *Portuguese Republic v Council*, *supra* n. 23, at para. 23, where the Court found that human rights clauses could be covered by an evolutionary conception of the competence of the EC in the field of development cooperation.

[28] Opinion 1/94 'WTO' [1994] ECR I-5267. See in particular paras. 43 ff. and 59 ff.

[29] See P. Eeckhout, *External Relations of the European Union*, supra, n. 19, at 103.

[30] Case 12/86, *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, para. 9. In the decisions, the Court went on to state: 'Since freedom of movement for workers is, by virtue of article 48 et seq. of the EEC Treaty, one of the fields covered by that Treaty, it follows that commitments regarding freedom of movement fall within the powers conferred on the Community by article 238.' The construction of

This conclusion entails clearly that Article 310 has the effect of attributing to the EC fresh external powers. Indeed, using Article 310 as the legal basis of its action, the EC is empowered to undertake obligations with third parties in all the fields covered by the Treaty, to the extent that they are necessary in order to set up an association agreement. This means that the power of the EC under Article 310 is co-extensive with all the areas in which the Treaty assigns competence to the EC. The potentially intrusive effect of this new competence on the delicate balance of power between the EC and the Member States can be hardly overshadowed. Indeed, the conclusion of an association agreement in mixed form can be viewed as an exercise of EC competence in regard to all the provisions included in that agreement which fall within the range of the actual or the potential competence of the EC.[31] Indeed, in *Demirel* the Court considered that provisions governing the treatment of non-national workers, for which one could hardly find *ad hoc* legal basis in the Treaty, constituted in effect an exercise of the EC competence distinctly assigned to it by Article 310.

Over the years, starting with the Maastricht Treaty, new provisions have been included in the Treaty which aim to bestow fresh powers on the European Community in the field of external relations. With the notable exception of the competence in the field of monetary policy[32], in other fields the competence is explicitly labelled as concurrent. This is the case with Articles 170, 174 and 181 EC, dealing respectively with research and technological development, the environment and development cooperation.

The implications of express concurrent competence in the field of external relations are not entirely clear and the success of this formula is probably due to political reasons. Beyond speculation, two kinds of consequences can be discerned. The first is that the conclusion of agreements by the EC does not have pre-emptive effect. In other words, the treaty-making power of the EC does not become exclusive even after being exercised.[33] Clearly, however, agreements concluded by the EC enjoy

Art. 238 as the legal basis of an instrumental competence of the EC to include in association agreements provisions in all the fields covered by the Treaty opened the door to the competence of the Court to interpret those provisions.

[31] Of course, the power of the EC to conclude association agreements cannot have, by itself, pre-emptive effect in regard to all the possible substantive provisions which can potentially be included therein. Thus, until an association agreement is concluded, the Member States retain the substantive competence that they possess internally. It follows that the presence in an association agreement concluded in mixed form of provisions falling within an area of concurrent competence is not an element pointing unequivocally to the competence of the EC.

[32] In this field, the external action of the EC is governed by specific treaty rules, which raise distinctive, and very complex, interpretative issues which must remain outside the scope of the present work. See, for all the extensive literature, J.-V. Louis, 'Les relations extérieures de l'Union économique et monétaire', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations*, *supra* n. 19, at 77.

[33] This marks off the express concurrent power from the implied concurrent power, in accordance with Opinion 1/76. In the latter case, as will be seen below, the actual exercise of the power has the

primacy over all Member State legislation. This means that the Member States are nonetheless precluded from concluding agreements whose effect would be to undertake obligations inconsistent with the implementation of EC law. The nature and content of this limitation, and the way it differs from the effect produced by implied concurrent competence, will hopefully become clear in the following pages.

The second, and probably more important, effect lies in the fact that EC action based on an express concurrent competence does not need further justification. In particular, in order to conclude agreements in these fields the EC does not have to demonstrate that the conclusion of agreement is necessary for achieving the objectives of the Treaty. This effect, which indeed did not emerge clearly from previous cases, was ultimately upheld by the ECJ in *Mox Plant*.[34]

effect of transforming it from concurrent to exclusive, with the consequence that the Member States cannot conclude agreements affecting agreements already concluded by the EC. This effect does not occur when an agreement is concluded under those express provisions of the Treaty which give to the EC the power to conclude agreements 'without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements'. The without-prejudice clause seems to refer to the possibility that an agreement concluded by the EC does not pre-empt the conclusion of agreements by the Member States so long as they do not require the Member States to act inconsistently with their obligation to comply with the agreements concluded by the EC.

[34] Judgment of 30 May 2006, Case C-459/03, *Commission v United Kingdom*, n.y.r. Paragraph 95 reads: 'The Community can enter into agreements in the area of environmental protection even if the specific matters covered by those agreements are not yet, or are very partially, the subject of rules at community level, which, by reason of that fact, are not likely to be affected.' Although the Court quotes in support of this finding the authority of Opinion 2/00, *supra* n. 23, this reference does not seem fully appropriate. Indeed, the reading of Opinion 2/00 does not leave the impression that the scope of the EC external power in the field of environmental protection is much different from that of the implied powers. On a careful reading, it even seems doubtful that the Court in that Opinion had identified the power to conclude the Cartagena Convention on the express external power of the EC to conclude agreement in the field of environmental cooperation. The ambiguous wording of the relevant passage of the Opinion (paras. 43–46) seem rather to indicate that the Convention was to be concluded on the basis of the implied external power and, more precisely, on the basis of the power produced by the existence of internal legislation in the field of the environment. Indeed, in Opinion 2/00 the Court was not asked to determine the scope of the external competence in environmental matters. The question concerned the identification of the most appropriate legal basis for the conclusion of the Cartagena Convention. In *Mox Plant*, the question was quite different, and concerned rather the identification of which entity, the EC or the Member States, was the proper addressee of certain obligations in the field of the environmental protection deriving from a mixed agreement: the UN Convention on the law of the sea. Thus, the Court, once stated that the EC, 'by becoming a party to the Convention, elected to exercise its external competence in matters of environmental protection' (paras. 96–97), concluded that 'a transfer of areas of shared competence, in particular in regard to the prevention of marine pollution, took place within the framework of the Convention, and without any of the Community rules concerned being affected, within the terms of the principle set out in the AETR judgment' (para. 105). According to the terms of the declaration of competence, such a transfer was 'subject to the existence of Community rules, even though it is not necessary that those rules be affected' (para. 106). Thus, the Member States retained their competence only in areas in which there were no Community rules (para. 107).

The conclusion of the judgment does not appear fully convincing. In particular, the wording of the declaration of Community competence seems to indicate precisely that in areas of shared competence the competence rests primarily with the Member States, unless Community internal rules existed

Implied Powers

Although a strictly textual reading of the Treaty might give the impression that the EC treaty-making power is limited to only some of the competences transferred to it internally, that impression is quickly dispelled when one considers the momentous development that has occurred by recourse to the implied powers doctrine. The rationale of the development lies in the search for consistency between internal and external action of the EC.

Although sometimes presented as a purely internal, constitutional doctrine, the implied powers doctrine is, in the present context, based on the implications of the sharing of competence on the external plane. The premise underlying it is the finding that the Treaty did not establish the EC as a means for coordinating the international activities of the Member States but rather as a separate entity, endowed with its own legal personality. The existence of a separate legal personality pleads in favour of a symmetrical sharing of competence in order to avoid inconsistencies between the obligations deriving from the exercise of competence on the external plane by one entity (ie a Member State) and the exercise of competence on the internal plane by the other (the EC).[35]

The basic rationale of the existence of a 'dormant foreign affairs clause' underlying the system of the competence assigned to the EC is the need to ensure that the Member States do not assume obligations with which they cannot comply due to a previously enacted EC norm.[36] Thus, the exercise of power on the internal plane by the EC pre-empts the Member States from acting externally insofar as they might otherwise incur obligations whose implementation could affect pre-existing EC norm. The scope of the external competence of the EC depends not on the mere existence of an internal competence but rather on its actual exercise. It is the

which could have been affected by the Convention. The interpretation of the relevant passage of the declaration by the Court seems to reverse that principle and to affirm instead the opposite principle, according to which, in the presence of Community rules, the Community must be presumed to have exercised its external competence, even if these rules are not affected by the Convention provisions. Be that as it may, it emerges that, in the conception of the Court, the express power of the Community to conclude environmental agreements is quite independent from both the conditions which, alternatively, justify the exercise of implied powers, ie from the existence of internal legislation likely to be affected by the agreement, under the *ERTA* doctrine; and the 'necessity' test, under the *Opinion 1/76* doctrine.

[35] See, in particular, paras. 12 ff. of the *ERTA* judgment, Case 22/70 *Commission v Council* [1971] ECR 263.

[36] One can wonder whether the same logical argument, applied in the reverse sense, could not support an implied power of the EC to assume obligations which it has the power to abide by. For example, this consideration could justify, contrary to the finding of the ECJ in Opinion 2/94, 'Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms' [1996] ECR I-1759, the power of the EC to conclude treaties on human rights containing obligations which the EC has the capacity to abide by or, respectively, to violate, through the exercise of its internal competence. I developed this line of reasoning more at length in my contribution 'The Scope of the EU Foreign Power', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations*, *supra*, n. 19.

existence of an EC act that triggers the pre-emption of the 'normative space' on the external plane.[37] So long as the EC's internal competence is not exercised, there is no need to pre-empt the Member States from concluding agreements whose implementation does not affect pre-existing EC norms.

This conclusion is politically wise. It would be unthinkable for the mere existence of a concurrent competence, which could remain quiescent forever, to indefinitely bar the external powers of the Member States. It is therefore not the abstract competence but its materialization which pre-empts the powers of the Member States. The emphasis on the actual exercise of internal competence as the factor producing EC's treaty-making power pleads in favour of a certain symmetry between the internal and the external planes.

The price to be paid for this is to make the scope of the EC external power very uncertain and likely to change in time. The instability of the legal basis of implied external powers might even prevent a 'perfect' symmetry between internal and external sphere from arising. Since it is only the exercise of the internal competence of the EC which has pre-emptive effect,[38] international obligations assumed by the Member States prior to the later enactment of EC norms might prove inconsistent with these subsequently adopted norms. Thus, the possibility of inconsistency between the external competence of the Member States and the internal competence of the EC remains and has not been completely swept away by the further developments of the jurisprudence, although the ECJ has recognized the existence of an obligation for the Member States to avoid concluding treaties without cooperating or consulting with the EC if they concern fields in which the latter has manifested an intention to act.[39]

Moreover, if the EC's treaty-making power is to follow the contours of the internal legislation, agreements to be concluded may frequently fall only partly within the competence of the EC and partly within the competence of the Member States. Such agreements therefore require the participation of both. In other words, the need for the external power to follow the 'sinuosity' of the internal legislation renders more and more frequent the occurrence of mixity, an issue which only indirectly affects the purpose of this study and which must therefore be left to one side.

Although the early jurisprudence could give the impression that the pre-emptive effect was triggered by the existence of an actual conflict between internal EC acts

[37] See paras. 17 ff. of the ERTA judgment, *supra*, n. 35.

[38] In the absence of internal rules, the EC can claim competence only if: its competence is exclusive (see Opinion 2/91, 'ILO Convention N. 170 Concerning the Use of the Chemicals at Work' [1993] ECR I-1061, para.8, where the Court said that the existence of an exclusive competence 'arising from a Treaty provision excludes any competence on the part of Member States which is concurrent with that of the Community, in the Community sphere and in the international sphere'); or the exercise of the external competence is necessary for the achievement of the objectives of the treaty (see the relevant passages in Opinion 1/76, 'Draft Agreements Establishing a European Laying-Up Fund for Inland Waterway Vessels' [1977] ECR 741 and, more recently, in Opinion 1/94 *supra* n. 28).

[39] See recently Case C-433/03, *Commission v Germany* [2005] ECR I-6985. The legal basis and the limits of this obligation are pointed out by AG Tizzano, at paras. 59 ff. of his Opinion.

and the Member States' international engagements, the ECJ has gradually developed a more nuanced concept of 'potential interference'. According to this concept, Member States are pre-empted from undertaking engagements which, while not necessarily involving a conflict with pre-existing EC acts, may nonetheless have the effect of interfering in a variety of manners with the scope of those acts.[40]

The foreign affairs power impliedly conferred to the EC by the exercise of its internal competence was from the origins conceived by the ECJ as exclusive. The *ERTA* judgment made it clear that the enactment of internal rules has a pre-emptive effect on the international power of the Member States.

However, the EC may have concurrent implied powers and may therefore conclude agreements, absent internal legislation, if their conclusion is necessary for the achievement of the objectives of the EC Treaty. This occurs, presumably, when the objectives of the Treaty cannot be achieved, or cannot be satisfactorily achieved, through unilateral EC action and an international instrument is therefore necessary. This principle was first established by the ECJ in Opinion 1/76,[41] and it was refined in the Court's subsequent case law.[42]

In principle, these two sets of external powers, deriving respectively from the application of the *ERTA* doctrine and from the *Opinion 1/76* doctrine, are distinct, although they are based on analogous reasoning. To bestow on the EC exclusive

[40] See the *Open Skies* judgments of 5 November 2005, (Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98, C-476/98, in particular paras. 108 ff. of Case C-476/98, *Commission v Germany*, [2002] ECR I-9427) containing a restatement of the cases in which the internal action of the EC has a pre-emptive effect on the treaty-making power of its Member States. In *Open Skies*, the Court has substantially followed the Opinion of AG Tizzano, who also seems to foreshadow subsequent developments in the case law (paras. 72 ff. of his Opinion). See below in the text and accompanying footnotes.

In light of the foregoing discussion, it may be useful to highlight some differences between the treaty-making powers of the EC and those of the EU. Since the doctrine of implied powers has been developed in regard to the EC system, it cannot be applied to the EU, where Arts. 24 and 38 TEU confer upon the EU a concurrent power to conclude treaties for the full range of its activities. This is an express power, which does not depend neither on the existence of an internal act nor on the necessity test under the Opinion 1/76 doctrine. Since this power has been bestowed independently of the existence of an internal act, it covers the full range of the EU's activities. Consequently, there is no need for an implied powers doctrine in order to enlarge the scope of the EU's treaty-making power. Conversely, the presence of an internal EU act does not seem to preclude further external action by the Member States. Due to the vagueness of content and scope of most EU acts, a pre-emption would otherwise have a dramatic effect on the capacity of the Member States to act as independent political actors in the international arena. See Declaration n. 4, attached to the Amsterdam Treaty, which refers to Arts. 24 and 38 TEU as provisions which do not entail a transfer of competence from the Member States to the EU. The wording of the declaration does not seem fully proper, as one could speculate about whether the treaty-making power constitutes an instrument or a competence. Be that as it may, the express provision of a power to conclude treaties for the full range of the EU activities makes it superfluous to inquiry about the existence of implied external powers in the TUE.

[41] Opinion 1/76, *supra* n. 38, para. 4.

[42] Opinion 1/94, *supra* n. 28 and Opinion 2/92, 'Third Revised Decision of the OECD on National Treatment' [1995] ECR I-521, para. 7.

external power to the extent necessary to preserve the scope of the EC internal legislation is not the same as bestowing on the EC a concurrent external power to the extent necessary to pursue the objectives of the Treaty. However, there are certain overlaps. In particular, there are many situations in which the two doctrines can be invoked alternatively as a basis for the Community's external competence. In those situations, trends in the case law seem to give priority to the application of the *ERTA* doctrine. This led to a particularly narrow approach to the necessity test under Opinion 1/76 and, conversely, to a broad application of *ERTA*.

Thus, in Opinion 1/94, the Court said that the need to conclude an agreement, absent previous internal legislation, occurs only insofar as the objectives of the Treaty are 'inextricably linked to the conclusion of a Treaty',[43] and this restrictive approach was maintained in the subsequent case law.[44]

The restrictive approach adopted in regard to the necessity test stands out when assessed against the recent development in the case law concerning the *ERTA* test. This development culminated in Opinion 1/03, where the Court developed the idea that the EC has exclusive external powers even if these are not strictly necessary in order to prevent an actual or a potential interference with common rules, if such powers are exercised with a view to ensuring 'a uniform and consistent application of community rules and the proper functioning of the system which they establish in order to preserve the effectiveness of community law'.[45]

This development thus seems to sever the link between external exclusive powers and internal rules, on which the entire doctrine of the parallelism of competence rested, and seems to embrace a new, much more extreme functional conception of the EC external powers. According to this scheme, the Treaty prevents the Member States from acting, and assigns exclusive powers to the EC, not only when there is an incumbent risk of interference with actual or foreseeable common rules but also in those cases in which the independent action of the Member States might jeopardise the proper functioning of the Community system. The scope of the implied external power of the EC thus extends to vast areas where the EC has only concurrent competence, and possibly also to areas where it has no competence at all, if there is the danger that the conclusion of that agreement might even remotely interfere with the functioning of internal rules. Absent any indication as to the kind of interference required in order to trigger the pre-emptive effect, this amounts to a radical transformation of the scope and nature of the EC's external competence. It does not seem hazardous to conclude that this new functional conception tends to merge together the two sets of implied external powers: the exclusive external

[43] Opinion 1/94, para. 86.

[44] See the *Open Skies* judgments, and, in particular, Case C-476/98, mentioned above, n. 38, at paras. 82 ff. For a thorough analysis of the difficulties surrounding the necessity test, see the Opinion of AG Tizzano, at paras. 51 ff.

[45] Opinion 1/03 of 7 February 2006 on the 'Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', n.y.r., paras. 128 ff.

powers, based on the *ERTA* doctrine and its progeny, and the concurrent powers, based on the *Opinion 1/76* doctrine.

So far, we have looked at the momentous process of expansion of the EC's foreign power, which has substantially transformed the system of the external EC competence and which now tends to correspond symmetrically to its competences on the internal plane. As seen above, the scope of the external competence might even be broader than those held on the internal plane by virtue of the doctrine of potential interference, which might prove to extend significantly the boundaries of the EC external power. The EC, in turn, has made ample use of this power, so as to enlarge its influence in world affairs progressively. Nowadays, the EC is a member of a large number of IOs, and is a party to important multilateral treaties related to its activities.

Although it sometimes operates at the borders of its competence, the EC's international role is nevertheless severely impaired by its inability to assert itself as a political actor. This is due to the limitation of the aims assigned to it by the EC Treaty, which coincide substantially with those assigned to purely internal action. The objectives assigned to the different EC policies only sporadically encompass objectives of a political character, such as the protection of human rights in the fields of development cooperation policy and economic, financial and technical cooperation with third countries.[46] However, with a few notable exceptions, the external action of the EC is confined to the pursuit of economic or social objectives related to the functioning of the common market.

The view has repeatedly been put forward that the EC can escape these narrow aims and have recourse to a wider and even unlimited set of aims. This view, expressed in particular in regard to the EC's common commercial policy, was fed initially with the idea that this competence was to be seen as eminently instrumental. If one accepted this position, EC measures affecting, for any purpose whatever, the commercial flows between the EC and third States would have the nature of trade measures and would fall under Article 133 EC. Nowhere has this position been upheld by the ECJ. Some equivocal expressions, contained in a late jurisprudential pattern, might suggest that the scope of the commercial competence also encompasses trade measures enacted for non trade-related purposes.[47] However, this stance seems simply aimed at upholding the competence of the EC to implement, through commercial measures, political decisions taken at the political cooperation level according to a scheme which was later embodied in the provisions of

[46] See Articles 177(2) and 181A.(1), which, with identical wording, read: 'Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms'. See the decision of the ECJ in Case C-268/94, *Portuguese Republic v Council*, *supra*, n. 23.

[47] As the Court said in the *Centro-com* judgment, Case C-124/95, *The Queen v HM Treasury and Bank of England ex parte Centro-Com* [1997] ECR I-81, 'the Member States cannot treat national measures whose effect is to prevent or restrict the export of certain products as falling outside the scope of the common commercial policy on the ground that they have foreign and security objectives' (para. 26).

Article 301 EC.[48] In any case, any possible doubt about the scope of the EC's foreign power, and in particular about the possibility of construing the EC's competence to adopt trade measures so broadly as to include every measure affecting international trade, even if it is not designed to 'promote, facilitate or govern trade', has been swept away by Opinion 2/00.[49]

This should also dispel the idea that functional and structural ties between the EU and the EC make it possible for EC measures to pursue the aims of the Treaty on European Union (TEU). Such an idea does not find support in the TEU, unless one construes in very broad terms those vague provisions which call for coherence and consistency between the action of the Union and that of its single parts.[50] Those provisions suggest that consistency in the Union's external action is to be secured by the Institutions, who should avail themselves, in this regard, of the margin of manoeuvre left by the Treaties. Nowhere is it suggested that this otherwise salutary result can be achieved at the cost of setting aside specific provisions of the EC Treaty which govern the conduct of the Institutions in that frame and determine the limits of their action. A further argument supporting this conclusion comes from the consideration of the very particular role assigned to Article 301 EC in the system of the relationship between the EC and the EU. This provision sets up an exceptional procedure for the Member States to bypass the functional limits placed on the EC's action and to use the substantive competence of the EC for achieving political aims. This provision would be superfluous if the EC could act on its behalf in the pursuit of objectives of the TEU.

It is true (and some examples will also emerge from the following analysis) that certain actions undertaken by the Community do not fit squarely within the limits set up by the Treaty, and that, quite to the contrary, they show a certain readiness to overcome these limits and to adapt the abstract principles to the needs of the international reality. It is much more doubtful that this flexible and casuistic approach can be converted into a coherent and full-fledged legal doctrine aimed at

[48] It is open to doubt whether, prior to the adoption of Art. 301, the EC had competence to implement at community level a political decision taken by the Member States. A positive answer seems to be given by AG Jacobs in his Opinion in Case C-124/95, *Centro-Com*, *supra* n. 47. See para. 42 of the Opinion. For an overall study of these issues, see A. Davì, *Comunità europee e sanzioni economiche internazionali* (1993).

[49] The Court ruled out the possibility that the Cartagena Protocol could be concluded on the basis of Art. 133 EC by virtue of its provisions concerning trade in living modified organisms (see Opinion 2/00, *supra* n. 23, paras. 35 ff). In the same vein, the Court concluded, in its judgment of 10 January 2006, Case C-94/03, *Commission v Council*, n.y.r., that the Rotterdam Convention on international trade of hazardous chemicals and pesticides could not be concluded on the sole basis of Art. 133 EC.

[50] Art. 3 TEU states: 'The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the acquis communautaire.

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.'

overcoming the limits of the principle of conferral, which is still to be considered as one of the cornerstones of the European legal system.

The existence of the EC's foreign power, running parallel with its internal competence but bound to pursue objectives narrowly assigned to it by its Member States, thus creates an unusual situation in the landscape of modern federalist structures: that of an entity possessing vast, unprecedented competence in external relations, substantially eroding its Member States' sovereign powers, which is however incapable of pursuing an open set of purposes in the international arena. The assignment of external power to the EC has thus 'dismembered' the otherwise unitary foreign-relations power of the Member States and has created a distinct class of powers which can be exercised only for integration purposes.[51] I will refer to this process as the 'de-politicization' of the EC's external power.[52]

THE FOREIGN POLICY OF THE EU

This section will be devoted to a brief analysis of the nature and scope of the foreign policy of the European Union. This policy has been conceived as detached from the substantive EC policies and, in particular, from the EC's external power. Yet these two fields interfere continuously and create a thick network of legal relations. Once again, it must be stressed that no attempt will be made to lay down a comprehensive analysis of the CFSP; the legal regime applying to this field will be considered only insofar as necessary to stress the lack of unity of the EU's foreign relations system.

To begin with, what is the CFSP? From its name, it can reasonably be inferred that it is a common policy, not so dissimilar from other common policies which, in a different context, have been established by the EC Treaty. However, stepping beyond this rather misleading terminology, the CFSP is not a 'policy' in the same sense as the others. The main difference lies in the fact that, unlike the vast majority of the EC's substantive policies, the CFSP has no pre-determined material content.

[51] It is an open question whether these restraints are purely *internal* restraints, which the Member States are bound to observe only in their relations with the other Member States and with the EC (but not *vis-à-vis* third States), or whether the transfer of powers to the EC created an objective situation in which the Member States, when acting externally, cannot exercise powers that have been transferred to the EC. See G. Gaja, 'Restraints Imposed by European Law on the Treaty-Making Power of the Member States', in I. Cameron and A. Simoni (eds), *Dealing with Integration*, vol. II: *Perspectives from Seminars on European Law 1996-1998* (1998), 97; J. Klabbers, 'Restraints on the Treaty-Making Powers of Member States Deriving from EU Law: Towards a Framework for Analysis', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations*, *supra* n. 19, at 151.

[52] Nowhere has the idea been suggested that the EC can enlarge the aims of its action by recourse to, as it were, an 'implied purposes' doctrine. It was only in the recent judgments of *Kadi* (Case T-315/01, *Yassin Abdullah Kadi v Council and Commission* [2005], n.y.r.) and *Yusuf* (Case T-306/01, *Ahmed Ali Yusuf e Al Barakaat International Foundation v Council and Commission* [2005], n.y.r) that the CFI advanced the idea that an interplay between Arts 301 and 307 of the EC Treaty can have the effect of enlarging the aims (and means) of EC action. See paras. 196 ff. of the *Kadi* judgment. For a more detailed discussion of these decisions see below, n. 68.

The scope of the EU's foreign policy is defined by Article 11(1) of the TEU:

> The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be:
>
> - to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter,
> - to strengthen the security of the Union in all ways,
> - to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders,
> - to promote international cooperation,
> - to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

As can be seen, this definition is strikingly tautological. As set forth by the introductory clause, the CFSP encompasses all actions which pursue the aims of the CFSP. The CFSP is thus defined in purely functional terms, which is very rare in the landscape of the competences transferred from the Member States. Potentially, its scope is very wide, as it extends to all kinds of material conduct or acts inspired by one of the objectives laid down in that provision, and can interfere materially with the other policies of the Union as well as those of the EC or of the Member States. The aims of Article 11(1) are also very broadly worded. It would thus appear to follow that the borders of this 'policy' are virtually unlimited.[53]

However, upon closer inspection, this impression proves to be fallacious. Indeed, although the TEU lays down only one limit to the scope of the CFSP, it is a very potent one. Article 47 TEU reads:

> Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.

While this provision has rarely been referred to explicitly in the jurisprudence of the ECJ,[54] its importance can hardly be understated. At first glance, this provision seems to lay down a mere clause of subordination, in the classical sense in which

[53] See P. Koutrakos, 'Which Policy for Which Europe? The Emerging Security and Defence Policy of the European Union', in T. Tridimas, P. Nebbia (eds), *European Union Law for the Twenty-first Century. Rethinking the New Legal Order*, *supra*, n. 21, 273 at 278.

[54] See the two judgments of the ECJ, Case C-170/96, *Commission v Council* [1998] ECR I-2763, and recently, Case C-176/03, *Commission v Council* [2005] ECR I-7879, concerning both the relationship between actions conducted under the third pillar and EC action. In regard to interference between CFSP and EC action, see the action brought on 21 February 2005 by the European Commission against the Council of the European Union for annulment of Council Decision 2004/833/CFSP of 2 December 2004, implementing Joint Action 2002/589/CFSP with a view to a EU contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons (Case C-91/05, *Commission v Council*, OJ 2005 C115/10). See also the decision of the CFI in Case T-338/02 *Segi and others v Council*

this notion is understood under the international law of treaties. If that were the case, inconsistency between obligations deriving from the TEU and obligations deriving from the EC Treaty would be solved in favour of the latter.

However, the broad wording of this provision suggests a wider effect. The provision does not refer only to the possibility of inconsistencies between measures adopted respectively under the two Treaties. Rather, it provides that the obligations deriving from the TEU must not 'affect' the EC Treaty. There are good reasons to assume that the term 'affect' must be understood in a broad sense, so as to prevent the EU from entering the normative space assigned, even only potentially, to the EC.[55] In particular, the Member States, acting under the CFSP, cannot take measures which the Community has the power to adopt. This view seems to have been upheld by the ECJ, which has treated the mechanism of Article 47 (and of Article 29) TEU as requiring an inquiry into whether the EC Treaty provides a proper legal basis for a measure which was taken instead under the second or the third pillar, without regard to the existence of an actual conflict between inconsistent provisions. Thus, if the EC Treaty provides for an appropriate legal basis for a certain measure, it would be illegal to adopt it under the TEU.

This jurisprudential pattern has two effects. First, it points out that it is not the actual conflict with a pre-existing EC norm which makes a CFSP measure illegal but the existence of a competence of the EC, regardless of its exclusive or concurrent character.[56] Thus, it would be improper to draw any analogy between the effect of Article 47 and the pre-emption of the Member States' treaty-making powers resulting from the transfer of powers to the EC.

[2004] ECR II-1647, para. 41. An indirect application of the mechanism of Art. 47 can also be seen in a jurisprudential pattern aimed at protecting the EC competence from intrusive action by Member States taken on the basis of their competence in the field of foreign policy. The most clear example in that direction comes from the judgments of the Court of 17 October 1995 (Case C-83/94, *Criminal proceedings against Leifer and others* [1995] ECR I-3231; Case C-70/94, *Werner v Bundesrepublik Deutschland* [1995] ECR I-3189) and of 14 January 1997 (Case C-124/95, *The Queen v HM Treasury and Bank of England ex parte Centro-Com*, *supra* n. 47). See, recently, M.-G. Carbagnati Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy', 55 *The International and Comparative Law Quarterly* (2005), 77 ff.

[55] This not only means that the Member States are prevented from taking measures, through the CFSP, which the EC has the power to take, but also that an act of CFSP cannot enlarge the scope of the EC competence. An example of this latter case is the improper use of Art. 308 to take measures aimed at the interruption or reduction of payments or movements of capital and of economic relations with regard to individual persons not directly linked to the government of a third country (see, for instance, Council Regulation (EC) No 1183/2005 of 18 July 2005, imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo, OJ 2005 L 193/1).

[56] At first sight, it might not seem totally logical to prevent the Member States from adopting, collectively through the CFSP, measures which they were fully entitled to adopt individually, if the competence assigned to the EC is concurrent and it has not been previously exercised. However, a CFSP act is much more liable to prejudice the EC's potential competence than measures adopted individually by the Member States. Indeed, CFSP acts have a pre-emptive effect on EC action which individual actions of the Member States do not have.

Second, it emerges from the ECJ's case law that the relevant element which triggers the prohibitory effect of Article 47 is the content of a certain measure which has been taken under the CFSP, and which instead could have been taken under one of the substantive EC policies.[57] The focus on the identity in content of the actual CFSP measure and a potential EC measure implies that Member States are not prevented from taking CFSP measures for the full range of EC competences, provided that the content of such measures is not susceptible of being the object of EC measures. This means that the CFSP could interfere with a competence transferred to the EC in a more subtle and nuanced way by, for example, soliciting the adoption of a certain measure on the part of the EC, or discouraging the EC from acting. Although, in a certain sense, this would 'interfere' with the EC's action, the CFSP measure could not be said to 'affect' the EC's competence in a proper sense. This might be legally explained on the basis of a systemic interpretation of the Treaties. Indeed, as noted above, the objectives of the CFSP are broadly drafted so that they undoubtedly overlap with the objectives assigned to the EC. This makes it possible for the EU to enact rules in the same fields assigned to the EC competence for the attainment of the EU's objectives, having care not to intrude substantively in the sphere of the EC competences or to alter their scope. In other words, the adoption of CFSP acts aimed at determining the political direction along which the EC can exercise its competence seems to be entirely consistent with Article 47 TEU. All things considered, this conclusion appears to be an acceptable compromise between the need to assign a guiding role to the CFSP in determining the aims of the EU's external action, on the one hand, and the need to protect the autonomy of the EC's supranational political process from the pervasive influence of the Member States, on the other.

However, with these notable exceptions, the main aim of Article 47 is that of insulating the EC's institutional and normative framework and of maintaining a principle of mutual exclusivity with the CFSP. Therefore, in the fields covered by the EC Treaty, the CFSP cannot have a substantive content which would otherwise affect the competence assigned to the EC. Nor can it enact rules aimed at altering the scope of the EC's competence. The 'de-politicization' of the EC's activities is thus matched by the 'de-materialization' of those of the CFSP.[58]

[57] A somewhat restrictive reading of Art. 47 seems to have been embraced by the ECJ in its recent judgment concerning the relationship between EC action and EU action under the third pillar. In its judgment of 13 September 2005 (Case C-176/03 *Commission v Council*, *supra* n. 54), in which the Court annulled a framework decision on the protection of the environment through criminal law, which allegedly affected the EC competence, the Court stated: 'It is therefore necessary to ascertain whether Articles 1 to 7 of the framework decision affect the powers of the Community under Article 175 EC inasmuch as those articles could, as the Commission maintains, have been adopted on the basis of the last-mentioned provision.' However, the Court did not exclude that even milder forms of interference could fall within the scope of Art. 47.

[58] This may raise, and in fact has raised, a serious negative conflict between activities carried out respectively within the EC and within the CFSP, as both, for different reasons, can lack competence to take action. In my view, this is the essence of the ECJ's holding in *Centro-com* (*supra* n. 47), *Leifer* and *Werner* (*supra* n. 54), where the Court found that 'the Member States cannot treat national measures whose effect is to prevent or restrict the export of certain products as falling outside the scope of the

INTERCONNECTING THE PILLARS: OVERLAPS BETWEEN THE EXTERNAL RELATIONS SYSTEM AND THE FOREIGN POLICY COMPETENCE

So far, I have tried to point out the elements which call for a strict distinction between the EU's external action and that of the EC. It is now useful to look at the elements which go in the opposite direction and which in fact call for an interaction between these two spheres of European integration.

Indeed, in a model of strict separation between the CFSP and the EC competence, the contacts between foreign policy of the EU and the foreign power of the EC would be infrequent and occasional. However, this is highly unrealistic.[59] In the contemporary world, foreign policy is not confined to the traditional instruments of diplomacy and military might; quite to the contrary, it spills over its original borders and tends to materialize, in a variety of ways, in acts having their own substantive content.

Thus, although they are in principle independent, it is unavoidable for the CFSP and the EC foreign power likewise to interact in a number of ways, in order to deal with issues which do not fall in their entirety within the competence of either entity.[60] The set of possible practical situations is virtually unlimited and includes many ways in which the powers of the EU or the EC must be adjusted with each other in order to comply with the variety of situations offered by the daily life of international intercourse. Absent any instrument of coordination, with the notable but isolated exception mentioned above of Article 301 EC,[61] the interaction

common commercial policy on the ground that they have foreign and security objectives'. This finding seems to indicate that measures which substantively fall within the scope of the common commercial policy cannot be taken by the Member States on the ground that the objective of such measures concerns foreign policy or security. This can hardly be interpreted in the sense that such measures can be taken by the EC. Indeed, applying the rationale of the ECJ case-law in a reverse manner, it seems plausible to argue that measures having political objectives inconsistent with the objectives of the EC treaty cannot be treated by the EC as falling outside the functional scope of the CFSP on the basis of their substantive content.

[59] See, among the many voices, F. Dehousse, 'La politique étrangère et de sécurité commune—L'identité européenne de sécurité et de défense', in J.-V. Louis, M. Dony (eds.), *Commentaire J. Mégret—Le droit de la CE et de l'Union européenne, Relations extérieures* vol. 12, *supra*, n. 19, 439, at 449; S. Griller, B. Weidel, *External Economic Relations and Foreign Policy in the European Union*, in Griller, B. Weidel (eds), *External Economic Relations and Foreign Policy in the European Union*, *supra* n. 19, at 5; R.A. Wessel, 'Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas and the New Constitutions for Europe', *supra* n. 2, at 123; P. Koutrakos, 'The Elusive Quest for Uniformity in EC External Relations', 4 *The Cambridge Yearbook of European Legal Studies* (2002) 243; K.N. Schefer, 'The Use of Trade Instruments in the Pursuit of Human Rights: European Foreign Policy', in F.M. Abbott, C. Breining-Kaufmann, and T. Cotter (eds), *International Trade and Human Rights: Foundations and Conceptual Issues* (2006); C. Novi, *La politica di sicurezza esterna dell'Unione europea* (2005).

[60] See E. Denza, *The Intergovernmental Pillars of the European Union* (2002); P. Gauttier, 'Horizontal Coherence and the External Competences of the European Union', 10 *European Law Journal* (2004), 23; R.A. Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations', 37 *CMLRev.* (2000), 1135.

[61] Notoriously, the ECJ, ruling after the entry into force of Art. 301 EC, had implicitly validated what appeared to be an early (anticipatory) application of that provision. In the well-known judgment

between these two sets of competences has been dealt with mainly through practical arrangements.

The multifarious set of instruments and devices used in practice can be grouped into two basic schemes. The first comprises the cases in which a distinct but interrelated action by both entities is required. This can be referred to as the model of coordination. A different scheme is one in which issues straddling over the competence of both entities are dealt with by the action of just one of them, either the EC or the EU. This latter scheme can be called the model of autonomy. Ultimately, the entire dynamics of the EC/EU external action can be described as the tension between autonomy and coordination.

In the following pages I will attempt to provide some insight as to the modalities of functioning of these two schemes, with a view to highlighting the tendency toward unity in the EU foreign relations system.

Cooperation

First, there are cases in which a CFSP act has been employed in order to give guidance to EC acts, which are therefore used in order to implement a legal framework designed by the Member States acting through the EU. One can distinguish two possible situations in which such a scheme has been employed. In the first, the CFSP act is adopted in order to give guidance to the EC action in situations in which the EC has competence to act on its own behalf. In such situations, the coordination between EU and EC action is not legally necessary but is nevertheless politically opportune in order to present the composite unit EU plus EC as a unitary entity. CFSP acts often call for EC implementing action, and such acts either indicate specific measures to be taken in regard to a certain issue or to a certain country, or, more frequently, they leave discretion to the EC as to the measures to be taken.[62]

of 30 July 1996 (Case C-84/95, *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECR I-3953, para. 13, the Court considered that, 'Regulation no. 990/93 of the Council gave effect to the decision of the Community and its Member States meeting within the framework of political cooperation, to have recourse to a Community instrument to implement in the Community certain aspects of the sanction against the Federal Republic of Yugoslavia by the Security Council of the United Nations'.

[62] See, among other examples of the latter type, 2006/304/CFSP, Joint Action of 10 April 2006 on the establishment of an EU Planning Team (EUPT Kosovo) regarding a possible EU crisis management operation in the field of rule of law and possible other areas in Kosovo, OJ 2006 L112/19; 2005/826/CFSP, Joint Action of 24 November 2005 on the establishment of an EU Police Advisory Team (EUPAT) in the Former Yugoslav Republic of Macedonia (FYROM), OJ 2005 L307/61; 2005/889/CFSP, Joint Action of 12 December 2005 on establishing a European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah), OJ 2005 L327/28; 2005/574/PESC, Joint Action of 18 July 2005 on support for IAEA activities in the areas of nuclear security and verification and in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction, OJ 2005 L193/44; 2005/557/PESC, Joint Action of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan, OJ 2005 L188/46; 2003/319/CFSP, Common Position of 8 May 2003 concerning European Union

On some occasions, the CFSP was used to secure a coordination in the combined action of the EC and of the Member States. A clear example of this way of addressing situations of common concern through a coordinated action is given by the response, by the EU, the EC and the Member States, to the enactment by the US of certain laws having extraterritorial effect. A CFSP act shaped the political frame within which the Member States and the EC adopted the countermeasures towards the US in their respective fields of competence.[63]

It is worth stressing that, in this case, the CFSP act carefully abstained from interfering with the scope of the EC competence. Indeed, both entities, the EC and the Member States, were fully entitled to use their competence in order to respond to unlawful conduct by the US in breach of its international prerogatives. What the CFSP did was simply to lay down a comprehensive framework for the combined action of the EC and the Member States. It thereby stressed the unity of the response by the EU and the EC as a single 'actor'—obtained through a combined, yet autonomous exercise of the respective competence of each entity. Another, more recent example, is Council Decision 2000/401/CFSP of 22 June 2000,[64] concerning the control of technical assistance related to certain military end-uses, which established a common legal frame implemented by the EC and the Member States, each acting within their own field of competence.[65]

support for the implementation of the Lusaka Ceasefire Agreement and the peace process in the Democratic Republic of Congo (DRC), OJ 2003 L115/87; 1999/479/PESC, Common Position of 19 July 1999 concerning support for the popular consultation of the East Timorese people, OJ 1999 L188/1; 98/735/PESC, Joint Action of 22 December 1998 in support of the democratic process in Nigeria, OJ 1998 L354/1. Examples of EU acts calling for more specific EC action might include 2000/420/PESC, Common Position of 29 June 2000, concerning EU support for the OAU peace process between Ethiopia and Eritrea, OJ 2000 L161/1; and 96/588/PESC Joint Action of 1st October 1996, on anti-personnel landmines, OJ 1996 L260/1.

[63] See 96/668/CFSP, Joint Action of 22 November 1996 adopted by the Council on the basis of Art J.3 and K.3 of the TEU concerning measures protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ 1996 L309/7; and Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ 1996 L309/1. This is by no means an exceptional situation. For a recent example, see 2004/796/PESC Joint Action of 22 November 2004 for the support of the physical protection of a nuclear site in the Russian Federation, which expressly states in the preamble that, '[t]o ensure coherence of the European Union's external actions, its activities should take place in a coordinated way with activities carried out by the European Community and Member States'. It might be worthwhile to add that the intent of this Joint Action to realize a common approach of the EC/EU to that issue is also evidenced by Art. 6, para. 2 of the document, which indicates that a failure by the Russian Federation to comply with its obligations under the Agreement on Partnership and Cooperation between the European Communities and their Member States and the Russian Federation may entail a suspension of the project of assistance established by the Joint Action.

[64] OJ 2000 L159/216.

[65] For the EC, see Council Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, OJ 2000 L159/1, enacted on that same day.

In a second category of situations, the CFSP has been used in order to call for Community actions to be taken beyond the spectrum of the objectives assigned to it by the EC Treaty. Since this turns out to be a generalization (beyond the scenario of sanctions) of the mechanism envisaged by Article 301, in which the EC action is 'curved', bent to fit the needs of the CFSP, this variant of the cooperation model can be more appropriately indicated by the term 'subordination'.

As an example, it is worth mentioning the dual-use goods regime adopted in 1994,[66] although subsequently repealed.[67] That regime was based on the consideration that neither the CFSP nor any of the substantive EC policies could possibly be deemed to have the appropriate competence to set up a full-fledged legal regime for dual-use goods. Under those circumstances, the regime was established by combining the competence of the two entities. The EC substantive competence was thus enlarged in order to encompass a trade regime with the political goals of a CFSP decision.

Recently, this model was employed in the context of EU action against terrorism. In that context, certain CFSP acts provided for an act of the EC (namely, a Regulation) to implement Security Council resolutions calling for actions against individuals allegedly involved in terrorist acts.[68]

[66] See 94/942/CFSP Council Decision of 19 December 1994 on the Joint Action adopted by the Council of the basis of Art. J.3 of the Treaty on European Union concerning the control of exports of dual-use goods (OJ 1994 L367/8); and Council Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods (OJ 1994 L367/1).

[67] See 2000/401/CFSP, Council Decision repealing Decision 94/942/CFSP on the joint action concerning the control of exports of dual-use goods, *supra* n. 64; and Regulation (EC) No 1334/2000, *supra*, n. 65.

[68] The legal basis for EC action can hardly be traced back to Art. 301. Article 301 bestows upon the EC authority to sever economic ties with *third States* under the political umbrella provided by a CFSP act. It is therefore inappropriate to refer to that provision in order to adopt sanctioning measures against individuals. Nor does Art. 308, read in conjunction with Art. 301, add much in this regard. To the contrary, such an approach results in a vicious circle. Indeed, an action of the EC based on Art. 301 consists of using means already at the EC's disposal for goals not assigned to it by the Treaty. Conversely, an action based on Art. 308 consists of pursuing objectives assigned to the EC by the Treaty through means of action not expressly conferred to it. Thus, to have recourse to a joint legal basis composed of Arts 301 and 308 in order to justify a Community action whose means and goals are both outside the scope of the Treaty is essentially boot-strapping. For a more complete critique of the CFI's judgments in *Kadi* and *Yusuf*, where just such an approach is taken, I refer to my study, 'The Machiavellian Moment: The UN Security Council and the Rule of Law', 3 *International Organizations Law Review* (2006), forthcoming. In practice, Art. 301 is frequently referred to, in conjunction with Art. 308, as the legal basis for the adoption of measures targeting individual persons not directly linked to the government of a third country. For further examples, see Council Regulation (EC) No 305/2006 of 21 February 2006 imposing specific restrictive measures against certain persons suspected of involvement in the assassination of former Lebanese Prime Minister Rafiq Hariri, OJ 2006 L51/1; Council Regulation (EC) No 1183/2005 of 18 July 2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo, OJ 2005 L193/1; Council Regulation (EC) No 1184/2005 of 18 July 2005 imposing certain specific restrictive measures directed against certain persons impeding the peace process and breaking international law in the conflict in the Darfur region in Sudan, OJ 2005 L193/9; Council Regulation (EC) No 560/2005 of 12 April 2005 imposing certain specific restrictive measures directed against certain persons and

In more general terms, the idea of a dual approach to political issues touching upon the EC competence has taken the form of 'common strategies' adopted by the EU on the basis of Article 13 TEU.[69] Common strategies are CFSP acts designed to promote an integrated approach in the relations between the EU, the EC and the Member States and a third State. Although this approach presents practical advantages, the legal nature of common strategies appears doubtful. Despite the call for coherence and consistency of the Union's external action, there seems to be nothing in the founding Treaties that gives formally to the Institutions authority to adopt acts having cross-pillar effects.

Autonomy

If the first model tends to achieve unity through coordination, the second stresses instead the capacity of one entity, the EC or the EU, to deal with complex issues stretching its competence, at the cost of producing interference with the competence of the other. This second model therefore purports to achieve unity through autonomy. It has been employed in situations very different with each other. The EU tends to act alone, and to 'drain' the competence of the EC, in politically sensitive issues where it is considered expedient to rely on intergovernmental decision-making mechanisms, for example to take advantage of the limited transparency that characterizes the adoption of CFSP acts. For its part, the EC tends to act alone in politically less sensitive fields.[70] Strikingly, however, the Member States tend to recognize an autonomous political role to the Community even for politically sensitive issues if they are already the object of political consent shared by the Member States and by the EU institutions.[71]

entities in view of the situation in Côte d'Ivoire, OJ 2005 L95/1; and Council Regulation (EC) No 1763/2004 of 11 October 2004 imposing certain restrictive measures in support of effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY), OJ 2004 L315/14.

[69] See 1999/414/CFSP Common Strategy of the European Union of 4 June 1999 on Russia (OJ 1999 L157/1); 1999/877/CFSP European Council Common Strategy of 11 December 1999 on Ukraine (OJ 1999 L331/1); and 2000/458/CFSP Common Strategy of the European Council of 19 June 2000 on the Mediterranean region, OJ 2000 L183/5.

[70] See K. E. Smith, *European Union Foreign Policy in a Changing World* (2003), at 52 ff.

[71] See, for example, Council Regulation (EC) No 381/2001 of 26 February 2001 creating a rapid-reaction mechanism, OJ L57 of 27 February 2001. This Regulation establishes a Rapid Reaction Mechanism which 'may be triggered when in the beneficiary countries concerned there occur situations of crisis or emerging crisis, situations posing a threat to law and order, the security and safety of individuals, situations threatening to escalate into armed conflict or to destabilise the country and where such situations are likely to jeopardise the beneficial effects of assistance and cooperation policies and programmes, their effectiveness and/or conditions for their proper implementation' (Art. 3); Council Regulation No. (EC) 2666/2000 of 5 December 2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, OJ L306 of 7 December 2000; and the twin Council Regulations, (EC) No 975/1999 of 29 April 1999 and (EC) No 976/1999 of 29 April 1999, which lay down the requirements for the

This long-standing practice has been dealt with by extensive literature and I will not dwell on it further.[72] None of the two entities seems to have raised serious objections to this creeping process of competence-adjusting, which witnesses a certain mutual acquiescence, to the benefit of the entire EC/EU unit.

In the light of this consideration, it is worth noting that this scheme was also used in order to reduce the otherwise complex procedures for dealing with cross-pillar issues, which theoretically require action to be taken by all the entities involved, and which have sometimes been dealt with in a more simple way, by assigning competence to the principally competent entity. A notable example is the Agreement of 17 April 2002 concluded between the EU and Lebanon concerning cooperation in the fight against terrorism.[73] The agreement, concluded under Article 24 TEU, contains provisions which also concern the first and third pillars. An example in the opposite direction is the internal agreement by which the Member States agreed that it was for the Council to decide, by way of majority voting, that a third State had failed to abide by its obligations under Articles 96 and 97 of the Cotonou Agreement, and further to decide to start consultations and even to suspend parts of the agreement.[74] Article 3 of the Agreement makes clear that this procedure also applies in matters falling within the competence of the Member States.[75]

A typical field in which the competence of the EU and the competence of the supranational entity (in this case Euratom) overlap continuously is nuclear non-proliferation. In this field, one can find numerous examples of actions undertaken by one entity overlapping with the competence of the other.[76]

implementation of development cooperation operations, and, respectively, the requirements for the implementation of Community operations, other than those of development cooperation, which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms (OJ L 120 of 8 Mai 1999). Both Regulations contain recitals according to which 'it is necessary to ensure that these operations are consistent with the European Union's foreign policy as a whole, including the common foreign and security policy'. See below, n. 78. The dual role of development aid measures is highlighted by C. Santiso, 'Reforming European Foreign Aid: Development Cooperation as an Element of Foreign Policy', 7 *European Foreign Affairs Review* (2002), 401.

[72] See the thorough analysis of R. Baratta, 'Overlaps between EC Competence and EU Foreign Policy Activities', in E. Cannizzaro (ed.), *The EU as an Actor in International Relations*, *supra*, n. 19, at 51.

[73] The agreement, concluded in the form of an exchange of letters, has never, to my knowledge, been published in the OJ.

[74] Internal Agreement between the Representatives of the Governments of the Member States, meeting within the Council, on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement, OJ 2000 L317/376.

[75] Article 3 reads: 'The position of the Member States for the implementation of Articles 96 and 97 of the ACP-EC Agreement shall, when that position concerns matters within their competence, be adopted by the Council, acting in accordance with the procedure set out in the Annex. If the planned measures concern matters falling within the competence of the Member States, the Council may also act on the initiative of a Member State'.

[76] See the Council Common Position 2001/869/CFSP of 6 December 2001 on participation by the EU in the Korean Peninsular Energy Development Organisation (KEDO), OJ 2001 L325/1. For a more comprehensive act on non-proliferation, see the European Security Strategy, 'A Secure Europe in

An example demonstrating the tolerance of the Member States for political action undertaken by the EC, absent any CFSP act but nonetheless supported by a wide political consent, is the creeping communitarization of human rights policy. In particular, the inclusion of human rights and democracy clauses in bilateral and multilateral agreements concluded by the Community with third States is striking.[77] This tendency is even more remarkable in the measures taken by the EC in order to promote and sustain political changes in Eastern Europe and presented as a first step towards the establishment of a partnership with the countries involved.[78]

a Better Word' adopted on 12 December 2003 by the European Council. This Strategy identifies a number of threats for the next decade, one of which is the proliferation of WMD. This strategy was implemented by certain CFSP decisions. See Council Joint Action 2006/243/CFSP of 20 March 2006 on support for activities of the Preparatory Commission of the Comprehensive Nuclear-Test-Ban Treaty Organisation (CTBTO) in the area of training and capacity building for verification and in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction (OJ 2006 L88/68); Council Joint Action 2005/574/CFSP of 18 July 2005 on support for IAEA activities in the areas of nuclear security and verification and in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction (OJ 2005 L193/44); Council Joint Action 2004/495/CFSP of 17 May 2004 on support for IAEA activities under its Nuclear Security Programme and in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction (OJ 2004 L182/46).

In the opposite sense, see 1999/25/Euratom Council Decision of 14 December 1998 (OJ 1999 L7/31), which adopts a programme of actions relating to the transport of radioactive materials, safeguards and industrial cooperation with third countries. This decision also established a regime of export controls related to the nuclear sector and corresponding in many respects to the dual-use goods regime adopted under Regulation 1334/2000. This probably represents the best example of a 'creeping communitarization' of issues which, although they fall substantively within the EC competence, are politically sensitive and would normally be matters of prerogative for the EU.

[77] I refer to my study, 'The Scope of the EU Foreign Power. Is the EC Competent to Conclude Agreements with Third States including Human Rights Clauses?', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations*, *supra* n. 19, 297. See, among the most recent contributions, L. Bartels, *Human Rights Conditionality in the EU's international Agreements* (2005); P. Leino, 'European Universalism?—The EU and Human Rights Conditionality', 24 *Yearbook of European Law* (2005), 329; J. Harrison, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights* (2005); C. Pippan, 'The Rocky Road to Europe: The EU's Stabilisation and Association Process for the Western Balkans and the Principles of Conditionality', 9 European Foreign Affairs Review, (2004) 214; E. Paasivirta, 'Human Rights, Diplomacy and Sanctions: Aspects to "Human Rights Clauses" in the External Agreements of the European Union', in J. Petman, J. Klabbers (eds), *Nordic cosmopolitanism* (2003); K. E. Smith, *European Union Foreign Policy in a Changing World*, *supra*, n. 70, at 134 ff.; P.A. Pillitu, *La tutela dei diritti dell'uomo e dei principi democratici nelle relazioni della Comunità e dell'Unione europea* (2003).

[78] The pre-existing practice in this regard has been codified by Council Regulation (EC) No 533/2004 of 22 March 2004 on the establishment of European partnerships in the framework of the stabilization and association process, OJ L86 of 24 March 2004, which was first implemented by the Council Decision of 14 June 2004 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo, as defined by the United Nations Security Council Resolution 1244 of 10 June 1999, OJ L227 of 26 June 2004. It is worth noting that Regulation

There have been other examples of EC measures inspired (in part or predominantly) by political aims. Here one can mention EC Regulation 2368/2002[79], which prescribes effective controls over the international trade in rough diamonds in order to prevent the trade in conflict diamonds from financing the efforts of rebel movements in Sierra Leone. The recitals make it clear that the Regulation also has the objective of maintaining international peace and security and to protect human rights, in spite of the absence of any CFSP decision.[80] The recently adopted Council Regulation 1236/2005/EC constitutes the apex of this tendency.[81] This Regulation bans the import to, and export from, the EC territory of equipment that can only be used for torture. Although import and export bans are typical measures used for regulating trade, there is little doubt that the only real motivation behind the Regulation is the protection of human rights. As no strictly commercial reason could possibly justify the adoption of such measures, it must be concluded that they fall outside the commercial policy competence of the EC.[82] Nor had any CFSP act been adopted with a view to calling for such a Regulation. Nevertheless, the Regulation

533 was based on Art. 181a TEC, incorporated in the TEC by the Treaty of Nice. This curiously worded provision assigned to the Community the competence to 'carry out, within its spheres of competence, economic, financial and technical cooperation measures with third countries'. According to the express terms of Art. 181a, activities undertaken under that provision can contribute to the 'general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms'. Thus, in addition to its more specific competences, the Community can now establish cooperation frameworks with third States, and in this context, can pursue objectives having an undeniable political nature such as the protection of democracy and human rights. Presumably, this provision was added to the TEC in order to complement the analogous provision of Art. 181, which, having been established within the development cooperation competence, has a particularly narrow scope. The interpretation of Art. 181a raises a number of difficult issues concerning, in particular, the relationship between the new competence and the other substantive competences of the Treaty. In spite of its apparently all-embracing nature, there is a case to be made that, in principle, the new provision must be relied upon as a basis of competence only where other substantive policies fall short. Indeed, the first sentence of Art. 181a makes it clear that priority must be given, in case of an overlap, to the other provisions of the Treaty. These issues will not be further discussed. Suffice it to say, for present purposes, that Art. 181a seems to codify strains of previous practice and thus tends to recognise a political role in the international arena for the Community, albeit in limited fields, within a certain degree of autonomy from its Members States.

[79] Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds, OJ 2002 L358/28.

[80] See in particular recital 4 and Annex I of the Regulation. For another example, see Council Decision 2004/520/EC of 14 June 2004 (OJ 2004 L227/21), which provides that priorities and conditions in the European Partnership with Serbia and Montenegro including Kosovo are defined by the United Nations Security Council Resolution 1244 of June 1999. This decision, based on Art. 181a EC, refers to a UN Security Council Resolution, notwithstanding the absence of an CFSP act.

[81] Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, OJ 2005 L200/1.

[82] See Arts. 131–134 EC.

is clearly in line with the political direction of the EU[83] and therefore enjoyed the broad support of the Member States.[84]

While the practice of the institutions has shown that a certain interconnection between the pillars is unavoidable, it has certainly not succeeded in shaping a coherent legal doctrine. In the recent past, much attention has been devoted by the European scholarship to the issue of the legal personality of the Union. Many different positions have been put forward, from those which recognize a unitary personality applying to the composite entity of 'EC plus EU', to those maintaining that the EC has its own legal personality but that the EU is not much more than a common agent of its Member States, with a variety of intermediate positions along the spectrum separating the two extremes.

In this study I have deliberately abstained from taking a position in a dispute for whose solution the fundamental elements are still, in my opinion, very uncertain. What is certain is that the question of the legal personality of the EU can hardly be resolved solely by interpreting the TEU's provisions, which are very ambiguous and do not lend support to either of the extreme positions just described. Only an analysis of how the EC/EU's powers have been concretely used can serve as an appropriate basis for solving this vexed issue. While it is indeed my intention to contribute to this analysis, the uncertainty of the results still makes me reluctant to draw definite conclusions.

The practice demonstrates a certain inclination of the EU and the EC to present themselves in the international arena as a unitary actor. This observation should lend some support to the idea that we are in the presence of one and the same entity.[85] This strangely configured entity would not dispose of the panoply of powers and prerogatives which are commonly referred to as the hallmark of statehood. Rather, it is vested with enumerated powers, transferred, moreover, not to one and the same unit, but rather to two different 'sub-units', the EC and the EU, and in an apparently

[83] The recitals to the Regulation (*supra*, n. 81) refer to Art. 6 TEU, which refers to human rights as one of the polestars of the European construction, and further reference is made to the Guidelines to the EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment, approved by the European Council in 2001, and to the UN Human Rights Commission's Resolution on torture and other cruel, inhuman and degrading treatment of 25 April 2001. However, while these acts, appropriately considered, might constitute a *limit* to the EC action, it is doubtful that they could ever be invoked as a *legal basis* for the EC competence.

[84] The creeping politicization of the external relations of the EC is highlighted by few contributions. See T. de Wilde d'Estmael, *La dimension politique des relations economiques extérieures de la Communauté européenne* (1998); recently, see F. Terpan, *La politique étrangère et de sécurité commune de l'Union européenne* (2003), at 33 ff.

[85] See, among the numerous contributions, A. Tizzano, 'La personalità internazionale dell'Unione europea', 3 *Il diritto dell'Unione europea* (1998) 377, at 404; A. Tizzano, 'The Foreign Relations Law of the EU between Supranationality and Intergovernmental Model', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations*, *supra* n. 19, 135, at 142; A. Von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System', 36 *CMLR* (1999) 907; R. Wessel, *The European Union's Foreign and Security Policy. A Legal Institutional Perspective* (1999) at 315; and J. Klabbers, 'Presumptive Personality: The European Union in International Law', in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (1998), at 249.

disorderly and inconsistent way. To the extent that these powers are exercised in coordination in the daily practice of international relations, the EU appears to be a unitary actor.[86]

To sum up briefly, the 'road towards unity' seems to be fraught with problematic issues. However, this should not preclude, in absolute terms, the possibility of interpreting the legal system erected by the founding Treaties in a coherent and consistent way.

ON THE ROAD TOWARDS UNITY: THE NEW CONSTITUTIONAL TREATY AND THE EU'S EXTERNAL ACTION

In the previous pages I have examined the main tools used in the inter-institutional practice to remedy the fragmentation of the external action inherent in the pillarization of the European construction. In this section I proceed further and analyse the provisions of the Constitutional Treaty aimed at establishing an external action of the EU. As already pointed out, the significance of this analysis is not merely historical and cultural. Yet while the chances for the entry into force of the Treaty are very slim, it is worthwhile inspecting this first attempt at establishing a unitary foreign relations system for the EU closely, with a view to determining its legal coherence and political propriety. Consistently with the purpose of this contribution, my analysis will focus on the substantive provisions of the Constitutional Treaty on the EU's external action, ie on those provisions which aim at grouping in a unitary legal setting competences and objectives which are, in the present system, distinctively assigned to the first or to the second pillar. In other words, I will look at those provisions which aim to lay down a bridge between the various competences of the Union in its external action and therefore to produce consistency through the normative dynamic. Little or no attention will be devoted to those provisions included in the Constitutional Treaty which aim to establish a unitary institutional frame and hence to produce consistency through the Union's institutional action.[87]

[86] 'That composite actor would thus have at its disposal the sum of the powers with which each 'sub-unit' was vested by the Member States, plus those powers which it acquires by virtue of its international 'actorship'. Indeed, the process of determining the complex of powers and prerogatives which the EC/EU wields internationally is not easy. In a different study, I suggested that the breadth of the international actorship of a certain entity vested with partial competence can be determined through a circular approach: the powers originally transferred to it by its constituent units generate the establishment upon it of rights and prerogatives by the international legal order by virtue of its international personality, which entails, in turn, a corresponding enlargement of its internal competence. See E. Cannizzaro, 'The Scope of the EU Foreign Power', supra, n. 77, at 297. Yet, if one accepts the idea that the international actorship of a certain entity tends to enlarge the set of powers of which it disposes by virtue of an internal transfer of competence, it does not seem illogical to argue that the scope of the international actorship of the composite entity EU/EC is in principle larger than the sum of powers and prerogatives possessed individually by each sub-unit.

[87] See Editorial, 'The CFSP under the EU Constitutional Treaty Issues of Depillarization', 42 *CMLR* (2005), 325.

The Main Features of the EU's External Action

The provisions which establish the EU's external action are extremely heterogeneous. Title V of the Constitutional Treaty regroups provisions concerning the CFSP of the Union and provisions concerning powers having an external impact which are, under the current system, assigned to the EC.[88] These two sets of provisions are kept together by norms which tend to establish a coordination between them. The result is an impressive number of provisions, many of which reproduce provisions already included in the TEU and the EC Treaty. Instead of passing to an analytical review of each individual provision, it seems more appropriate to illustrate the main features and the possible functioning of the new system. To that end, an analysis of the provisions which tend to ensure a coordination between the different policies is in order.

The first issue concerns the nature of the Union's external action. Even at a first reading, it is apparent that it is not a new policy but rather an attempt at regrouping and coordinating the exercise of a number of other autonomous policies, which therefore maintain their own nature and scope, and whose common hallmark is their external impact. This conclusion emerges clearly from Articles I-12 and I-16 of the Constitutional Treaty (CT).

A further question concerns the rationale for the inclusion or, respectively, exclusion of certain policies from the Union's external action. The answer is not as simple as it seems. One's first impression might be that the criterion for this relates to the possible effects of a certain policy on the external plane. However, since virtually all the substantive policies of the EU might have an external effect, the distinctive factor should lie in the main effect that a certain policy is designed to produce. Even from this perspective, however, the exclusion of policies such as border control, asylum and immigration, or environmental policy, which have a strong or even intrinsic external component, remains difficult to explain.[89] Moreover, it is hard to understand why Article III-292(3) CT extends the external action regime to the external aspects of other policies only as regards paragraphs (1) and (2) of that Article and not also, for example, as regards the application of other provisions,

[88] In the new Title V also provisions concerning the process of conclusion of agreements have been included, whose interpretation is not easy and whose coordination with other provisions included in the same title appears problematic. See B. de Witte, 'The Constitutional Law of External Relations', *supra*, n. 3.

[89] This mysterious plot thickens if one considers that environmental protection was in fact included among the aims of the external action enshrined in Art. III-292 CT. Nor is the decision as to the inclusion or exclusion of a certain policy in, or, respectively, from the external action without practical consequence. Indeed, Art. III-292(3) CT indicates that the legal regime of the external action applies to all other policies in their external aspects. However, it is highly controversial to determine precisely what are the 'external aspects' of a policy. Although the wording of this curious provision seems to allude to the conclusion of agreements, this would render the provision almost meaningless, as the conclusion of agreements is in fact governed by Art. III-325 CT, which is part of the external action. A different interpretation, according to which all aspects of a given policy having an external impact would be included in the external action regime, seems exceedingly broad since numerous actions undertaken under various policies might well have an external impact.

including, for example, the application of Article III-293 CT, which empowers the European Council to determine the Union's strategic interests and objectives.

CFSP and Substantive Policies as Part of a Unitary EU Foreign Affairs Power: Autonomy Versus Co-ordination

The case for autonomy

The main substantive novelty introduced by the Constitutional Treaty is the establishment of a common set of aims. In particular, Article III-292 merges, in a single provision, the objectives previously assigned to the CFSP with others currently assigned to EC policies. The effect of a common set of aims is to enable the EU external action to pursue simultaneously a plurality of objectives, some of which are unrelated to the common market and are aimed, rather, at asserting a political role for the EU in international relations. All in all, by establishing a plurality of heterogeneous aims, and by cumulatively assigning them to the diverse policies which constitute the EU's external action, Article III-292 CT subverts the principle of conferral, which requires that individual policies pursue the objectives distinctively assigned to each of them.

Is it then to be concluded that, in the system set up by the Constitutional Treaty, the principle of conferral is definitively abandoned in favour of a system of 'interchangeability' between the aims and means of the foreign power? There is a case to be made for adopting a more cautious attitude. First, the fact remains that, in addition to the general objectives of the external action laid down by Article III-292, several provisions assign specific aims to the substantive policies to which they correspond. For example, Article III-314 lays down the objectives specifically assigned to the common commercial policy. It would therefore be illogical to construe these two sets of provisions, containing respectively general and specific objectives, as clashing with each other. It seems more reasonable to argue that both have a binding effect and that, consequently, commercial measures of the Union must simultaneously conform to both. Thus, while the EU must take into account the political objectives of the Constitutional Treaty in the conduct of the commercial policy, it is more doubtful that it could adopt commercial measures inspired by purely political aims, not adequately supported by commercial considerations.

Another argument pointing toward a moderate interpretation of Article III-292 is the consideration that, if under the new system, individual EU substantive policies could pursue purely political aims, the very *raison d'être* of the CFSP would be seriously jeopardized. In other words, there would be little sense in establishing a complex machinery (based, moreover, on the common consent of the Member States) for adopting a stance on foreign policy if the EU, through its substantive policies and through a supranational method, could circumvent that machinery acting on its own initiative. The maintenance of a CFSP in parallel with other substantive policies can have no other meaning than to confirm and reinforce the primacy of the Member States on the political dimension of European integration.

The conclusion to be drawn from these considerations is that the establishment of a common set of aims in Article III-292 has the effect of enlarging the set of objectives of the EU substantive policies, without however making them completely interchangeable with those of the CFSP.

The case for subordination

If EU substantive policies are not conceived in the Constitutional Treaty as a substitute for the CFSP, and if instead the Treaty maintains a dual approach to the foreign power, questions arise as to their mutual relationship. In the new regime, one can certainly find elements suggesting a certain priority accorded to the CFSP to the detriment of the substantive policies, or, as it were, to the intergovernmental over the supranational dimension. An element in that direction is Article III-293(1), which provides for European decisions identifying the strategic interests and objectives of the Union. According to this provision, such decisions spell out the aims of Article III-292 in regard to a particular country or region (although they may also be more 'thematic' in approach) and establish an integrated frame for the harmonious and co-ordinated action developed by CFSP acts and by other substantive acts.

Thus, the Constitutional Treaty replaces the common strategies with a new kind of normative instrument which is truly 'cross-pillar' and which may provide guidance to all the activities undertaken by the Union in its external action. Article III-293(1), third paragraph, provides that the strategic interests and objectives of the Union are to be adopted under the arrangements laid down for each area. Therefore, if they include a foreign policy aspect, they must be adopted using the decision-making procedure established for the CFSP and are therefore subject to the intergovernmental voting procedure established for that policy. A hierarchy is thereby implicitly established between the CFSP and other external policies of the Constitutional Treaty. This normative hierarchy has important institutional implications, as it puts the supranational institutions under the direction and control of the intergovernmental decision-making mechanisms.[90]

Neither Autonomy Nor Subordination. A New, Creeping Pillarization?

In an integrated system that merges the CFSP and other external policies, there should be no room for a clause such as the one laid down in the current system by

[90] If the existence of this framework act serves the aim of coordinating the CFSP and the substantive policies so that the former has the power to give impetus and direction to the latter, it would nevertheless be a large step to think that the absence of this political umbrella prevents substantive EU policies from autonomously pursuing the aims of Art. III-292. In the provisions which laid down the legal regime of individual policies included in Title V CT, it is stated that these policies must be conducted 'in the context of the principles and objectives of the Union's external action' laid down by Art. III-292 (see, for example, Art. 315, para. 1). Thus, a political intermediation between the EU substantive policies and the political aims of the Treaty may be opportune, but it does not seem altogether necessary.

Article 47 TEU. However, the Constitutional Treaty contains a provision which indeed corresponds, with some significant change, to that Article. Ironically, this may in turn reintroduce the pillarization of the system, the abandonment of which was among the main aims of the Constitutional Treaty.

In order to explain this point, a brief analysis of the function discharged by Article 47 in the present system is in order. In the present, three-pillar system, the function of Article 47 is to 'protect' the EC policies from intrusion by a CFSP act. The provision has a unilateral structure insofar as it protects EC policies *vis-à-vis* the CFSP but not vice versa. At the present stage, this seems to be perfectly logical. There is a strong case for protecting the EC policies from the interference of the CFSP, a policy which is defined, as noted above, in purely functional terms. By contrast, there is no need to protect the CFSP from interference by the EC policies, precisely because these policies, as already pointed out, may only pursue the aims specifically assigned to them by the EC Treaty and are strictly excluded from pursuing the political aims assigned to the CFSP. Thus, the CFSP is sufficiently 'shielded' by the principle of conferral contained in the EC Treaty.

The establishment of a new, integrated normative system, and the merging of the two pre-existing systems, might raise the need to shield the CFSP from possible interference by substantive policies. This in turn would entail, one might conclude, the need to *bi-lateralize* the saving clause, which now, with a unilateral structure, is contained in Article 47 TEU. In this respect, Article III-322 would simply constitute an updated version of such a clause.

However, this conclusion would be simplistic, to say the least. A quick observation may reveal that, far from constituting an innocuous operation of adapting the pre-existing regime to the needs of new integrated system, the provision of Article III-322 represents the most vivid illustration of the difficulty of dismantling the normative barriers erected by the pillarization without, at the same time, reducing (lifting) the institutional barriers deriving from the existence of a plurality of decision-making procedures.

Protecting the Union's substantive policies from interference by the CFSP is technically possible, and indeed necessary to preserve the *acquis communitaire*. Since the scope of these policies is determined by reference to a material field, this aim is easily achieved by prohibiting CFSP measures from entering that field. This is, as seen above, the role of Article 47 TEU.

The inverse operation is more problematic. As the scope of the CFSP is determined by recourse not to a material field but only functionally, by reference to the objectives pursued by a certain measure, the only way to prevent substantive policies from interfering with the CFSP is to prohibit these policies from pursuing political objectives and to reserve the pursuit of these objectives to the CFSP.

Under the current regime, this function is discharged by the principle of conferral, without need for an express clause. Yet the novelty of the Constitutional Treaty resides in the establishment of a common set of aims assigned to the external action. Such a system implies that, in order to work properly, all the policies forming the

external action must be able to pursue the common aims laid down by Article III-292. This effect would clearly be impaired if, by virtue of Article III-322, the Union's substantive policies could not intrude into the realm of the CFSP. Due to the purely functional nature of the CFSP, this prohibition would necessarily prevent the substantive policies from pursuing political objectives. In other words, as noted earlier, the undesired but inevitable effect of Article III-322 would be to re-erect the normative barrier between the CFSP and the substantive policies corresponding to the pillar structure that the Constitutional Treaty was meant to overcome.

The logical difficulty encountered in seeking a consistent construction to this strangely worded provision must not of course be overemphasized. There are certainly many possible interpretations which could avoid this patent contradiction and could soothe the impression of a new, creeping pillarization. However, in my view the foregoing discussion shows clearly just how tortuous the road toward unity is in the Union's foreign relations power.

CONCLUDING REMARKS: THE ASPIRATION TOWARD UNITY AND THE PERSISTENCE OF FRAGMENTATION IN THE EUROPEAN FOREIGN AFFAIRS POWER

At the outset, the question at the heart of this chapter is: 'Is there a unitary European foreign affairs power?' Or, put differently, can the various powers and prerogatives assigned to the different EU sub-units be composed in a legally unitary frame, or must we resign ourselves to having a multifarious gaggle of distinct powers and competences on the external plane, each detached from the others, which cannot be integrated within a single, comprehensive international 'actorship'?

In the preceding sections, an analysis was therefore undertaken with a view to answering that question. However, this analysis unfolded across a perilous path, fraught with technicalities making it easy to lose the thread that should give guidance to it. At the end of that path, one may be left with a sense of dissatisfaction and with the acute impression that no clear-cut answer can be given.

In particular, a tendency can be discerned to overcome the current state of fragmentation, and to ensure a coordinated exercise of the various powers assigned respectively to the EC and to the EU. Whereas in most cases such coordination is achieved at the expense of the Community pillar—as it entails superimposing the intergovernmental elements of the CFSP over the supranational elements of the EC—there are notable exceptions pointing in a different direction. From the institutional practice, some cases have emerged in which the EC has wandered beyond the limits to its action and adopted acts and policies having a clear political impact on the international arena. Indeed, at times the sole purpose of these acts and policies has been political.

The aspiration toward unity, which echoes in practice, makes abundantly clear the shortcoming inherent in the fragmentation of the European foreign relations system and creates a strong need for the creation of a new, integrated system of external action. This is essentially the conceptual ground on which the idea of an

integrated external action took shape, and this finally materialized in Title V of the Constitutional Treaty. However, the analysis above has demonstrated the precariousness of the logic of the new system, which sought—unsuccessfully, in my view—to reconcile the need to attribute a political role to the supranational institutions with the strong will of the Member States to maintain their leading role in shaping the main lines of the European foreign policy. The many technical flaws of the system constitute the reflex, in legal terms, of the incapacity to balance these two incoherent objectives; to create a new integrated system while leaving the decision-making processes and the institutional features of the pre-existing ones untouched.

Indeed, the need to sustain the European integration at two different paces, one supranational and one intergovernmental, ultimately splits the external power into two parts, one political and one substantive. This essentially excludes unity and coherence in the foreign affairs power. The opposite path, the re-establishment of a unitary power, can be pursued via one of two alternatives: either to acknowledge the leading role of the CFSP, to the detriment of the autonomy of the supranational dimension, or to acknowledge the autonomy of the EU's substantive policies in pursuing foreign policy objectives. Given the lack of a *via media* between these two paths, the attempt of the Constitutional Treaty to set up an integrated external action for the EU seems to have been doomed to failure.

Thus, the analysis of the previous pages seems to offer some tentative results, which could be summarized as follows:

(a) The first conclusion concerns the difficulty of coordinating the external dimension of European economic integration, which logically and practically should be linked to the EC, with international political action, over which the Member States are keen to maintain control. This imbalance creates a clear asymmetry in the EU's foreign relations power, deriving basically from the fact that it is one thing to allocate competence on the internal plane between the EC and the EU, but that distributing between these entities the capacity to handle complex international issues is quite another matter. The 'impossible symmetry' between an entity's internal powers and its international powers, or rather the imperfect correspondence between the internal personality and international actorship of entities sharing powers and competence, is at the origin of the fragmentation of the legal system of the European foreign relations power.

(b) A second observation is that the drafters of the Constitutional Treaty were well aware of the problem just described. However, they sought to resolve this problem with the aid of the wrong utensils. As stated above, in order to remedy the lack of coordination in the international action of the EU and the EC, a previous determination of the nature and scope of the international actorship of the EC seems to be inescapable. Is the EC an entity which has the power to deal with politically sensitive issues using its competence and its supranational decision-making processes, or must it instead act, when political issues are at stake, only under the direction and control

of its Member States? If a solution is to be found, the ship of the European integration must pass through the treacherous narrow waters between these two contradictory models, as in the legend of the two monsters at the strait of Messina, Scylla and Carybdis. However, the reading of the provisions on the EU's external action included in the Constitutional Treaty do not make it possible to untie this knot. They swing, with no apparent rationale, from cooperation to autonomy and betray a failure to reach any resolute decision in favour of one of the two models. In the end, the objective of de-pillarizing the Union's external action seems far from being attained.

(c) The difficulty of finding a proper solution through an adjustment of the normative process of the EU leads one to shift the course of the research and to ask whether a solution might not be found in the institutional practice. This hope is based on the fact that developments on the ground have often helped to work out feasible solutions to practical problems that could not adequately be solved through strictly legal techniques. Indeed, a global reading of the practice leaves the impression that, beyond the paralysing theoretical problems, a solution based on mutual understanding and tolerance has already taken place. This is based, on the one hand, on the acceptance that, with respect to certain issues in which political consent among the Member States and the European institutions is discernible, the EC feels confident to act as an autonomous political actor, even beyond the strict limits of the principle of conferral. For their part, the Member States exhibit a certain acquiescence to this expansion and tend to recognize the EC as a political actor, at least for low-level political issues. Conversely, where highly sensitive political issues are at stake, the EC seems to accept the EU giving guidance to its action not only by laying down general guidelines but also specific directives in the full spectrum of its competence. By gauging the effect of the basic principles which govern the interplay between supranational and intergovernmental action, the EU has been able to assert itself, in several situations, as a unitary political actor.

Among the virtues of practice there is the ability to adapt, on a case-by-case basis, the legal reality to the political reality, and hence the ability to find flexible solutions that cannot be expressed in 'hard' rules. A coordination based on mutual political arrangements and on a day-to-day search for the best practical solution can make it possible to work around the *impasse* created by the multi-speed pace of European integration. If there is a sense of dissatisfaction prompted by such a solution—which is the farthest thing from a coherent legal doctrine—this might be assuaged to some degree by the observation that the process of European integration has accustomed us to solutions which are at odds with the traditional premise of the coherence of legal orders, a premise which increasingly appears to be the myth of a bygone era.