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A Constitutional Basis for Effective External Action?
An Assessment of the Provisions on EU External
Action in the Constitutional Treaty

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Abstract

This paper will appear in *Genèse et Destinée de la Constitution Européenne Commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir* edited by Giuliano Amato, Hervé Bribosia and Bruno De Witte. It seeks to assess, on a selective basis, the provisions in the Constitutional Treaty which relate to the Union's external action. In doing so it considers issues of consistency, competence, the partial integration of the pillars and remaining questions concerning the legal nature of the EU's Common Foreign and Security Policy, the Common Security and Defence Policy, the procedures for concluding international agreements and the common commercial policy. Institutional aspects of external action, and in particular the creation of the Minister of Foreign Affairs, are considered elsewhere in the volume and are therefore not covered here. Consideration is also given to the extent to which it would be possible, and/or desirable, to incorporate the changes made by the Constitutional Treaty into a revised text or an alternative Treaty

Keywords

Differentiation – competences – international agreements – CFSP/ESDP – EU-East-Central Europe – international relations – Mediterranean – security/external

Disciplinary background of paper: Law

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I. INTEGRATION, GENERAL PRINCIPLES AND CONSISTENCY

1. Integration

1. The European Union's external policy was one of the issues highlighted in the Laeken Declaration which established the Convention on the Future of Europe in December 2000 and it had a relatively high profile during the Convention, as is reflected in Part I Chapters XXIII to XXVIII of this volume. The Convention, and the Constitutional Treaty certainly aimed to impose a rational structure on the external policy field, one that would largely codify the existing legal position while at the same time systematizing and clarifying what is at present a complex web of (multiple) treaty provisions and judicial development of the law.¹ That this has been only partially achieved is hardly surprising and results from two factors in particular. First, the decision taken that only very minimal changes would be made to the substantive policy provisions in what became Part III. It might be argued that this approach was implied in the Laeken mandate which did not invite wholesale rewriting of the Treaties, and that it enabled agreement to be reached which would otherwise have been impossible, but it did have the effect of constraining the "constitutional" nature of the project (rightly, according to some) and given the rather more adventurous attitude to Part I, resulted in some awkwardness in bringing the two together. Second, is the nature of the Community and Union themselves as organisations of limited, attributed, competences operating in the external sphere alongside the Member States. The inherent complexity of the Union as a system of external relations,² combining the three pillars and the Member States, makes a simple integrative solution unlikely.³ Nevertheless an important measure of integration was achieved, and one which has particular importance for external relations: the creation of a single legal personality and the (partial) merger of the three pillars into one single albeit complex legal order. In practical terms it appears that the decision to create a single legal personality for the Union led to the decision to merge the Treaties.⁴ Certainly a clear statement of legal personality would have great symbolic significance, would remove the questions that still arise concerning the legal personality of the EU,⁵ and the creation of a single legal

¹ For analysis of the discussion in the Convention and the intergovernmental conference (IGC), see Part I Chapter XXIII of this volume.

² On the Union as a system of external relations, see C. Hill, 'The Capability-Expectations Gap, or Conceptualising Europe's International Role', *JCMS* 1993, p. 305, at p. 321-326; B. White, 'The European Challenge to Foreign Policy Analysis', *European Journal of International Relations*, 1999, p. 37.

³ M. Cremona, 'The Union as a Global Actor: Roles, Models and Identity', *CMLRev*, 2004, p 553, at p. 570.

⁴ See Part I Chapter XXVIII at paras 22-23.

⁵ R.A. Wessel, 'The International Legal Status of the EU', *EFARev*, 1997, p. 109; R.A. Wessel, 'Revisiting the International Legal Status of the EU', *EFARev*, 2000, p. 507; N. Neuwahl, 'A Partner with a Troubled Personality: EU Treaty-Making in Matters of CFSP and JHA after Amsterdam', *EFARev*, 1998, p. 177; R. Gosalbo Bono, 'Some Reflections on the CFSP Legal Order', *CMLRev*, 2006, p. 337, at p. 354-357.

personality would remove some of the difficulties of so-called “inter-pillar mixity”.⁶ It would be one of the few unambiguous benefits of the Constitutional Treaty.

2. The merger of the treaties also has advantages as far as external relations is concerned although it is in this field that the partial character of that merger becomes most apparent (see Section III). Is the partial depillarization (Bruno de Witte’s term⁷) or structural differentiation (Alan Dashwood’s term⁸) achieved by the Constitutional Treaty a good enough solution? Koopmans has his doubts, and his suggestion that instead of a merging of the pillars we should consider opting for a more complete separation between economic integration on the one hand and foreign policy and defence cooperation on the other is challenging and interesting.⁹ However it is probably too late for that: the *Yusuf* case is just one example of the difficulty of accommodating the current pillar divisions as external relations become more integrated.¹⁰ In Section III we identify some of the difficulties remaining or created by the solution adopted in the Constitutional Treaty. Here we can point to a number of ways in which even the limited depillarization achieved will strengthen the integration of external policy.

3. First, it has facilitated the granting of a clear external mandate to the Union. The Treaty on European Union (TEU) provides that one of its objectives is to “assert its identity on the international scene” (Article 2 TEU) but this is linked specifically to the development of the CFSP, it lacks any indication of what it might actually mean and an overall sense of external “mission” for the Union as a whole is missing. The European Community (EC) has developed its sense of external policy in an incremental way, reactive, closely linked to internal policy objectives and without a Treaty basis for an overall strategy. The Constitutional Treaty gives the Union a clear mandate:

“The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share [its] principles¹¹ It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.” (Article III-292 (1))

⁶ The agreement between the EU, the EC and Switzerland on the Schengen acquis, for example, required two separate Decisions on signature by the EU and EC respectively: on behalf of the EC Council Decision 2004/860/EC OJ 2004 L 370/78, and on behalf of the EU Council Decision 2004/849/EC [sic] OJ 2004 L 368/26. As Passos and Marquardt point out there does not seem to be a legal reason why a single decision could not be adopted: Part I Chapter XXVIII, at para 25. Note that the problems of legal base and those which currently arise in an inter-pillar context from Article 47 TEU would not disappear; this is discussed further below.

⁷ B. de Witte, ‘The Constitutional Law of External Relations’ in I. Pernice and M. Poiares Maduro (eds.) *A Constitution for the European Union: First Comments on the 2003 Draft of the European Convention*, Baden-Baden, Nomos, 2004.

⁸ A. Dashwood, ‘The Relationship between the Member States and the European Union/European Community’, *CMLRev*, 2004, p. 355, at p. 363.

⁹ T. Koopmans, ‘Guest Editorial: In Search of Purpose’, *CMLRev*, 2005, p. 1241.

¹⁰ Case T-306/01 *Yusuf and Al Barakaat International Foundation*, judgment 21 September 2005, not yet reported. See also border disputes such as case C-91/05 *Commission v Council* (pending) on small arms and light weapons.

¹¹ These principles are defined as “the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.” (Article III-292 (1))

The Union is to “define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations” in order to achieve its objectives. Thus, its external action is to include common policies, actions, cooperation, and the development of bilateral and multilateral relations and partnerships, with an emphasis on cooperation and multilateralism. This both more accurately reflects the way in which EC and EU policy has already evolved and provides a basis for further development.

4. Second, the creation of a single Title on External Action, with the systemization and rationalization of external relations provisions currently scattered throughout the Treaties¹² and a single procedural provision which covers nearly all international agreements.¹³ Some anomalies remain, some of which are mentioned in Section II below, including provision for the external dimension of policies which are not specifically external but which have important external dimensions, such as transport and justice and home affairs.

5. Relations with some categories of third country are nevertheless found outside Title V: the Associated countries and territories,¹⁴ and the neighbourhood.¹⁵ Much has been said about the significance, the challenge and the methodology of the EU’s European Neighbourhood Policy.¹⁶ The key elements in Article I-57 are the “special relationship”, “close and peaceful relations”, “prosperity and good-neighbourliness”, and the “values of the Union”.¹⁷ Agreements are envisaged (which would thus be different from both association and cooperation agreements) involving “reciprocal rights and obligations” and the possibility of joint activities although nothing is said about their institutional framework. The position of this provision demonstrates the Union’s ambivalence. It is not part of the External Action Title in Part III, it is not in Part III at all; it is rather anomalously in Part I, next door to the provisions on Union Membership. This implies a separate kind of status for neighbours, rather than merely a field of action, and a status which is separate from accession.

¹² Substantive policy areas included in Title V include the CFSP/CSDP, the common commercial policy (CCP), development cooperation, economic, financial & technical cooperation and humanitarian aid, restrictive measures, monetary agreements, association agreements and relations with international organisations.

¹³ Article III-325.

¹⁴ Title IV, Articles III-286 to 291.

¹⁵ Article I-57.

¹⁶ D. Lynch, ‘The New Eastern Dimension of the Enlarged EU’ in *Partners and Neighbours: A CFSP for a Wider Europe*, Chaillot Paper No.64, Institute for Security Studies, 2003. Available online: <http://www.iss-eu.org/>; M. Cremona, ‘The European Neighbourhood Policy: Partnership, Security and the Rule of Law’, in A. Mayhew and N. Copey (eds.) *Ukraine and the European Neighbourhood Policy*, SEI, University of Sussex, 2005; R. Aliboni, ‘The Geopolitical Implications of the European Neighbourhood Policy’, *EFARev*, 2005, p. 1; R. Del Sarto and T. Schumacher, ‘From EMP to ENP: What’s at Stake with the European Neighbourhood Policy towards the Southern Mediterranean?’, *EFARev*, 2005, p. 17.; J. Kelley, ‘New Wine In Old Wineskins: Policy Adaptation In The European Neighbourhood Policy’, *JCMS*, 2006, p. 29.

¹⁷ For an examination of this provision and its relationship to other ways in which “le concept d’ ‘appartenance à l’Union européenne’ est en réalité moins absolu que l’on ne s’imagine”, see P. Van Nuffel, Part I Chapter VII of this volume, paras 21-34.

6. Third, the formalisation of the strategic role of the European Council in external relations in general,¹⁸ and not only within the CFSP is to be welcomed.¹⁹ It is already *de facto* the case and it is important, especially with the differential decision-making still in place for the CFSP, to charge the European Council with the role of developing and maintaining a consistent strategy across all aspects of external policy. It should be noted that acts of the European Council would be subject to judicial review under Article III-265 insofar as they are intended to produce legal effects vis-à-vis third parties; the CFSP exclusion of the jurisdiction of the Court of Justice however also operates for acts adopted under Article III-293 insofar as they concern the CFSP;²⁰ it may not always be easy to divide an Article III-293 act into CFSP and non-CFSP elements, and to try to do so rather undermines the policy-unifying purpose of the provision.

2. General objectives, principles and values

7. Alongside greater institutional and structural integration, the attempt has been made to shape a series of generalised objectives governing all EU external action.²¹ At present we do not have explicit objectives for many aspects of external policy, where objectives are explicit they are linked to specific policy fields (such as development cooperation), implied external powers are tied to internal objectives and indeed the nature of the link between internal market objectives and external action has not always been clear.²² The Constitutional Treaty provides a set of objectives for all external action, and also endeavours to enhance consistency by requiring these objectives to be respected in the external aspects of the Union's other policies.²³ The provision is designed to support consistency of external action, and between external and internal policy fields; it is undoubtedly important that the Union should be explicit and open about its overall policy direction. Although the list of objectives is largely taken from existing Treaty provisions (Articles 131, 174, 177 TEC, Article 11 TEU, for example) the newly-phrased objective of contributing to "the strict observance and the development of international law, including respect for the principles of the United Nations Charter" is particularly significant;²⁴ it is repeated in the form of a principle in Article III-292 (1) and reflected in the reference to the promotion of "an international system based on stronger multilateral cooperation and good global governance" in Article III-292 (2) (h). In addition, the need to take into account a wider set of objectives than those currently attached to a specific policy field, for example, development-related objectives in formulating the common commercial policy, is an important step (see further on this, Section V below). The list of objectives is inevitably broadly-drafted and lacks any prioritization; it is perhaps unlikely to offer

¹⁸ Article III-293 (1), complementing Article III-292 (3) which gives the Council, Commission and the Union Minister for Foreign Affairs (UMFA) the duty to ensure consistency across Union external action.

¹⁹ I do not here discuss the institutional provisions in more detail, or the creation of the double-hatted UMFA, as this is the subject of Part II Chapter IX.

²⁰ Article III-376 (1).

²¹ Articles I-3 (4); III-292 (2). See Part I Chapter XXIII of this volume, paras 16-18.

²² See for example *Opinion 1/94* [1994] ECR I-5267, at paras 81-86.

²³ Article III-292 (2) & (3).

²⁴ Article I-3 (4). See *C-162/96 Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR I-3655; T-306/01, *supra* note 10, paras 242-254.

more than guidance to the legislative institutions and to the Court of Justice in interpreting the Treaty and secondary instruments. However, the list of objectives serves another function: it may itself provide the basis for action. Under Article III-323 (1) the Union may conclude international agreements where this is necessary “in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Constitution” and these objectives include those set out in Article III-292. The “flexibility clause” in Article I-18 also provides a basis for action “within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution”. Recently the Court of First Instance pointed out that international peace and security is not an objective of the EC Treaty in the sense that it could form a basis for action under Article 308 TEC;²⁵ this would no longer be the case. It is not clear whether the phrases “within the framework of the Union’s policies” or “the policies defined in Part III” could be said to refer to external policy generally or whether it would be necessary to argue that action was being taken within one of the more specific external or internal policy fields.²⁶ Given the breadth of the objectives defined in Articles I-3 (4) and III-292, the former approach would give the Union potentially very wide-ranging external powers.

8. The principles and values which underpin all EU external action are also made explicit.²⁷ At present the impression given is that we make up these values as we go along – or if you prefer, they have evolved organically but now need to be openly declared. These values may not be formally justiciable, or if they were to be regarded as justiciable, they still leave a large amount of discretion to the policy-making institutions. It can also be argued that to set out values in this way raises false expectations. Nevertheless I would not under-estimate the usefulness of aspirational provisions and the formal statement of principles and values in the Treaty would improve transparency and accountability.²⁸

9. Title I of Part III also contains some general principles which are to be taken into account across all policy fields, including external action: equality between men and women; social values (a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health); combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; environmental protection, consumer protection, animal welfare, and the importance of services of general economic interest.²⁹ Thus, for example, the social values of Article III-117 should inform the Union’s development policy; and the needs of consumers and the importance attached to services of general economic interest should inform Union negotiations within the WTO.

²⁵ T-306/01, *ibid*, at para 154.

²⁶ Article 308 TEC requires action to be “necessary to attain, in the course of the operation of the common market, one of the objectives of the Community”. The sometimes strained link between external action and the operation of the common market will be less in evidence under Article I-18 as Part III is much wider than the common or internal market and includes all substantive policy areas, including external action in Title V.

²⁷ Articles I-2; III-292 (1).

²⁸ See further, M. Cremona, ‘Values in the EU Constitution: the External Dimension’ in S. Millns and M. Aziz (eds.) *Values in the Constitution of Europe*, Ashgate, Aldershot, forthcoming 2006.

²⁹ Articles III-116 to 122.

3. Consistency

10. The requirement of consistency was written into the TEU,³⁰ but the abolition of the pillars does not remove the need to ensure consistency across an increasingly diversified range of Union external policies.³¹ Title I of Part III contains a general requirement of consistency across all policy fields.³² In addition, under Article III-292 (3), “The Union shall ensure consistency between the different areas of its external action and between these and its other policies.” In areas of shared competence (especially non-pre-emptive shared competence) consistency between EU and Member State action is also important: see for example Article III-318. Passos and Marquardt suggest that consistency in matters of complementary or supporting competence is best achieved through mixed agreements,³³ but in the light of the principle of loyal cooperation, and the binding nature of Union agreements as far as the Member States are concerned, that should not always be necessary.³⁴

11. Consistency of policy within Title V of Part III has to be seen in the light of Article III-308, which preserves the differentiation between the CFSP/CSDP and other areas of external action. This underscores a more general point: that consistency does not obviate the need to choose the correct legal base for action. This may generate a sense of frustration – is the coherence and effectiveness of Union external action always to be subject to boundary disputes, debates about competence and legal base? However such issues are not merely symptomatic of some failure of political will or the inability to devise better institutional structures. They are the inevitable consequence of the nature of the Union as “a constitutional order of sovereign States”,³⁵ a multi-level system incorporating the Member States themselves and an entity with limited competences.

4. Conclusion

12. The rationalization of the external relations provisions in the EC Treaty and TEU into one Title with a single set of objectives and a single procedural provision for the conclusion of international agreements is certainly one of the successes of the Constitutional Treaty. Unfortunately it is one which would be difficult to retain were the Treaty to be revived in a partial form (for example, separating Parts I and II from Part III), as it carries with it the idea of merging the different pillars and depends on a radical reorganization of the existing Treaty structures. In addition, were Part I alone to

³⁰ Article 3 TEU.

³¹ As Grevi points out, “The wider the toolbox available to the Union, the stronger is the requirement for overall coordination and consistency, if EU external action is to be effective.” Part I Chapter XXIII of this volume, para 3.

³² Article III-115.

³³ Part I Chapter XXVIII, at para 48.

³⁴ As Passos and Marquardt recognize, Part I Chapter XXVIII, at para 48, a mixed agreement is not required in every case involving complementary or supporting competence, any more than it is in cases of shared competence: see Case C-268/94 *Portugal v Council* [1996] ECR I-6177.

³⁵ A. Dashwood, ‘The EU Constitution: What Will Really Change?’, *Cambridge Yearbook of European Legal Studies*, 2005, p. 33, at p. 34.

be retained we would lose the common provisions³⁶ as well as the other provisions designed to enhance consistency, and would be left only with the short version of values, principles and external objectives in Articles I-2 and I-3 (4). It might be tempting to suggest the inclusion of provisions equivalent to Articles III-292 and III-293 in a revised version of Part I (assuming that Part III would be lost). While possible, it would be necessary to introduce some amendments in order to remove potential conflict with existing sets of external competences with their own distinct objectives. These common provisions could possibly even be included in a revised version of the existing Treaties (presumably in Title I of the TEU) although it would be necessary to ensure that they were applicable across the Treaties and pillars. Some thought would also need to be given to the appropriate role of the European Council as set out in Article III-293 in the context of the existing Community institutional structures.

13. What of the legal personality of the Union? Two options are available here, apart from retention of the unsatisfactory status quo. It would be possible, in an amendment of the TEU, to make it clear that the European Union has full international legal personality. The disadvantage here is of course the complication engendered by having two separate (in fact, three, including the Euratom) international legal personalities with all that entails in terms of arrangements for negotiating and concluding agreements. Inter-pillar issues would if anything be exacerbated. The other option would be to create a single legal personality for the Union, which would subsume the existing legal personality of the Community. Were Part I to be retained, this would be possible, with necessary amendments to the EC Treaty and TEU; it would also be possible although more complicated, by amendment of the existing Treaties. The Convention chose to link the creation of a single legal personality with merger of the pillars, but this is not strictly necessary. It would be possible for the EU, as a single legal entity, to conduct its external relations via three separate sets of legal provision with differing legal instruments and different institutional mechanisms. In such a case the retention of Articles III-292 and III-293 would be all the more important.

II. COMPETENCE AND THE POWER TO CONCLUDE INTERNATIONAL AGREEMENTS

14. Although the preponderance of attention during the Convention process was centred on the institutional questions discussed in this volume in Part II Chapter IX, rather than on matters of competence, some significant changes have been made in the Constitutional Treaty to the overall scheme of attribution of external competence and in specific policy areas. In 2000 Alan Dashwood wrote that “even in the latest version of the EC Treaty, the provisions on the external relations competence of the Community are scattered and incomplete; and the text remains silent as to the possibility of pursuing some of the Community’s central objectives by action taken within the international legal order”.³⁷ The Treaty of Nice did not remedy this problem. One of the objectives of the Constitutional Treaty has been to clarify the scope and nature of Union competences and their relationship to Member State powers. Hence the systematic approach in Part I

³⁶ Articles III-292 and III-293.

³⁷ A. Dashwood, ‘The Attribution of External Relations Competence’ in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations*, London, Sweet and Maxwell, 2000, p. 116.

of the Treaty to the delimitation of Union competences and the attempt to codify existing constitutional law drawn from the current Treaties and the case law of the Court of Justice, setting out the principles of conferred powers, subsidiarity and proportionality and providing definitions of exclusive, shared and supporting or complementary competences.

15. Insofar as the Constitutional Treaty clarifies the division and definition of external competence in the EU we should welcome the end result. However I have my doubts about both the utility and the desirability of the attempt to codify the Court's case law on competence, especially external competence. As Dashwood has also said, "any attempt to fabricate constitutional provisions giving effect to a complex and subtle case law is liable to result in distortion and impoverishment of the *acquis*."³⁸ And as the present author has already commented, "the true import of some of the provisions [of the Constitutional Treaty] is only really clear to those who have a good understanding of the pre-existing Treaty rules and the case law of the Court of Justice."³⁹ More specifically, the provisions on implied competence, and the conditions under which that competence is exclusive, contain some puzzling anomalies and – in a not always successful attempt to reproduce the Court's case law – a disappointing failure to clarify and simplify the existing position. The relationship between Article I-13 (2) and Article III-323 is especially problematic.

1. A non-specific treaty-making competence

16. Article III-323 (1) sets out a non-specific treaty-making competence for the Union, complementing specific provisions such as Article III-315 on the CCP and Article III-324 on association agreements.

"The Union may conclude an agreement with one or more third countries or international organisations where the Constitution so provides or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Constitution , or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."

17. It is no doubt helpful to have a clear statement of the existence of treaty-making competence attached to Treaty objectives even in cases where the Treaty does not expressly confer such powers. It also makes sense to say that a legally binding Union act may provide for the conclusion of an international agreement. This provision is intended to reflect Court of Justice case law and although it does not give any guidance as to the limits of the competence potentially conferred by a legally binding act Griller and Hable both argue, surely correctly, that this provision cannot be seen as granting the legislature *carte blanche* to authorize external competence.⁴⁰ The principle of conferred powers would require that the agreement facilitates a Union objective as well

³⁸ A. Dashwood, *supra* note 8, at p. 373.

³⁹ M. Cremona, 'The Draft Constitutional Treaty: External Relations and External Action', *CMLRev*, 2000, p. 1347, at p. 1366.

⁴⁰ A. Hable, 'The European Constitution: Changes in the Reform of Competences with a Particular Focus on the External Dimension', *EuropaInstitut Wirtschaftsuniversität Wien Working Paper* No. 67, 2005. S. Griller, 'External Action: Towards More Efficiency, Coherence and Clarity?', lecture at University of London, 10 February 2005.

as the existence of a link between the legal base of the competence-conferring act of secondary legislation and the scope of the envisaged agreement.⁴¹ The existence of an internal act will ensure that the international agreement has an appropriate legal base in the Constitutional Treaty.

18. However, Article III-323 (1) goes on to provide for competence to conclude an international agreement “where the conclusion of an agreement ... is likely to affect common rules or alter their scope.” The purpose of this provision is not clear. It is clearly derived from the *AETR* line of jurisprudence, which relates to exclusive implied competence, although it omits the reference to exclusivity found in Article I-13 (2). But it is not in line with that jurisprudence to introduce a disjunctive between objective-based competence and the “*AETR* effect” rule. At present in order to identify an exclusive implied competence it is necessary to demonstrate that an agreement serves a Community objective (a pre-condition for competence) *and* that it would “affect or alter the scope” of existing common rules (a condition of exclusivity). The Constitutional Treaty makes these alternative rather than cumulative and in doing so unhelpfully obscures the distinction between the existence of competence and its nature (exclusive or shared). For a clearer statement by the Court of Justice (which does not itself always keep these issues clearly separated) see recently for example:

“... whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect ... That competence of the Community may be exclusive or shared with the Member States.”⁴²

In the same Opinion, the Court goes on to mention the conditions for exclusivity set out in both *Opinion I/76*, and in the *AETR* line of jurisprudence culminating in the *Open Skies* case law. Thus, the effects-based case law is discussed in the context of exclusivity, not in the context of (implied) competence *per se* which, as the Court says, may be shared or exclusive.⁴³

19. The Constitutional Treaty provision conflates these two ideas in an unfortunate way. In fact, the almost identical wording of the phrases in Article I-13 (2) and Article III-323 (1) suggests that implied shared competence would disappear, that all “implied” competence, as defined in Article III-323 (1), would be exclusive, as defined in Article I-13 (2).⁴⁴ Such a reading is hard to defend in terms of outcome. It would entail a potentially large expansion of exclusive competence if it were no longer possible for the Union to exercise non-exclusive competence in fields where there is otherwise no express treaty-making power, including many areas of shared and complementary competence such as justice and home affairs, culture and public health. Given the Court’s clear affirmation that implied powers may be either shared or exclusive, it is a

⁴¹ Article I-11 (2) provides “Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution.”

⁴² *Opinion I/2003* on the Lugano Convention, paras 114-115.

⁴³ For another recent example of the Court’s insistence on the difference between the existence or attribution of competence and its nature (shared or exclusive), see *C-459/03 Commission v Ireland*, judgment 30 May 2006, not yet reported, para 93.

⁴⁴ S. Griller, *supra* note 40.

wholly undesirable departure from that case law to insist that except where the Treaty expressly provides for shared competence (for example, environmental policy or development cooperation), the Union must have either no competence at all or exclusive competence. Although exclusive competence is necessary in some situations it does not need to be the norm.

20. Dashwood has argued convincingly that Article I-13 (2) is unnecessary as the preemptive exclusivity described here is already implicit in the principle of loyal cooperation found in Article I-5 (2) – and indeed in the definition of shared competence in Article I-12.⁴⁵ I would argue that the provision in Article III-323 (1) for competence to conclude an agreement which “is likely to affect common rules or alter their scope” is unnecessary as a basis of competence. It is difficult to conceive of a situation where an agreement should be concluded *by the Union* because it is “likely to affect common rules or alter their scope”, but on the other hand that agreement is not “necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Constitution”. Why then, the need for this reference to effects? Worse, it introduces a confusion between the existence of competence and exclusivity, between the scope and the nature of Union competence. It is more possible to conceive of a situation where, although an agreement is perhaps not necessary to achieve a Union objective, its conclusion *by a Member State* might “affect common rules or alter their scope.” As can be seen clearly from *Opinion 1/2003*, this condition is essentially concerned with exclusivity — and exclusivity, as its name suggests, is really about excluding the power of the Member States to act in a field. For the reasons given above, Article III-323 (1) cannot be read as conferring an exclusive competence whenever it applies.

21. A further barrier to clarity arises out of the similarity in wording between Article I-13 (2) and Article III-323 (1), which nevertheless contain several significant differences.⁴⁶ First, Article III-323 (1) refers to the competence to conclude agreements “where the conclusion of an agreement ... is likely to affect common rules or alter their scope”, whereas Article I-13 (2) has exclusive competence arising “insofar as its conclusion may affect common rules or alter their scope.” The difference may seem small but assuming it is intentional,⁴⁷ competence appears to cover the whole agreement (even if only part of it affects common rules), whereas exclusivity is limited to those

⁴⁵ A. Dashwood, *supra* note 8, at p. 372-3.

⁴⁶ Article I-13 (2): The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

Article III-323 (1): The Union may conclude an agreement with one or more third countries or international organisations where the Constitution so provides or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Constitution, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

⁴⁷ The Convention draft version of what became Article I-13 (2) actually read “The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion ... affects an internal Union act.” (CONV 850/03). The alteration in wording to include the phrase “insofar as” and a reference to common rules thus appears to be deliberate.

aspects of the agreements that actually have such an effect (“insofar as its conclusion may affect ...”).

22. Second, where Article III-323 (1) has “necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Constitution”, Article I-13 (2) has “necessary to enable the Union to exercise its internal competence”. A literal reading of the two provisions would suggest that the former is a condition of competence while the latter is a condition of exclusivity. The latter criterion appears to be based on the so-called *Opinion 1/76* type of exclusivity, recently formulated by the Court of Justice in these terms:

“As regards exclusive competence, the Court has held that the situation envisaged in *Opinion 1/76* is that in which internal competence may be effectively exercised only at the same time as external competence (see *Opinion 1/76*, paragraphs 4 and 7, and *Opinion 1/94*, paragraph 85), the conclusion of the international agreement being thus necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules (see, in particular, *Commission v Denmark*, paragraph 57).”⁴⁸

Apart from a desire to reflect the existing legal position, it is difficult to see why this provision is really necessary and in the interest of simplification it would have been better omitted from the Constitutional Treaty. In fact it potentially widens the existing grounds for exclusivity based on *Opinion 1/76*, as it omits the idea of an “inextricable link” between external and internal action, the need to act simultaneously at both levels.⁴⁹ It has never, since *Opinion 1/76* itself, been applied in practice. It was formulated at a time when the Court of Justice was still developing its ideas of implied external competence (in particular the relationship between the existence and the exclusivity of competence), and has been subject to convincing academic criticism.⁵⁰ *Opinion 1/76* would be better regarded as an example of the existence of competence even in the absence of prior internal legislation;⁵¹ it is not demonstrably necessary for the Union legal order that such competence should be exclusive per se; the other conditions of exclusivity (in particular the *AETR* test) are sufficient.

23. Third, there is the difference between “provided for in a legally binding Union act” in Article III-323 (1) and “provided for in a legislative act of the Union” in Article I-13 (2). Not all legally binding acts are legislative acts: legislative acts are defined in Article I-33 to include European laws and framework laws; European regulations and European decisions are on the other hand non-legislative acts which are nonetheless legally binding. So, again following the literal reading of the text, legislative acts may confer an exclusive competence to conclude an international agreement, but other legally binding acts, such as European decisions, will only confer non-exclusive competence (unless, presumably, one of the other Article I-13 (2) conditions applies). This is significant when one considers that all CFSP acts are in the form of European decisions.

⁴⁸ *Opinion 1/2003*, *supra* note 42, para 115.

⁴⁹ On the inextricable link and the need to act externally and internally at the same time, see *Opinion 1/94*, *supra* note 22, paras 86 and 89. See Part I Chapter XXVIII, para 42 and note 43. A. Dashwood, *supra* note 8, at p. 372.

⁵⁰ A. Dashwood and J. Heliskoski, ‘The Classic Authorities Revisited’ in A. Dashwood and C. Hillion (eds.), *supra* note 37, at p. 13-14.

⁵¹ P. Eeckhout, *External Relations of the European Union, Legal and Constitutional Foundations*, Oxford, Oxford University Press, 2004, p. 68.

24. These differences are small but significant. A less close reading of the text might assume that the two provisions were equivalent, and that the provision in Part III was merely repeating or reflecting the provision in Part I; that appears not to be the case, but the absence of any clear link or cross-reference between the two provisions is likely to create confusion as to their precise relationship. It is also odd to separate the two provisions in this way. It would at least be clearer if the competence to conclude agreements set out in Article III-323 (1) were cross-referenced to Article I-13 (2), which sets out the conditions under which such competence may become exclusive – if indeed Article I-13 (2) is thought to be necessary at all.

2. The external dimension of sectoral policies

25. These provisions relating to implied powers are important since, although the opportunity was taken to introduce a new express competence in the field of humanitarian aid (and the new provision on relations between the Union and its neighbours in Article I-57), the external dimension of sectoral policies remains as it is at present, largely implied. The general approach to Part III, of making minimal changes to most policy sectors, has meant the retention of a number of differences when it comes to their external dimension without any very clear rationale. In relation to energy policy, for example, and transport policy (the *locus classicus* of implied external competence since *AETR*), no express provision is made for external powers.⁵² In fact, transport is expressly excluded from the scope of CCP, a not entirely logical continuation of the historical position.⁵³ On the other hand, in relation to environment policy⁵⁴ and research and development,⁵⁵ also areas of shared competence, the conclusion of international agreements is expressly mentioned in the context of international cooperation. In contrast again, the provisions dealing with supporting, coordinating or complementary action, while providing for international cooperation, do not specifically mention the conclusion of international agreements.⁵⁶ However we cannot assume that the conclusion of international agreements in these areas is not in fact within Union competence: the existing Treaty provisions on which these provisions are based have provided the legal basis for agreements; for example the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression.⁵⁷ Such agreements, in common with secondary legislation adopted in these areas generally, would not have a pre-emptive effect, and should not be used to harmonise

⁵² The external dimension of energy policy is increasingly important; see for example Council Conclusions of 14 March 2006 on a New Energy Policy for Europe; ‘An External Policy to Serve Europe’s Energy Interests’, paper from Commission/SG/HR for the European Council, S160/06.

⁵³ Article III-315 (5); this provision by virtue of its reference to Title III, Chapter III, Section 7 and Article III-325 thus provides a kind of indirect legal base for agreements in the field of transport.

⁵⁴ Article III-233.

⁵⁵ Article III-252 (4).

⁵⁶ See on public health Article III-278 (3), on culture Article III-280 (3), on education and sport Article III-282 (2), and on vocational training Article III-283 (2).

⁵⁷ The proposal for a Decision concluding this agreement is based, *inter alia*, on Article 151 TEC; COM(2005) 678.

Member States' legislation.⁵⁸ It would have been preferable to rationalise these provisions into a general clause on international cooperation within Part III Title V. Or indeed they could have been omitted altogether in the light of the general competence provision in Article III-323. The resulting piecemeal approach to these different sectoral policy areas is a consequence of the unwillingness on the part of the drafters of the Constitutional Treaty to open up new potentially sensitive issues and the consequent wholesale transference of much of the EC Treaty virtually unchanged into Part III.

26. Perhaps more surprising but presumably due to the same reluctance is the absence of a systematic reference to external action in relation to the Area of Freedom, Security and Justice (AFSJ),⁵⁹ or indeed a separate policy chapter on this field within Title V, which might have been expected given its importance. Apart from one specific provision on readmission agreements in Article III-267 (3) in the context of immigration policy, there is no explicit external competence granted. This omission again reflects the existing Treaty text, and we are reminded that it by no means implies an absence of competence: in *Opinion 1/2003*, for example, the Court of Justice held that the Community was *exclusively* competent to conclude the revised Lugano Convention on mutual recognition and enforcement of judgements, on the basis of Regulation 44/2001/EC and Articles 61 (c) and 65 TEC. The omission may also perhaps be explained by the view being expressed by the institutions at the time of the drafting of the Constitutional Treaty that there should be no specific "foreign policy on AFSJ" but rather that its external dimensions should be taken into account in all aspects of AFSJ policy, and that the AFSJ dimension should be included in other regional and bilateral Union policies (such as the European Neighbourhood Policy, or development cooperation).⁶⁰ Nevertheless in the longer perspective, the omission is probably a mistake. The most recent Council Strategy on the external dimension of the AFSJ suggests that a more autonomous "external AFSJ" is emerging.⁶¹ There is no lacuna in the sense that Article III-323 would provide the basis for external agreements in this field (alongside Article III-267 (3) on readmission agreements), but there is no real logic to the different treatment of (say) environmental policy and AFSJ.

⁵⁸ Article I-12 (5); see also Article III-315 (6). See *Opinion 1/2003*, *supra* note 42, at para 132: "If an international agreement contains provisions which presume a harmonisation of legislative or regulatory measures of the Member States in an area for which the Treaty excludes such harmonisation, the Community does not have the necessary competence to conclude that agreement. Those limits of the external competence of the Community concern the very existence of that competence and not whether or not it is exclusive."

⁵⁹ Chapter IV of Title III.

⁶⁰ For example, "Developing the JHA external dimension is not an objective in itself. Its primary purpose is to contribute to the establishment of an area of freedom, security and justice. The aim is certainly not to develop a "foreign policy" specific to JHA. Quite the contrary. The JHA dimension should form part of the Union's overall strategy. It should be incorporated into the Union's external policy on the basis of a 'cross-pillar' approach and 'cross-pillar' measures." 'European Union Priorities and Objectives for External Relations in the Field of Justice and Home Affairs: Fulfilling the Tampere Remit', approved by the European Council, Feira, June 2000, p.1.

⁶¹ 'A Strategy for the External Dimension of JHA : Global Freedom, Security and Justice', adopted by the GAERC, 12 December 2005, doc. no. 15446/05.

3. Procedures for concluding international agreements

27. The two explicit external relations competences in the original EEC Treaty (commercial policy under what is now Article 133 TEC, and Association agreements, under what is now Article 310 TEC) combined substantive and procedural provisions in the same legal basis. Alongside these, however, was the general procedural provision of what is now Article 300 TEC.⁶² Later additions of substantive competences have tended not to include procedural aspects, relying on Article 300 TEC, but in addition, of course, there are now procedural treaty-making provisions relating to the second and third pillars.⁶³ The Constitutional Treaty rationalises this position. Article III-325 provides the procedure for the conclusion of all international agreements, including CFSP agreements and association agreements. The only exceptions are the existence of some specific additional provisions relating to commercial policy agreements under Article III-315 (see below), and international agreements in the field of monetary policy.⁶⁴ Overall this is a welcome simplification. It should also be said that the provision is not noticeably more complex as a result, although some reflection of the continued differential treatment of the CFSP and ex-EC legal orders is evident, for example in providing that the Union Minister for Foreign Affairs may recommend the opening of negotiations and the absence of a formal role for the European Parliament where the agreement relates exclusively to the CFSP.⁶⁵ There is also a welcome increase of clarity in the arrangement of the Article, with identification of the different stages and the roles of the different institutional actors within the procedure. Apart from exclusively CFSP agreements, it has become the norm for the European Parliament to play a part in the adoption of the decision concluding an international agreement (we have come a long way since the original version of Article 228 in the Treaty of Rome, which did not mention the Parliament at all). Indeed under the Constitutional Treaty the consent of the Parliament is needed for a wider range of agreements, most notably including all agreements “covering fields to which ... the ordinary legislative procedure applies”.⁶⁶ This provision extends Parliamentary consent to the Common Commercial Policy and to the former third pillar policy areas of judicial and police cooperation in criminal matters. It replaces the current requirement of Parliamentary assent in cases where the

⁶² As Dashwood points out, the existence of Article 228 (now Article 300 TEC) in the original Treaty of Rome provides support for the existence of implied competence to conclude agreements in areas other than commercial policy and association which contained their own procedural rules; A. Dashwood, *supra* note 37, at p. 122.

⁶³ Articles 24 and 38 TEU.

⁶⁴ Article III-326.

⁶⁵ In other cases it is the Commission which recommends the opening of negotiations. We may remark that by setting the Commission and the UMFA as alternative actors here, this provision reflects the ambiguity of the UMFA's position. As the member of the Commission who “shall ensure the consistency of the Union's external action [...] responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action” (Article I-28(4)) it would have been possible to entrust him/her with proposing negotiations across the whole field of Union competences. As things stand, for agreements outside the CFSP, the support of the Commission as a whole is required, not merely its UMFA Vice-President. On the issue of the Union negotiator where an agreement covers both CFSP and other policy areas, see Passos and Marquardt in this volume, Part I Chapter XXVIII at para 54.

⁶⁶ The concept of “covering a field” is potentially wider than the legal base of an agreement and its application is likely to be disputed.

agreement would entail the amendment of an act adopted under the co-decision procedure.⁶⁷

4. Conclusion

28. In a number of ways the Constitutional Treaty provides greater transparency and clarity with respect to external competences. In particular, Article III-323 confirming the Union's competence to conclude agreements where necessary to achieve a Constitutional objective, and Article III-325 on the procedure for concluding international agreements, are to be welcomed. In any minor revision of the text, which might be achieved as part of a revised ratification process, the final phrase of Article III-323 (1) ("or is likely to affect common rules or alter their scope") should be removed. The complete removal of Article I-13 (2) should be considered; it does not add clarity (quite the opposite) and its substance – the affirmation of exclusivity in certain circumstances – flows in any case from the principle of sincere cooperation in Article I-5 (2) and the definition of shared competence in Article I-12 (2). At the very least, the precise relationship between Article I-13 (2) and Article III-323 (1) needs to be clarified and the differences of wording between them either removed or made more explicit as intentional differences of substance. It would have been desirable to "tidy up" and rationalise the provisions relating to international cooperation in sectoral policy fields. Arguably, the references to conclusion of international agreements could all be removed as external competence is provided by Article III-323. There is a case for a chapter in Title V on the external dimension of AFSJ. These alterations, with the probable exception of the last, are all fairly minor technical amendments which could be made were the Constitutional Treaty to be ratified "as is" or in a slightly modified form. Were an amendment of the existing Treaties envisaged instead, it would be possible to amend Article 300 TEC in line with Article III-325, although presumably removing references to CFSP agreements,⁶⁸ and to add a revised version of Article III-323.

III. COMMON FOREIGN AND SECURITY POLICY

1. The special status of the CFSP

29. It is, of course, difficult to disentangle the institutional (see Part II Chapter IX) from the policy aspects of the CFSP. The particular characteristics of the CFSP noted by Grevi in Part I Chapter XXIV, including progressive "legalisation" or "proceduralisation", consensus building and flexibility, have an impact on the dynamics of policy-making and the content of policy. Indeed throughout the history of the development of European Political Cooperation (EPC), the CFSP and now the

⁶⁷ Article 300 (3) TEC. For an example of a case where the issue of "entailing amendment" has been disputed, see case C-317/04 *European Parliament v Council* (Passenger Name Records), judgment of 30 May 2006, not yet reported.

⁶⁸ Unless the Community and Union are merged, it is probably simpler to continue to provide separately for the conclusion of Union and of Community agreements.

CSDP, the emphasis has been on institutional and procedural evolution rather than the substantive policy agenda.⁶⁹

30. A continued recognition of the special status of the CFSP is inevitable, in my view, given the nature of foreign policy.⁷⁰ The question is whether the Constitutional Treaty has found the right balance between integrating foreign policy into Union external action generally, and making provision for that special status. I do not think that the balance is right yet: on the one hand, it is not clear from the Constitutional Treaty whether or not the “strong” form of primacy which attaches to directly effective Community law applies to CFSP acts; on the other hand, the continued exclusion of the Court of Justice from jurisdiction over the CFSP is unnecessary and undesirable. Let us examine a little more closely this special status insofar as it is preserved in the Constitutional Treaty.

2. Primacy and the nature of CFSP competence

31. First is the separation of CFSP competence from the three general categories of competence (exclusive, shared and supporting or complementary). The difficulty here is not in setting CFSP competence apart from other forms of competence, it is the lack of clarity as to what form of competence this might be. The three general categories of competence are defined in Article I-12, and in particular, the relationship between Union and Member States’ powers is specified. Logically it is difficult to imagine a type of competence that is neither exclusive, shared nor complementary, and if it were not for the political sensitivities it would seem that the CFSP would be best defined as a type of non-pre-emptive shared competence (akin to development cooperation). We are told in Article I-12 that the Union will have competence to “define and implement” a CFSP but not what this implies for the Member States; in particular, to what extent the principles of primacy, pre-emption and direct effect might apply. Although Article I-6 does not exclude any part of Union law from the principle of primacy, it has been argued that it should not apply to the CFSP on both policy and textual grounds. Neither does Article I-6 specify exactly what is meant by primacy.⁷¹ Within the Community legal order, primacy has developed a strong meaning requiring national courts to disapply conflicting national law.⁷² It is possible (though not at all transparent) that

⁶⁹ P. Koutrakos ‘Constitutional Idiosyncrasies and political realities: the emerging Security and Defence Policy of the European Union’, *Columbia Journal of European Law*, 2003, p. 69. Perhaps inevitably this was also true in the Convention. See also R. Gosalbo Bono, *supra* note 5.

⁷⁰ See D. Thym, ‘Beyond Parliament’s Reach? The Role of the European Parliament in the CFSP’, *EFARev*, 2006, p. 109.

⁷¹ “The more I think about that provision, the harder I find it to give a precise meaning to the principle of primacy, taken out of its context in the case law.” A. Dashwood, *supra* note 8, at p. 379. There is a Declaration (Declaration A.1) to the effect that this Article reflects existing case law, but of course existing case law has nothing to say about primacy in relation to the CFSP; and case law changes: Case C-105/03 *Pupino*, [2005] ECR I-5285, para 34 *et seq.*

⁷² Case 106/77 *Simmenthal* [1978] ECR 629; C-213/89 *R v Secretary of State for Transport ex parte Factortame* [1990] ECR I-02433. This may be distinguished from the status of international law generally, which although it regards itself as hierarchically superior to domestic law, does not impose on the domestic legal order the means by which compliance is achieved: E. Denza, ‘Lines in the Sand: Between Common Foreign Policy and Single Foreign Policy’ in T. Tridimas and P. Nebbia (eds.) *European Union Law for the Twenty-first Century*, Oxford, Hart Publishing, 2004, p. 268.

primacy is intended to have different meanings in relation to specific areas of Union competence; it is also possible that Article I-6 is not intended to apply to the CFSP at all. Denza has argued that Article I-6 must be read in conjunction with Article I-1, according to which the Union “shall exercise on a Community basis the competences they [the Member States] confer on it” – and that this implies *inter alia* primacy in the Community law sense.⁷³ An Editorial Comment in the *Common Market Law Review*, on the other hand, has argued that the Court of Justice, which has jurisdiction over Article I-6, would be unlikely to interpret Article I-6, in this “strong” sense, as extending to the CFSP.⁷⁴ Dashwood agrees, on the grounds that the Treaty drafters clearly intended CFSP competence to be different from other types of EU competence, and secondly that to impose the “strong” form of primacy while at the same time excluding the jurisdiction of the Court of Justice would put national courts in an impossible position.⁷⁵

32. Primacy and direct effect are closely linked in that primacy, in the *Simmmenthal* sense, operates to require national courts to give effect to directly effective Community law. Whereas Article I-6 makes no reference to exclusion of the CFSP from the principle of primacy, it is hard to see how it might be applied in the absence of direct effect. The Constitutional Treaty is silent on direct effect, so it is, as now, an attribute conferred by interpretation by the ECJ. However, the ECJ has no jurisdiction over the CFSP, and so *prima facie* there is no context in which the Court would have the opportunity to declare a CFSP act directly effective and thus (potentially) having primacy over conflicting domestic legislation. The difficulty remains, however, that there is nothing to prevent CFSP measures from being raised, directly or indirectly, in national courts which may then have to resolve conflicts between national law and CFSP acts. It is hard to see how national courts would deal with such a question without being able to refer to the ECJ for a ruling.⁷⁶

33. Pre-emption applies to shared competence under Article I-12 (2) so although the Treaty does not expressly state that CFSP action by the Union does not exclude or pre-empt Member State action, the implication is that pre-emption would not apply to the CFSP, which is not shared competence, at least of this type. It is not so clear that the CFSP is also excluded from Article I-13 (2) whereby the Union has exclusive competence to conclude international agreements under certain conditions. This provision is textually independent of Article I-13 (1), which lists areas of exclusive competence and is clearly intended to operate in fields beyond those covered in that

⁷³ E. Denza, *ibid*, at p. 267-8. The phrase “on a Community basis” is obscure; it replaces “in the Community way” in the Convention draft, and is perhaps meant to echo Article 1 TEU whereby the Union is “founded on” the European Communities and to imply a degree of continuity where that might be in doubt.

⁷⁴ Editorial comment, *CMLRev*, 2005, p. 325, at p. 327.

⁷⁵ A. Dashwood, *supra* note 35, at p. 37-38.

⁷⁶ The European Union Bill, which the UK Government introduced into the House of Commons in January 2005, reflects Dashwood’s view that “strong” primacy is not intended to apply to the CFSP: it exempts the CFSP provisions from the procedures applicable to the rest of the Treaty and the implementation of the CFSP is dealt with completely separately: the term “EU Treaty” to which Article 2 (1) of the European Communities Act 1972 is to apply is defined as “the treaty establishing a Constitution for Europe signed at Rome on 29th October 2004, except the common foreign and security policy provisions”.

paragraph. To date, CFSP agreements have been fairly limited in scope, but under the Constitutional Treaty certain provisions of Union agreements now falling within Member State competence, such as those on political dialogue, would no doubt be found to come within the scope of the CFSP. Although the uncertainty is undesirable and symptomatic of the ambiguity surrounding the nature of CFSP competence it is perhaps unlikely that the conditions contained in Article I-13 (2) would apply in a CFSP context. More important in practice for the Member States is the strongly worded principle of loyal cooperation, repeated in Article I-16 (2),⁷⁷ lest we might imagine that the general statement of the principle in Article I-5 (2) does not apply to the CFSP.

34. The special status of the CFSP in the Constitutional Treaty is reflected in the decision-making procedures for European decisions adopted under this chapter.⁷⁸ Likewise, although the procedure for concluding international agreements is found in the same Article as other areas of Union competence,⁷⁹ there is some procedural differentiation.⁸⁰ Presumably CFSP agreements once concluded will have the same status within the Union legal order as other Union agreements (for example, forming an integral part of Union law⁸¹). It is not clear, however whether the general exclusion of the Court of Justice from jurisdiction in relation to the CFSP will apply to CFSP agreements. Let us now turn to that issue.⁸²

3. The Court of Justice and the CFSP

35. The exclusion of the jurisdiction of the ECJ in Article III-376 refers to “Articles I-40 and I-41 and the provisions of Chapter II of Title V concerning the common foreign and security policy and Article III-293 insofar as it concerns the common foreign and security policy.”⁸³ The specificity of the exclusion has puzzled some; it does not refer to Article I-16 (which outlines CFSP competence) nor to Article III-325 (11) (ECJ opinions on envisaged agreements). In fact, as it is not worded to exclude jurisdiction in all matters pertaining to the CFSP it has been argued that the exclusion should be

⁷⁷ Article I-16 (2): “Member States shall actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area. They shall refrain from action contrary to the Union's interests or likely to impair its effectiveness.” The wording is based on Article 11 (2) TEU, although the phrase “and shall comply with the Union's action in this area” is an addition.

⁷⁸ For detailed analysis, see Grevi, Part I Chapter XXIV in this volume, especially paras 18-24.

⁷⁹ Article III-325.

⁸⁰ Consultation of European Parliament is not required and the decision to conclude the agreement will normally be taken unanimously. Under Article III-32 5(8), unanimity is required “when the agreement covers a field for which unanimity is required for the adoption of a Union act”, a situation which would normally apply to the CFSP; for exceptions to CFSP unanimity see Article III-300 (2) & (3). If this were to be applied strictly, unanimity would be required for all agreements where there is a CFSP element, which would greatly reduce the use of qualified majority voting.

⁸¹ See Case 181/73 *Haegeman* [1974] ECR 449.

⁸² On the role of the Court of Justice in relation to the CFSP, see M. Garbagnati Ketvel, ‘The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy’, *ICLQ*, 2006, p. 77.

⁸³ For an account of the discussion in the Convention on this issue, see Passos, Part I Chapter XV in this volume, at paras 56-60 and 63-5.

read in a restrictive way, to cover only actions which relate directly to the provisions of Chapter II.⁸⁴ It may be that the Court would take a restrictive view of the exclusion, but (for example) Article I-16 is expanded upon in Article I-40, which *is* excluded, and it is hard to conceive of a meaningful application of Article I-16 which did not encroach on the excluded Article I-40. Similarly, Article III-303, which gives the EU competence to conclude agreements in the CFSP area, is in the excluded Chapter, so arguably Article III-325 (11) should not be used to examine CFSP agreements. It could also be added that neither Article III-365 (on judicial review) nor Article III-369 (on preliminary rulings) explicitly exclude the CFSP either, so in that respect Article III-325 (11) is consistent; were it to be argued that those provisions too should cover CFSP issues, then the exclusion in Article III-376 would be meaningless. This indicates that the exclusion should cover Article III-325 (11) although there is certainly an ambiguity here.⁸⁵ One possibility is that the Court's jurisdiction under paragraph 11 does extend to CFSP agreements (or agreements with a CFSP dimension) insofar as it has indirect jurisdiction in relation to the CFSP, in particular with regard to compliance with Article III-308, or even Article III-292. The form of wording chosen in Article III-376 – that the Court does not have “jurisdiction with respect to” the CFSP chapter does suggest that the Court should not ignore CFSP acts and instruments completely and could/should take them into account in the course of exercising its jurisdiction in respect of other Treaty provisions.⁸⁶ Indeed it is also of significance that whereas the TEU excludes the Court of Justice's jurisdiction subject to exceptions (Article 46 TEU), the Constitutional Treaty confers jurisdiction on the Court in principle over the whole Treaty,⁸⁷ subject only to the exception of the CFSP laid down in Article III-376; this has rightly been called a “shift in perspective”⁸⁸ which we should expect the Court to reflect.

36. There are in addition two clearly stated limits to the exclusion of the Court's jurisdiction. The first has significance when considering the position of individuals under the Constitution. Under Article III-376, the Court would have jurisdiction

“to rule on proceedings, brought in accordance with the conditions laid down in Article III-365(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V.”

This provision reflects the fact that Article III-322 would amend the current Article 301 TEC so as to enable the Union to adopt restrictive measures against “natural or legal

⁸⁴ Oral communication from Clemens Ladenburger, Commission Legal Service, on the basis of discussions within the Convention.

⁸⁵ Unlike the articles on judicial review and preliminary rulings, Article III-325 does explicitly cover the conclusion of CFSP agreements and there is nothing in the wording of the Article itself to suggest that paragraph 11 does not apply to this particular category of agreement; however the competence to conclude such agreements is given by Article III-303 which is in the excluded chapter. Passos and Marquardt take the view that the Court has jurisdiction to consider CFSP agreements under Article III-325 (11): Part I Chapter XXVIII, at para 87. Certainly, were the exclusion to apply, it might be difficult for the Court to consider only non-CFSP elements of envisaged agreements, but this problem will arise too in relation to judicial review of the Council's concluding act.

⁸⁶ C.f. Case T-14/98, *Hautala v Council* [1999] ECR II-2489, at paras 41-2.

⁸⁷ In Article I-29 (1) the Court is given the duty to “ensure that in the interpretation and application of the Constitution the law is observed.”

⁸⁸ M. Garbagnati Ketvel, *supra* note 83, at p. 100.

persons and groups or non-State entities.”⁸⁹ Article III-322 (3) also provides that “The acts referred to in this Article shall include necessary provisions on legal safeguards.” At present Community acts based on Articles 301 and 60 TEC may be challenged by natural or legal persons under the standard conditions for judicial review. However, the possibility of judicial review established by Article III-37 6(2) is potentially wider than restrictive measures adopted under Article III-322. The cross-reference in Article III-376 (2) is not to Article III-322 but to decisions adopted on the basis of Chapter II of Title V – the CFSP chapter.⁹⁰ Any CFSP or CSDP decision which has the effect of a “restrictive measure” against an individual could thus be challenged. How far this could go is a matter for conjecture: presumably it would include a visa ban, and also a decision identifying a person as a member of a terrorist organisation; but would it include, for example, a Council decision authorising a European Security and Defence Policy (ESDP) operation on the ground which may involve “restrictive measures” against individuals, or the activities of a Police or Border Mission?

37. The Court is also given jurisdiction to “police the boundary” between the CFSP and other Union competences (a further clear signal of the special status of CFSP competence, the possibility of removing this provision was considered but rejected⁹¹). Inter-pillar legal base disputes are becoming more common and this provision will ensure that they do not disappear.⁹² Article III-308 differs from its existing counterpart (Article 47 TEU) in that it is concerned with procedural differentiation rather than division of competence (the CFSP and other external policies would all be *Union* competences) and this is reflected in its wording which refers to “the application of the procedures and the extent of the powers of the institutions ...”.⁹³ More significantly, the “Chinese wall” between the CFSP and other Union policies (internal and external) is intended to protect both sides; thus it would be incompatible with Article III-308 not only for a CFSP measure to encroach on another Union exclusive, shared or complementary competence, but also if the exercise of the latter were to encroach on CFSP competences.⁹⁴ The two types of competence are given equal weight; there does not appear to be a presumption in favour of using non-CFSP powers where that is possible, whereas Article 47 TEU (read in the light of the need to maintain and build on the *acquis communautaire*: Article 2 TEU) indicates that where possible an EC competence should be used. This is borne out by the emphasis in Article III-308 on the procedures and institutional balance of power: it is not primarily a matter of

⁸⁹ It would therefore no longer be necessary to combine Articles 60, 301 with Article 308 TEC to achieve this result: Case T-306/01, *supra* note 10.

⁹⁰ In contrast, Article III-282 (the equivalent provision to Article III-376) of the Convention draft as adjusted by the Working Party of IGC Legal Experts, CIG 50/03, 25 Nov. 2003, referred to acts adopted on the basis of Article III-224, which was the equivalent to Article III-322. The change is logical, in that Article III-322 is in any case not excluded from the Court’s jurisdiction and makes specific reference to a prior decision taken under the CFSP Chapter; however it does potentially expand the scope of the Court’s jurisdiction in relation to the CFSP.

⁹¹ Passos, Part I Chapter XV in this volume, at para 60.

⁹² See for example Case C-176/03 *Commission v Council*, judgment of 13 September 2005, not yet reported; Case C-403/05 *European Parliament v Commission*, pending; Case C-91/05, *supra* note 10.

⁹³ Compare Article 47 TEU: “nothing in this Treaty shall affect the Treaties establishing the European Communities ...”

⁹⁴ In *Yusuf* the CFI showed itself alert to this danger, particularly in the use of Article 308 TEC: see *supra* note 10, para 156.

competence boundaries but of appropriate legal base. However if we look again at the scope of the CFSP as set out in the Constitutional Treaty problems arise with this “equal weight” approach; the CFSP is to cover “all areas of foreign policy and all questions relating to the Union’s security”.⁹⁵ Taken literally, the CFSP legal base *could* be used to act in every field of external Union policy (trade, development, cooperation, humanitarian aid etc) and the “equal weight” approach does not help us to decide how to tilt the balance one way or the other. We therefore have to see the CFSP (“all areas of foreign policy”) as a general competence alongside the specific competences creating distinct areas of external policy. The logic just outlined suggests that in fact the current position should be maintained and the general competence (legal base) used where action under a more specific provision is not possible. Thus the meaning attributed to “all areas of foreign policy” in Article I-16 should (and was no doubt intended to) take account of the *acquis* relating to its scope developed under the TEU, a more limited field of activity than that suggested by the words themselves. Only thus can the intention behind Article III-308 – the maintenance of “separate but equal” policy fields – be achieved.

38. Nor is the sort of question raised by current cross-pillar legal base disputes resolved by this provision: how would the Court of Justice use standard legal base tests in this new context?⁹⁶ In an area of non-pre-emptive competence such as development cooperation,⁹⁷ where Member States can continue to act unilaterally or bilaterally or even collectively,⁹⁸ could they also choose to use a CFSP instrument as an alternative to exercising competence under one of the other possible external action legal bases? Given that these will all now be *Union* competences (albeit of different kinds) it seems right that the decision as to which Union competence to use – in contrast to the issue of whether or not to use Union competence at all – will not be a matter of institutional discretion but should be based on objective criteria.⁹⁹ However, applying the current objective criteria tests will create difficulty: although weight is placed by the Court on the aim and purpose of the act in question, under the Constitutional Treaty, as we have seen, all external action operates under a single set of objectives and it would run counter to the purpose of that provision to regard some objectives as intrinsically linked to certain legal bases.

⁹⁵ Article I-16. The wording is taken from the existing Treaty provisions (Article 11 (1) TEU) but the TEU does not contain a provision purporting to protect the CFSP from being “affected” by Community action. See P. Eeckhout, *supra* note 52, at p. 151; M. Garbagnati Ketvel, *supra* note 83, at p. 84-91.

⁹⁶ For example, the legal base of international agreements may affect the voting requirements: CFSP agreements require unanimity, and so the Court may well be called upon to judge whether an agreement actually requires a CFSP legal base.

⁹⁷ See Article I-14 (4).

⁹⁸ Case C-316/91 *European Parliament v Council* (EDF) [1994] ECR I-0625.

⁹⁹ See Case 45/86 *Commission v Council* [1987] ECR 1493, para 11; Case C-300/89 *Commission v Council* (the ‘Titanium dioxide case’) [1991] ECR I-2867, para 10; Case C-268/94, *supra* note 34, para 22; Opinion 2/00 [2001] ECR I-9713, para 22; Case C-176/03; *supra* note 93, para 45; and Case C-94/03 *Commission v Council* (Rotterdam Convention), judgment of 10 January 2006, not yet reported, paras 34-36.

4. Conclusion

39. The CFSP has travelled a remarkably long way since its origins in EPC in the 1970s. Certainly it does not always go smoothly, and the patient techniques of consensus building are not always able to react quickly enough in a crisis where critical interests differ. This incremental process of convergence is likely to continue; it is not a process that can easily be speeded up by institutional change or by (for example) moving to a more “Communautaire” institutional model. Within the Constitutional Treaty, however, the special and differentiated nature of CFSP competence arises more from implication than direct provision, and this is a mistake. In particular, the application of Article I-6 to the CFSP needs clarification. The existing Declaration does not do this. The Convention, I think rightly, did not see the need to alter significantly the substantive powers available to the Union under the CFSP; since the Treaty of Amsterdam practice in the use of common positions and joint actions has become settled and there are no obvious gaps. I am not convinced of the advantage in bringing these different acts under the general rubric of “European decisions”, as although it may appear simpler to have fewer different types of legal act, in practice it does not aid transparency. Increasingly we are seeing the use of “soft law” instruments such as Council Conclusions and Strategies to define policy outside formal decision-making structures, in an attempt to achieve coherence within competence attribution and legal base constraints;¹⁰⁰ this is likely to continue. Although it may adopt European decisions under the Constitutional Treaty, in practice it seems likely that the European Council is likely to continue to “identify strategic interests and objectives” and “define general guidelines” without using formal decisions.

40. In spite of the merging of the “pillars” the Constitutional Treaty would not remove the significance of choice of legal base, and the special status of CFSP competence will mean that the question has especial significance in this context. The increasing number of “boundary disputes”, which are not going to go away, together with legal issues arising from cross-pillar actions (such as sanctions) suggest that the Court of Justice is increasingly likely to have to deal, even if indirectly, with CFSP acts. It was a mistake to exclude the Court of Justice almost entirely from the CFSP.¹⁰¹ A better solution would have been to exclude the possibility of Commission enforcement actions,¹⁰² but otherwise to extend CFSP jurisdiction to the Court of Justice. As we have seen, the new Article III-376 offers potentially wider protection than at present where individuals are subjects to restrictive measures; there is however no damages liability, a serious lack in the light of increased ESDP activity. Clear provision that Article III-325 (11) is intended to cover CFSP agreements would certainly be desirable, and there seems no

¹⁰⁰ Although if a Strategy is implemented by decision, the legal base issue may re-emerge: see for example the EU Strategy on combating illicit accumulation and trafficking of Small Arms and Light Weapons (SALW) adopted in December 2005, and case C-91/05, *supra* note 10, in which the Commission is challenging the legality of Council Decision 2004/833/CFSP on SALW, on the grounds that it infringes Article 47 TEU by encroaching on Community competence.

¹⁰¹ For a discussion of the reasons for excluding the Court’s jurisdiction, see M. Garbagnati Ketvel, *supra* note 83, at p. 79-82.

¹⁰² Arguably the Commission is not and should not be an enforcer of “high” foreign policy. It is using its power to enforce compliance with international obligations more readily in the EC field (see for example case C-239/03 *Commission v France (Étang de Berre)* [2004] ECR I-9325); would this really be appropriate in the CFSP field?

good reason why the Court's jurisdiction should not be extended to CFSP decisions, including questions of the interpretation and validity of CFSP agreements (or the CFSP parts of wider agreements), especially if the nature of the Union's CFSP competence were clarified. Both these issues should be addressed were a revised version - whether major or minor revision - of the Constitutional Treaty to be considered.

IV. COMMON SECURITY AND DEFENCE POLICY

41. In spite of the increased centrality of security within EU external (and internal) policy and the progress in developing the ESDP since 1999, we should be cautious about the EU's ability to become a "security superpower" in the traditional sense,¹⁰³ as well as questioning the desirability of that objective. In fact the nature of the security dimension to EU policy suggests rather a broader concept of security, which uses the EU's normative and civilian power as well as the military power which still lies essentially with the Member States.¹⁰⁴ However the development of a military capability and the military dimension to the EU's conflict prevention and crisis management tasks, will not necessarily undermine its status as a civilian power.¹⁰⁵ The Security Strategy is evidence that the EU sees its responsibility for global security¹⁰⁶ as based on its own achievements in terms of peace and integration.¹⁰⁷ In addition to supporting multilateralism and strengthening international and regional institutions, the EU sees itself as a model for conflict resolution, for regional conflict prevention, and as having a great deal of experience in State building. The priority since 1999 has been to develop a civilian and military capacity (military operations, police missions, crisis management, and peacekeeping for example) to further these strategic objectives, which will complement the more traditional first-pillar instruments such as trade policy, technical assistance programmes and conditionality.

1. Clearer and fuller delineation of the CSDP provisions

42. The Constitutional Treaty expands the Treaty provision on the CSDP (currently Article 17 TEU), extending both its aims and its tasks. The Petersberg tasks currently found in Article 17 (2) TEU have been extended to include joint disarmament operations, military advice and assistance tasks, conflict prevention and post-conflict stabilisation, with explicit reference to action outside the Union and to combating

¹⁰³ T. Salmon, 'The European Security and Defence Policy: Built on Rocks or Sand?', *EFARev*, 2005, p. 359.

¹⁰⁴ I. Manners, 'Normative Power Europe: A Contradiction in Terms', *JCMS*, 2002, p. 235; R. Whitman, 'Road Map for a Route March? (De-)civilianizing through the EU's Security Strategy', *EFARev*, 2006, p. 1.

¹⁰⁵ A. Treacher, 'From Civilian Power to Military Actor: The EU's Resistible Transformation', *EFARev*, 2004, p. 49; F. Charillon, 'The EU as a Security Regime', *EFARev*, 2005, p. 517; J. Mitzen, 'Anchoring Europe's civilizing identity: habits, capabilities and ontological security', *Journal of European Public Policy*, 2006, p. 270; R. Whitman, *ibid.*

¹⁰⁶ "Europe should be ready to share in the responsibility for global security and in building a better world", European Security Strategy, p.1.

¹⁰⁷ S. Duke, 'The European Security Strategy in a Comparative Framework', *EFARev*, 2004, p. 459 at p. 463.

terrorism.¹⁰⁸ The Union is extending its security and defence ambitions, clearly setting itself up as a global player, and anchoring itself firmly in the multilateral and legal framework of the UN. In this way the Constitutional Treaty echoes the tenor of the European Security Strategy adopted in December 2003. Extended ambition requires extended operational capacity. The Member States are committed to make civilian and military capabilities available to the Union in order to achieve its CSDP objectives.¹⁰⁹ It is important to note however that for the foreseeable future the military dimension of the CSDP will always be implemented via Member State resources – there are no Union “own resources” here – and this has long term implications for the way the policy is likely to develop; the Member States will remain in the driving seat.¹¹⁰

43. The European Defence Agency (EDA) (Article III-311) is one element of the strengthened CSDP which has not had to await the coming into force of the Constitutional Treaty; it has already been implemented via a Council Joint Action.¹¹¹ The Agency’s remit is the development of defence capabilities and it is a response to a perceived need to complement the building up of the CSDP with a greater degree of cooperation and integration in the commercial aspects of defence.¹¹² It is taking initiatives in the fields of Research and Technology¹¹³ and Defence Procurement.¹¹⁴

2. A common policy?

44. The Constitutional Treaty envisages a transformation of the ESDP into a *Common Security and Defence Policy*. How common is this policy in the light of the provisions on flexibility and structured cooperation? As measures of the extent to which a common policy is developing we can point to operational capacity (progress with the headline goals); the level of activity in terms of numbers of missions; the degree to which this activity is forming a part of overall policy development within the EU (not only the Security Strategy, but policies on the neighbourhood, or development, for

¹⁰⁸ Articles I-41 (1) and III-309 (1). See Part I Chapter XXIV in this volume, para 26.

¹⁰⁹ Article I-41 (1) and (3). This provides a Treaty basis for the “headline goals” established through Council decision: see for example the “Headline Goal 2010” agreed by the Council on 17 May 2004 and endorsed by the European Council in June 2004, doc. 6309/6/04; Declaration on European Military Capabilities, endorsed by the Council in November 2004, annexed to ESDP Presidency Report, 13 December 2004, doc.16062/04.

¹¹⁰ One aspect of this issue relates to the financing of operations: see Part I Chapter XXIV in this volume, para 27.

¹¹¹ Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ L245/17 of 12 July 2004. All Member States except Denmark are participating in the Agency. See Part I Chapter XXV in this volume, para xx.

¹¹² Commission Communication of 12 November 1997 on an EU strategy for defence related industries COM(97) 583 final; Commission Communication of 11 March 2003 ‘Towards an EU Defence Equipment Policy’ COM (2003) 113. P. Koutrakos, *supra* note 70.

¹¹³ R & T spending was emphasised as a priority at the Hampton Court Summit, 27 October 2005. ‘Research and Technology: An Imperative for European Defence’, speech by Javier Solana, Head of the EDA, 9 February 2006, doc. S043/06. On 15 May 2006 the Steering Board of the EDA proposed a new funding mechanism to encourage increased defence R & T spending.

¹¹⁴ A voluntary Code of Conduct on Defence Procurement was agreed 21 November 2005, available at <http://www.eda.europa.eu/>. Together with a Code of Best Practice in the Supply Chain, the regime is due to come into force from 1 July 2006 with all Member States except Denmark, Hungary and Spain participating.

example); the move towards a more open defence equipment market. These are concrete measures of progress. The Solidarity clause¹¹⁵ is a further example of the strengthening of mutuality and commonality in the Constitutional Treaty. Of symbolic significance is the alteration of “might” to “will” and “should” to “when” in the Constitutional Treaty provisions on a “common defence,”¹¹⁶ although the Treaty does not remove the need for individual States to accept the concept of a “common defence” in accordance with their respective constitutional requirements.¹¹⁷ The Treaty also takes care to recognise both the specific character of some Member States’ security and defence policies, and the requirements of NATO obligations. Again, therefore we have an increased level of ambition for the CSDP while expressing the determination to act within, and in a complementary way to, existing multilateral structures. Exactly what this “common defence” might mean is not made clear, but presumably it is an expression of the principle that an attack on one is an attack on all found in Article 5 of the NATO Treaty. It should be contrasted with the aid and assistance obligation in case of armed aggression against a Member State found in Article I-41 (7), which reflects Article V of the (WEU) Brussels Convention.¹¹⁸

45. It might seem paradoxical for the Constitutional Treaty, at the same time as this stress on building a common policy and on solidarity, to accept the extension of flexibility into the defence sphere. This takes several forms.¹¹⁹ The possibility of enhanced cooperation is no longer excluded.¹²⁰ Participation in the EDA is optional.¹²¹ There is the possibility of delegating the implementation of a CSDP initiative to a small group of willing and able Member States,¹²² which amounts to the formalisation of existing practice in delegating specific operations to one or more Member States.¹²³ Most significantly, the Treaty introduces the possibility of permanent structured cooperation allowing some Member States to integrate more fully.¹²⁴ The provisions on permanent structured cooperation emphasise openness to all Member States who wish to join (see Article 43b TEU) but a Protocol establishes conditions in terms of capacity for joining and requires commitments on military capabilities. The Protocol makes clear what is hinted at by Article I-41 (6),¹²⁵ that permanent structured cooperation is not really about a deeper form of integration in defence, but is rather a matter of certain

¹¹⁵ Articles I-43 and III-329.

¹¹⁶ See Part I Chapter XXIV in this volume, para 25. An ambiguity is preserved by Article I-16 (1) which retains “might” in its reference to a common defence.

¹¹⁷ Article I-41 (2).

¹¹⁸ The recent Leila/Perejil incident indicates that even this level of mutual support is not easy to mobilise in practice: J. Monar, ‘The CFSP and the Leila/Perejil Island Incident: The Nemesis of Solidarity and Leadership’, *EFARev*, 2002, p. 251; P. Koutrakos, *supra* note 70.

¹¹⁹ See further Part I Chapter XXV of this volume.

¹²⁰ Articles III-419 (2) and III-420 (2). Under Articles 27a-e TEU, enhanced cooperation within the CFSP shall not relate to matters having military or defence implications.

¹²¹ Article III-311 (2).

¹²² Articles I-41 (5) and III-310. See Part I Chapter XXV of this volume, para xx.

¹²³ For example Operation Artemis, in the Democratic Republic of the Congo, where France acted as Framework Nation: Joint Action 2003/423/CFSP of 5 June 2003 OJ 2003 L 143/50.

¹²⁴ Articles I-41 (6) and III-312.

¹²⁵ Article I-41 (6): “Those Member States whose military capabilities fulfill higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. ...”

Member States being prepared to take the lead and commit resources to ensuring that the Union “is capable of fully assuming its responsibilities within the international community.” Certainly there will be closer integration in the sense of “pooling and, where appropriate, specialising their defence means and capabilities”, interoperability and development of common objectives in commitment of forces, alongside greater commitment to defence spending, research and work within the framework of the EDA on defence equipment programmes. Flexibility in this sense, which does not relate to the purpose or objectives of action but rather to the mechanisms used to achieve those objectives, will allow the CSDP to grow incrementally and to build on the different strengths – and willingness – of the Member States. In this respect, as in many, the Constitutional Treaty is not seeking to create something totally new, but rather to reflect existing realities and to channel existing powers.

3. Defence and other policy areas

46. The merging of the pillars achieved by the Constitutional Treaty has a particular relevance to the CSDP. At present, the EC Treaty is widely regarded as excluding all application of its principles to “arms, munitions and war material.”¹²⁶ So, for example, where a CFSP Common Position on sanctions includes an arms ban, the implementing EC Regulation will not cover arms; that aspect of the Common Position will be implemented directly by the Member States. However, this position has to be nuanced in two ways. First, it is quite clear that EC Treaty powers can be used to achieve CFSP objectives and this includes action relating to “dual-use” goods, goods the movement of which the Member States would be justified in restricting on grounds of public security.¹²⁷ Second, Article 296 TEC does not in fact have a completely exclusionary effect, i.e. it does not prevent trade in arms from falling within the scope of the EC Treaty.¹²⁸ Although it may provide an exception to any and all internal market rules, the measures adopted by a Member State must be “necessary for the protection of the essential interests of its security” and its exercise is subject to consultation obligations and to judicial review.¹²⁹ Case law and recent institutional practice has tended to confirm this reading of Article 296 TEC.¹³⁰

47. From this perspective, the approach of the Constitutional Treaty is significant. Article 296 TEC has not disappeared; it appears as Article III-436, right at the end of Part III. Articles 297 and 298 TEC in contrast appear in Article III-131 and 132, in the

¹²⁶ Article 296 TEC.

¹²⁷ C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v Germany* [1995] ECR I-3189; Regulation 1334/2000/EC OJ 2000 L 159/1; P. Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law*, Oxford, Hart, 2001, ch 5-6.

¹²⁸ P. Koutrakos, *ibid*, at p. 182-192. Commission Green Paper on Defence Procurement, COM (2004) 608 p. 5-6. C.f. also P. Koutrakos, ‘Is Article 297 EC A Reserve of Sovereignty?’, *CMLRev*, 2000, p. 1339.

¹²⁹ Article 298 (2) TEC.

¹³⁰ Directive 2004/18/EC OJ 2004 L 134/114, Article 10; Case C-414/97 *Commission v Spain* [1999] ECR I-5585, paras 21-22; Commission Green Paper on Defence Procurement, COM (2004) 608. The voluntary Code of Conduct of Defence Procurement agreed between 22 Member States within the framework of the EDA (see *supra* note 115) expressly states that it applies “without prejudice to their rights and obligations under the Treaties” and in cases “where the conditions for application of Art. 296 are met”.

chapter on the internal market. The positioning of Article III-436 (currently Article 296 TEC) shows that it is intended to apply to the whole of Part III, that is, it will operate as an exception even to the CFSP/CSDP chapters of Title V.¹³¹ Its placing confirms the non-exclusionary reading of Article 296 TEC: Article III-436 cannot have a completely exclusionary effect – it cannot be intended to take the field of armaments outside the Treaty framework altogether, as Articles I-41 (3) and III-311 on the EDA demonstrate. Rather, it operates as an exception: a Member State will be able to “take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material”. It is subject to the same control procedures as at present, that is, consultation with other Member States and the Commission, and possible recourse to the Court of Justice.¹³² The first paragraph of Article III-132 refers to action by the Commission if measures taken under Articles III-131 or III-436 have the effect of distorting the conditions of competition in the internal market. However the second paragraph, which allows for the jurisdiction of the Court of Justice in case of improper use of the powers granted by Articles III-131 or III-436, is not limited textually to cases where the internal market might be affected. Arguably such a limitation could be implied from the position of the provision (in the chapter on the internal market); however it is possible that an action taken by a Member State under Article III-436, which derogates from an obligation under the CSDP, would be subject to the jurisdiction of the Court under Article III-132.

4. Conclusion

48. The Constitutional Treaty provisions on the CSDP reflect the political will of the Member States to develop a more ambitious security and defence policy. They reflect the priorities of the European Security Strategy, especially the need for increased operational capability, and the importance of the multilateral and international legal framework. However they also reflect the fact that for the foreseeable future, the Union’s capabilities in the defence field will come from the Member States and thus progress requires the ability to work through groups of willing Member States, either in specific cases or in the form of permanent structured cooperation. The national security exception is retained, but the Treaty structure makes it clear that increasingly the Union will become involved in the hitherto national domains of armaments and defence. The EDA has started work already and provides a bridge between the CSDP and the more commercial aspects of defence policy, including procurement. The current Treaty provisions provide a basis for moving forward with defence policy, and even a common defence, were this to be desired. There is no current provision for permanent structured cooperation, so a formalisation of such a development would require Treaty amendment but could be done relatively simply.

¹³¹ For the relationship between Articles 296 to 298 TEC and the CFSP under the existing Treaties, see R.A. Wessel ‘The Inside Looking Out: Consistency and Delimitation in EU External Relations’, *CMLRev*, 2000, p. 1135.

¹³² Article III-132 refers to Article III-436. Thanks to Panos Koutrakos for conversation on these points.

V. COMMON COMMERCIAL POLICY

1. Aims and objectives of the Common Commercial Policy

49. The recasting of the provisions on the CCP in Articles III-314 and III-315 offers a clear improvement on the confusing and complex results of the Treaty of Nice amendments.¹³³ In what follows we cannot look at every aspect of the CCP but will merely draw attention to some of the major changes and issues arising.¹³⁴

50. First, we should note the altered wording of Article III-314 as compared with the current version. This article has been of importance as (i) it is the only indication we have in the Treaty of objectives governing one of the most important elements of external policy, and (ii) it has been used by the Court of Justice as evidence of the desire of the drafters of the Treaty to situate the Community firmly within the GATT (and now WTO) framework.¹³⁵ Article 131 (1) TEC provides:

“By establishing a customs union between themselves Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.”

51. Two things are of especial note: the importance of progressive liberalisation of trade, and the fact that this commitment, while real, is expressed as an “aim” rather than a firm obligation.¹³⁶ The commitment is then to orient policy in a particular direction (but without even a “standstill” obligation as regards existing restrictions) and, one could argue, to negotiate in a framework of progressive reduction of barriers (in practice within GATT/WTO and bilateral/regional agreements). The Convention text has expanded the scope of the provision to include references to the abolition of restrictions on foreign direct investment (FDI) and “other barriers” to trade alongside customs barriers. The former is an innovation reflecting the wider scope of the CCP which will be discussed below; the latter reflects the interpretation to the CCP given by the Court of Justice to include quantitative restrictions and measures of equivalent effect as well as tariffs.¹³⁷ In addition the “aim” becomes an aim of the Union, rather than of the Member States, reflecting the understanding of the CCP as an exclusive Union competence.¹³⁸ The final text of Article III-314 in the Constitutional Treaty reflects a small but significant change made by the legal working group of the IGC,¹³⁹ so that we now have “the Union *shall* contribute ...”. It would be interesting to see whether the Court would treat this imperative wording as imposing a stronger obligation towards trade liberalisation.

¹³³ See for example, M. Cremona, ‘A Policy of Bits and Pieces? The Common Commercial Policy After Nice’, *Cambridge Yearbook of European Legal Studies*, 2001, p. 61; H.G. Krenzler and C. Pitschas, ‘Progress or Stagnation? The Common Commercial Policy after Nice’, *EFARev*, 2001, p. 291; C. Herrmann, ‘Common Commercial Policy after Nice: Sisyphus would have done a better job’, *CMLRev*, 2002, p. 7.

¹³⁴ On the discussion in the Convention and IGC on procedures for the conclusion of trade agreements, see Part I Chapter XXVIII, paras 57-69.

¹³⁵ Cases 22-24/72 *International Fruit Company* [1972] ECR 1219, at paras 12-13.

¹³⁶ Case C-150/94 *UK v Council* [1998] ECR I-7235, at paras 67-68.

¹³⁷ Case C-62/88 *Greece v. Council* [1990] ECR 1527; *Opinion 1/94*, *supra* note 22, at para 33.

¹³⁸ Article I-13 (1).

¹³⁹ CIG 50/03, 25 Nov 2003, Article III-216.

52. This change in emphasis needs to be read alongside another change. As we have already seen, Article III-292 sets out a series of principles and objectives that are to guide all Union external action. This is reinforced by Article III-315 (1) which provides that the Union's CCP is to be "conducted in the context of" those principles and objectives. This provision is important: it makes it clear that the Union does not only have a liberalisation agenda, but that other objectives (human rights, sustainable development) must be taken into account in formulating trade policy within (for example) the WTO. It also makes explicit what is already the case: that trade policy can be used in order to attain other, non-economic objectives,¹⁴⁰ that links can be made between trade policy and the Union's principles and values, and it therefore also provides a basis for the use of conditionality in trade policy.¹⁴¹ However we should note the difference between the strengthened ("shall") liberalisation objectives of Article III-314 and the softer reference in Article III-315 (1) to the CCP being "conducted in the context" of other principles and objectives of the Union, suggesting a prioritisation which does not appear in Article III-292 itself.

2. Scope of the CCP

53. Article III-315 provides a welcome simplification to the complex provisions whereby the Treaty of Nice extended the scope of the CCP to cover aspects of trade in services and intellectual property (IP) rights. Instead of being relegated to a separate paragraph, they are now included, along with FDI, in paragraph one which outlines (non-exhaustively) the scope of the CCP.¹⁴² It should be noted, though, that there is still some ambiguity which reflects the not always clear relationship between the CCP and other Treaty provisions. Under the existing Article 133 (5) TEC, trade in services and commercial aspects of IP are covered by the CCP only insofar as the conclusion of agreements are concerned; autonomous external measures in these fields (unlike goods) must still be based on other "internal market" Treaty articles.¹⁴³ Article III-315 (1), with its reference to agreements, might be said to preserve this position, although it is not clear from the drafting to what extent the term "agreements" is intended to cover what follows.¹⁴⁴ In any event, it seems highly likely that autonomous external measures in

¹⁴⁰ Case C-62/88, *supra* note 138; Case 45/86, *supra* note 100.

¹⁴¹ Although there may be issues of WTO-compatibility in cases of differential treatment: see European Communities – Conditions For The Granting Of Tariff Preferences To Developing Countries, WT/DS246/AB/R, 7 April 2004.

¹⁴² For discussion of the debates over the scope of the CCP and its evolution, see M. Maresceau, 'The Concept "Common Commercial Policy" and the difficult road to Maastricht' in M. Maresceau (ed.) *The EC's Commercial Policy after 1992: The Legal Dimension*, The Hague, Kluwer, 1993; P. Eeckhout, *supra* note 52, chapter 2, and works cited *supra* note 134.

¹⁴³ I use the term "autonomous external measures", to refer to non-contractual acts relating to external trade rather than "internal acts" (Passos and Marquardt in Part I Chapter XXVIII of this volume, para 62 note 88) as the term internal act is more aptly used to cover purely internal measures, i.e. measures which relate to the internal market and do not have an external dimension: c.f. the reference to "internal policies and rules" in Article III-315 (3).

¹⁴⁴ It refers to "changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies." See Part I Chapter XXVIII of this

relation to services, IP and FDI are covered by Article III-315: (i) paragraph one is not an exhaustive list; (ii) “measures of liberalisation” mentioned in that paragraph will certainly include autonomous measures and should in principle cover all sectoral fields within the CCP; (iii) Article III-315 (2) refers to measures for implementing the CCP in general terms with no indication that certain areas such as services are excluded.

54. No definition of “services” is given and commentators have differed over whether this term in the current Article 133 TEC should be given the same meaning as it holds elsewhere in the Treaty, or whether it should be interpreted more broadly, in the light of the GATS, to cover also “commercial presence” (covered by the term “establishment” in the EC Treaty).¹⁴⁵ The Constitutional Treaty does not resolve this issue but removes its importance, as the inclusion of FDI clearly covers the GATS concept of commercial presence. The concept of FDI is not defined either; it has the potential to overlap with Article III-157 which gives competence to enact laws and framework laws on “the movement of capital to or from third countries involving direct investment”.¹⁴⁶ The exclusive nature of CCP competence means that the question of appropriate legal base is not a formality; is FDI really intended to cover and thus bring within exclusive Union competence the Member States’ extensive network of bilateral investment treaties?

3. Exclusivity and decision-making

55. A major change in the decision-making procedures for the CCP is to be welcomed: the CCP is to be implemented by way of “European laws”, thus involving the European Parliament as co-legislator under the ordinary legislative procedure, and this in turn means that the Parliament’s assent is required for the conclusion of CCP agreements.¹⁴⁷ Currently the European Parliament does not even have the right to be consulted over CCP measures or agreements. The wording of Article III-315 (2), under which this procedure will be used to “define the framework” for implementing the CCP, seems to suggest that the detail might be left to implementing legislation (by “European regulation” or even delegated European regulations). In addition, the multiple exceptions to the standard decision-making procedures in the current Treaty have been greatly simplified; the exceptional provisions for unanimous voting in the current Article 133 (5) have been limited, although it is easy to see room for argument as to when exactly the new conditions for unanimity in Article III-315 (4) would apply; it is clear that they reflect a lack of consensus over the extension of qualified majority voting alongside the extension of the scope of the CCP.¹⁴⁸

volume, at para 62 where it is argued that autonomous acts in the field of services, IP and FDI are covered by this formulation; Krajewski takes the same view: M. Krajewski, ‘External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?’, *CMLRev*, 2005, p. 91, at p. 109-110. For a contrary view, see A. Hable, *supra* note 40, at p. 37-38.

¹⁴⁵ In favour of a broader interpretation, see Passos and Marquardt, Part I Chapter XXVIII in this volume, para 62; M. Cremona, *supra* note 134; in favour of a narrower interpretation, see A. Hable, *ibid*.

¹⁴⁶ According to Passos and Marquardt there was discussion within the IGC on a proposal to include the provision relating to FDI in the Treaty chapter on capital movements, but this was rejected: Part I Chapter XXVIII in this volume, para 62 note 86.

¹⁴⁷ Articles III-315 (2) and 325 (6) (a) (v).

¹⁴⁸ Part I Chapter XXVIII in this volume, paras 64-68.

56. The CCP is one of the few areas of exclusive Union competence set out in the Constitutional Treaty.¹⁴⁹ The exceptions to exclusivity currently in Article 133 TEC are removed. Given that the internal market is expressly an area of shared competence,¹⁵⁰ although subject to pre-emption,¹⁵¹ the Constitutional Treaty reflects a distinction between internal competence (shared) and external competence (exclusive). Thus, although the word “internal” that appeared in the Convention draft has been removed from Article III-315 (6),¹⁵² it is the internal delimitation of competence that must be referred to (external competence already lying exclusively with the Union). In other words, that paragraph is intended to ensure that there will be no “reverse *AETR*” effect: external action by the Union under the CCP provision (for example by concluding an agreement relating to trade in services) will not then imply exclusivity with respect to later action taken internally in the same field.¹⁵³

4. Conclusion

57. In spite of a few remaining ambiguities, the CCP articles in the Constitutional Treaty are an undoubted improvement on the existing provisions; they are clearer and simpler, they make clear reference to the Union’s wider principles and objectives and the European Parliament will play a full part in policy development and treaty-making. It would certainly be desirable, and not legally difficult, to amend the existing EC Treaty in line with these provisions, with some necessary adjustments.

¹⁴⁹ Article I-13 (1).

¹⁵⁰ Article I-14 (2).

¹⁵¹ Article I-12 (2).

¹⁵² Compare Article III-217 (6) of the Convention draft as adjusted by the Working Party of IGC Legal Experts, CIG 50/03, 25 Nov. 2003: “The exercise of the competences conferred by this Article in the field of commercial policy shall not affect the delimitation of *internal* competences between the Union and the Member States ...” (emphasis added).

¹⁵³ Part I Chapter XXVIII in this volume, para 69. Once action has been taken internally, however, then Article I-12 (2) applies: the Member States may only exercise their competence “to the extent that the Union has not exercised, or has decided to cease exercising, its competence”.

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