CHAPTER 2

THE EU'S EXTERNAL RELATIONS REGIME: MULTILEVEL COMPLEXITY IN AN EXPANDING UNION

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1. INTRODUCTION: DEFINITION OF THE EU'S EXTERNAL RELATIONS

The external relations law of the European Union is generally considered to cover all relations between the European Union (and the European Communities) and third states or other international organisations. It is concerned both with competences and procedures (the institutional dimension) and with the norms and rules laid down in agreements concluded with third parties (the substantive dimension). After the qualification in 1963 of the Community as constituting 'a new legal order of international law',[1] one year later the Court confirmed the Community's 'own legal capacity and capacity of representation on the international plane'.[2] Obviously, the Community was not merely meant to govern the relations between its Member States but also to partly replace these Member States in their relations with third states and other international organisations. In fact, the extent to which the Community can do the latter may very well be the most important question in the law of external relations.

Since, at least in the early days, the Treaty did not devote too much space to the division of external competences between the Community and its Member States, developments in this field are to a large extent driven by case law. Thus, the 'outside' of the European Community was placed under the spotlight every now and then. After a boom in the 1970s, following judgments or opinions of the European Court of Justice like *ERTA*, *Kramer*, *Haegeman*, *International Fruit Company* and Opinion 1/76, and in the 1990s,[3] as a reaction to Opinions 1/91 and

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1 ECJ, Case 26/62 *Van Gend en Loos* [1963] *ECR* 1.

2 ECJ, Case 6/64 *Costa* v. *ENEL* [1964] *ECR* 585 at 593.

3 ECJ, Case 22/70 *Commission* v. *Council (ERTA)* [1971] *ECR* 263; ECJ, Case 181/73 *Haegeman* v. *Belgium* [1974] *ECR* 449, at 460, paras. 2-6; ECJ, Case 21-24/72 *International Fruit Company NV et al*. v. *Produktschap voor Groenten en Fruit* [1972] *ECR* 1219; ECJ, Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] *ECR* 741, paras. 3-4.

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1/92 (EEA), 2/91 (OECD) and especially 1/94 on the WTO Agreement,[4] the beginning of the new millennium seemed to herald yet another period in which the external dimension of the European Community received abundant attention. This may have been triggered by some new case law, in which the Court addressed the relationship between Community law and international law proper (e.g., *Racke*, *Opel Austria* and *Portugal* v. *Council*),[5] but also reflects the problems resulting from the establishment of the European Union (introducing external relations in separate but connected areas) and the subsequent modification treaties, as well as from the conclusion of the Treaty establishing a Constitution for Europe.

If nothing else, the external relations regime of the European Union reflects the tension that is apparent in the constitutional debate as well. It is in this area, in particular, that the complex relationship between the Union and its Member States presents itself in all its dimensions.[6] One way of making sense of this complex development is not to focus on an emerging constitution at the EU level, but instead to take account of the complex relationship with the Member States, as well as the unity of national and supranational legal orders, and to try and see a constitution made up of the constitutions of the Member States bound together by a complementary constitutional body consisting of the European Treaties.[7] Pernice describes this *Verfassungsverband* – as he calls it – as a multilevel constitution.[8] This approach acknowledges that one cannot simply place the

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[4] ECJ, Opinion 2/92 *OECD* [1995] *ECR* I-521; ECJ, Opinion 1/92 *EEA* [1992] *ECR* I-2821; ECJ, Opinion 1/94 *WTO* [1994] *ECR* I-5267.

[5] ECJ, Case C-162/96 *Racke GmbH & Co.* v. *Hauptzollamt Mainz* [1998] *ECR* I-3655, para. 45; CFI, Case T-115/94 *Opel Austria GmbH* v. *Council* [1997] *ECR* II-39, para. 77.

[6] This is not to say that this phenomenon is not more general. In the words of Joerges: '*De facto*, the dependence of European governance on the collaboration of the Member States is drastically perceptible everywhere one looks. This dependence determines the EU's shaping of political programmes which are then transposed with the help of the committee system; the inclusion of non-governmental organisations, and the preference for "soft law" and information policy measures. Equally important is the fact that the freedoms that European law guarantees are exercised outwith, or away from one's own Member State and, at the same time, can be upheld against one's own "sovereign".' Ch. Joerges, 'The law in the process of constitutionalizing Europe', paper presented at the ARENA Conference on Democracy and European Governance (4-5 March 2002) p. 33, available at: <http://www.arena.uio.no/events/Conference2002/documents/Joerges.doc>. The same line of thought can be discovered in A. Milward, *The European Rescue of the Nation State* (London, Routledge 1992).

[7] Cf., K. Lenaerts and M. Desomer, 'New models of constitution-making in Europe: The quest for legitimacy', 39 *CMLRev.* (2002) pp. 1217-1253 at p. 1219: 'There are no convincing legal arguments why a Constitution may not be made up of a variety of interconnected Treaty texts founding the legal order.'

[8] I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?', 36 *CMLRev.* (1999) pp. 703-750 at pp. 706-707 and 715: 'This perspective views the Member States' constitutions and the treaties constituting the European Union, despite their formal distinction, as a unity in substance and as a coherent institutional system, within which competence for action, public authority or, as one may also say, the power to exercise sovereign rights is divided among two or more levels. … This concept treats European integration as a dynamic

different issue areas of the Union (such as the internal market or foreign policy) under either the heading of supranationalism or intergovernmentalism, but that competences related to these issue areas are allocated between the different levels of decision making.[9] The evolution of the external relations regime reveals its (need for) flexibility. According to the Court's judgment in *ERTA*, 'the system of internal Community measures may not … be separated from that of external relations',[10] which means that variations in the allocation of competences between the Union and its Member States will have an impact on the external relations regime. And indeed, as one observer holds, 'the EU should be seen not as a static model, but as a dynamic experiment, a process or a laboratory in which new methods of integration, multi-level and multi-centred governance and a new constitutionalism are being worked on and bargained, and are evolving.'[11]

While keeping in mind the more specific focus of this book on the European Union and its neighbours, the present contribution aims to shed some light on the current legal and institutional framework of the European Union's external relations and on the problems related to the complex division of powers between the Union and its Member States in this area. A key question will be whether and to what extent the current twenty-five Member States still have powers to formulate and implement an external policy – including a neighbourhood policy – of their own. In the expanding European Union, the law and politics of external relations are characterised by a complexity of different levels of decision making, policy making and law-making that results in a major challenge for a coherent and effective EU foreign policy. Most of the legal analyses provided by the literature and cases brought before the ECJ concentrate on the division of external competences, in particular among the European Community and its Member States, as well as on the consequences of this division, *inter alia*, in the form of

process of constitution-making instead of a sequence of international treaties which establish and develop an organisation of international cooperation. The question "Does Europe need a Constitution?" is not relevant, because Europe already has a "multilevel constitution"… According to the concept of "multilevel constitutionalism", the Treaties are the constitution of the Community – or, together with the national constitutions, the constitution of the European Union – made by the peoples of the Member States through their treaty-making institutions and procedures.' The notion finds its source in the multi-level governance literature, popular in some political science approaches. See, for instance, L. Hooghe and G. Marks, *Multi-level Governance and European Integration*, (Lanham, MD, Rowan & Little Field Publishers 2001). In legal studies the notion has been picked up and applied, *inter alia*, by N. Bernard, *Multilevel Governance in the European Union* (The Hague, Kluwer Law International 2002).

9 On this issue, see U. Di Fabio, 'Some Remarks on the Allocation of Competences between the European Union and its Member States', 39 *CMLRev.* (2002) pp. 1289-1301; G. de Búrca and B. de Witte, 'The Delimitation of Powers Between the EU and its Member States', in A. Arnull and D. Wincott, eds., *Accountability and Legitimacy in the European Union* (Oxford, Oxford University Press, 2002) pp. 201-222.

10 ECJ, Case 22/70 *Commission* v. *Council (ERTA)* [1971] *ECR* 263, para. 19.

11 M. Cremona, 'The Union as a Global Actor: Rules, Models and Identity', 41 *CMLRev*. (2004) pp. 553-573 at p. 554.

the mixed agreements (international agreements in which Member States and European Community participate and share competences).[12] This is without doubt an important and complex subject which explains not only the dynamic nature of the entity that is the European Community/Union but also the complexity of external relations, with different actors and concrete legal questions relating to the impact of external relations on internal law, liability and legality. However, the overall complexity in the external policy field goes beyond law-making and concerns the internal management of external relations and its appearance towards third countries. The parallelism of competencesm[13] thus translates into a parallelism of complexities.

In an enlarged European Union, the division of competences to engage in international legal relations thus deserves renewed attention. What are the legal parameters on the basis of which the Community and the Union are competent to implement the so-called Wider Europe – Neighbourhood policy? In addition, is it possible to point to trends concerning the division of competences between the European Community/Union and its Member States? Before entering into the complexity of the second question (on the 'exclusivity' of competences), the following section starts by examining the state of affairs regarding the competences of the Community and the Union on the basis of the relevant treaties and case law (the 'existence' question).[14]

2. EXTERNAL COMPETENCES: BETWEEN ATTRIBUTED AND IMPLIED POWERS

2.1 **Competences based on the EC Treaty**

From the outset, the capacity of the Community to enter into legal relations with third states or other international organisations has been undisputed. In *Costa/ENEL*, the Court already referred to 'its own personality, its own legal capacity and capacity of representation on the international plane'.[15] The status enjoyed by the Community as a 'legal person' was already established by Article

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[12] On mixity, see A. Dashwood, 'Why continue to have mixed agreements at all?', in J.H.J. Bourgeois, J.-L. Dewost and M.-A. Gaiffe, eds., *La Communauté européenne et les accords mixtes* (Brussels, Presses Interuniversitaires Européennes 1997) pp. 93-99; N.A. Neuwahl, 'Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member States: Mixed Agreements', 28 *CMLRev.* (1991) pp. 717-740.

[13] On the doctrine of parallelism, see, for instance, M. Cremona, 'External Relations and External Competence: The Emergence of an Integrated Policy', in P. Craig and G. de Búrca, *The Evolution of EU Law* (Oxford, Oxford University Press 1999) pp. 137-176 at p. 139.

[14] The distinction is borrowed from A. Dashwood, 'Implied External Competence of the EC', in M. Koskenniemi, ed., *International Law Aspects of the European Union* (The Hague, Kluwer Law International 1998) pp. 113-124.

[15] ECJ, Case 6/64 *Costa* v. *ENEL* [1964] *ECR* 585.

281 TEC, which simply states that '[t]he Community shall have legal personality.' The same provision makes clear that a number of legal capacities are connected to this status: 'In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws…'.[16] However, two questions were not completely answered at that time. First, does the Community also enjoy objective legal personality, that is to say, can it enter into legal arrangements with non-Member States? Second, if so, does Article 281 constitute a general legal basis for international action by the Community?

Regarding the first question, the Court confirmed the earlier observation that the Community is competent to enter into international agreements with third states in its *ERTA* judgment of 1971. After all, the Treaty explicitly allowed the Community to do so with regard to some issue areas (e.g., Article 133 concerning trade relations). However, in *ERTA*, the Court also acknowledged the treaty-making capacity of the Community in cases where this was not explicitly provided for in the Treaty: 'Such authority arises not only from an express conferment by the Treaty … but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.' In fact, 'regard must be had to the whole scheme of the Treaty no less than to its substantive provisions.'[17]

Following this line of reasoning, one could come to the conclusion that the capacity to enter into international agreements could be used across the board. Based on the place of Article 281 in the 'General and Final Provisions', the Court held 'that in its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty.'[18] Nevertheless, the Court made clear that 'capacity' should not be interpreted as a 'competence' to enter into every international agreement. Account should be taken of the 'attribution principle' (now in Article 5, first paragraph, TEC), which implies that the Community must be specifically authorised to deal with a particular issue.[19]

One could thus argue, on the basis of an interpretation of the *ERTA* case, that the Community has a general capacity to enter into international agreements, as long as authorisation follows either from explicit attribution of that competence or from other provisions implying an international competence. Since then, the link between the international competence and existing provisions has become more

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[16] On the distinction between 'personality' and 'capacity', see R.A. Wessel, 'Revisiting the International Legal Status of the EU', 5 *EFA Rev*. (2000) pp. 507-537.

[17] ECJ, Case 22/70 *Commission* v. *Council (ERTA)* [1971] *ECR* 263, paras. 15-16.

[18] Ibid., para. 14.

[19] See more extensively A. Dashwood and J. Heliskoski, 'The Classic Authorities Revisited', in A. Dashwood and C. Hillion, *The General Law of E.C. External Relations* (London, Sweet & Maxwell 2000) pp. 3-19 at pp. 6-7.

loose. In Opinion 1/76, the Court seemed to place the 'attribution principle' into perspective by holding that 'authority to enter into international commitments may not only arise from an express attribution by the Treaty, but may equally flow implicitly from its provisions.'[20] Here, the argument was that external competence was needed for the Community to attain its objectives. The (implied) powers were thus related to the so-called 'complementarity principle':[21] an external competence exists as a necessary corollary of an existing internal competence. Or, as generally phrased in Opinion 1/76:

> The Court has concluded *inter alia* that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion. …
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> Although the internal Community measures are only adopted when the international agreement is concluded and made enforceable … the power to bind the Community *vis-à-vis* third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is … necessary for the attainment of one of the objectives of the Community.[22]

Nevertheless, subsequent case law made clear that, although the principle of complementarity was clearly upheld, this also implied that no division could be made in the application of the attribution principle in relation to internal and external competences. After all, if the Community would enjoy a general power to enter into international agreements in furtherance of any objective whatsoever, the attribution principle would be undermined.[23] And, indeed, in Opinion 2/94, the Court clearly stated that 'the principle of conferred powers must be respected in both the internal action and the international action of the Community.'[24] Implied powers thus have their limits.

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[20] ECJ, Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] *ECR* 741, para. 3.

[21] Dashwood and Heliskoski, loc. cit. n. 19, at pp. 12-13, seem to have a point in arguing that this label describes the relationship between internal and external competences better than the more widely used term 'parallelism'. After all, 'things which are parallel, run alongside each other without ever meeting'.

[22] ECJ, Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] *ECR* 741, paras. 3-4. Also in the *Kramer* judgment, Joined Cases 3, 4, and 6/76 *Cornelis Kramer and others* [1976] *ECR* 1279.

[23] Cf., A. Dashwood, 'The Attribution of External Relations Competence', in Dashwood and Hillion, op. cit. n. 19, pp. 115-138 at p. 117.

[24] ECJ, Opinion 2/94 *Accession by the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] *ECR* I-1759.

Express references to external action were rare in the original EC Treaty, and were limited to what are now known as Article 133 (on the implementation of the Common Commercial Policy),[25] Article 310 (on the conclusion of Association Agreements) and three provisions on other international cooperation: Article 302 (on the duty of the Commission to maintain appropriate relations with the United Nations, the GATT organs and other international organisations), Article 303 (on cooperation with the Council of Europe) and Article 304 (on cooperation with the OECD). The general procedural arrangements were – and although amended are – laid down in (current) Article 300(1):

> Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.

The Single European Act (1986) extended the Community's explicit external competences to other fields that were thought to form part of the newly introduced concept of the 'internal market': agriculture and fisheries (Article 37),[26] transport (Article 71), competition (Article 83), the harmonisation of indirect taxation (Article 93) and the general approximation of legislation and administrative practices (Article 94). In addition, the SEA introduced the possibility of international action in furtherance of internal Community policy in some areas. Even before the establishment of the European Union, we have thus been able to witness an evolution in the express external powers of the Community from commercial policy and the conclusion of Association Agree-ments to research and technology (Article 170) and environmental policy (Articles 174(4) and 175).[27] The Treaties of Maastricht, Amsterdam and Nice subsequently provided not only for a broadening of the scope of the Common Commercial Policy, but also for external powers in development policy (Article 181), monetary matters, cooperation powers with third states (related to education, culture, health and

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[25] Originally Article 113 TEC. Article 114 concerned the conclusion of agreements by the Council and has been repealed. For an application, see Council Decision of 2 June 1997 concerning the conclusion of the Euromed Interim Association Agreement on trade and cooperation between the EC and the Palestine Liberation Organisation for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, *OJ* 1997 L 187/1. This Council Decision refers to Articles 133 and 181 EC.

[26] See, for instance, Council Decision of 25 July 1983 on the accession of the Community to the Convention on fishing and conservation of the living resources in the Baltic Sea and the Belts, *OJ* 1983 L 237/4.

[27] Council Decision of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, *OJ* 2002 L 130/1.

trans-European networks), including a new legal basis for economic, financial and technical cooperation with third countries (Article 181a).

Special attention should be devoted to Title IV TEC, the communitarised part of the Justice and Home Affairs domain, which deals with visas, asylum, immigration and other policies related to the free movement of persons. As no explicit external competences can be found in this title, the competences of the Community in this area depend on the existence of implied powers. Indeed, complementary external action can be envisaged in relation to a number of internal competences in the fields of asylum, immigration and civil law cooperation, including more concrete powers related to illegal immigration and the residence and repatriation of illegal residents (Article 63(3)(b) TEC). Practice has revealed the use of these competences, for instance, in the conclusion of readmission agreements with a number of third countries as well as in readmission clauses in Political Dialogue and Cooperation Agreements and Association Agreements.[28]

The external competences – and more specifically their division – have been subject to dispute from the outset. Irrespective of the limited number of explicit provisions in the original Treaty, the Community was already involved in so many agreements by the end of the 1960s that the question of how to justify its treaty-making power and how to define its scope in relation to the remaining treaty-making powers of its Member States arose. We have already referred to the landmark *ERTA* case, in which the ECJ developed the doctrine of parallelism in such a way that competences flow not only from the express conferral of competences but also from implicit competences, such as the other Treaty provisions, the Act of Accession and the measures adopted.[29] Matters were further complicated when the Court ruled that the Community can rely on its implicit competences even when they have not yet been used for internal measures. These implicit competences may, in turn, lead to exclusive external competences. This very broad interpretation was refined in later judgments as a special exemption, which is only to be used when it is necessary to achieve Treaty objectives that cannot be attained by the adoption of autonomous Community rules,[30] or in the words of the ECJ:

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[28] Cf., Council Decision of 17 December 2003 concerning the conclusion of the Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation, *OJ* 2004 L 17/23. See more extensively J. Monar, 'The EU as an International Actor in the Domain of Justice and Home Affairs', 9 *EFA Rev* (2004) pp. 395-415.

[29] ECJ, Case 22/70 *Commission* v. *Council (ERTA)* [1971] *ECR* 263. See also these other judgments: ECJ, Joined Cases 3, 4 and 6/76 *Cornelis Kramer and others* [1976] *ECR* 1279; ECJ, Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] *ECR* 741, paras. 3-4.

[30] ECJ, Opinion 2/92 *OECD* [1995] *ECR* I-521, at 559, para. 32; ECJ, Opinion 1/94 *WTO* [1994] *ECR* I-5267, at 5413.

> [W]henever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts (Opinion 1/94, paragraph 95; Opinion 2/92, paragraph 33).
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> The same applies, even in the absence of any express provision authorising its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation in a given area, because the common rules thus adopted could be affected within the meaning of the *ERTA* judgment if the Member States retained freedom to negotiate with non-member countries (Opinion 1/94, paragraph 96; Opinion 2/92, paragraph 33).[31]

In most of the agreements concluded, except for trade agreements, the Commission and the Council decided to involve the Member States and conclude so-called mixed agreements. Parallel to this pragmatic inclusion of Member States for reasons of legal liability and blurred lines of competences, the ECJ has at least established that the areas of the Common Commercial Policy,[32] the Common Fisheries Policy[33] and competition policy[34] belong to the exclusive competences of the European Communities. This external relations *acquis* is confirmed in Part I of the Constitutional Treaty, specifically in Article I-13(1), which also includes a codified *ERTA* doctrine.[35]

The evolution of the Community's external powers is further proof of the fact that Community policy – in the words of Cremona – 'emerges within an international context and increasingly that international context is helping to define the content of that policy, while Community policy and institutions contribute to the development of international norms and standards.'[36]

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[31] Open Skies judgments: ECJ, Case C-467/98 *Commission* v. *Denmark* [2002] *ECR* I-9519.

[32] ECJ, Case 41/76 *Donckerwolke and Schou* v. *Procureur de la République* [1976] *ECR* 1921; the scope of the Common Commercial Policy in relation to services and intellectual property was only defined by the WTO opinion, see ECJ, Opinion 1/94 *WTO* [1994] *ECR* I-5267.

[33] More precisely the conservation of the biological resources of the sea: ECJ, Joined Cases 3, 4 and 6/76 *Cornelis Kramer and others* [1976] *ECR* 1279; ECJ, Case 804/97 *Commission* v. *UK* [1981] *ECR* 1045, para. 20.

[34] ECJ, Opinion 1/92 *EEA* [1992] *ECR* I-2821, paras. 40-41; I. MacLeod, I.D. Hendry and S. Hyett, *The External Relations of the European Communities* (Oxford, Clarendon Press 1996) pp. 56-57.

[35] 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.'

[36] Cremona, loc. cit. n. 13, at p. 148.

2.2 Competences based on the Treaty on European Union

The introduction of the Common Foreign and Security Policy (in Title V of the 1992 Maastricht Treaty) and the more recent European Security and Defence Policy extended the external competences of the Community/Union beyond economy-related issues. The same increasingly holds true for Police and Judicial Cooperation in Criminal Matters (Title VI TEU). The main instruments to be used in implementing the CFSP are enumerated in Article 12 TEU, which outlines the means to achieve the objectives listed in Article 11:

> The Union shall pursue the objectives set out in Article 11 by:
> – defining the principles of and general guidelines for the common foreign and security policy;
> – deciding on common strategies;
> – adopting joint actions;
> – adopting common positions;
> – strengthening systematic cooperation between Member States in the conduct of policy.

An interesting new development is that apart from these means in Article 12 TEU, the CFSP objectives may also serve to establish an external *Community* competence. In two judgments of September 2005, the Court of First Instance held that in the area of sanctions the Community is competent to impose financial sanctions on individuals (irrespective of Article 60 TEC indicating otherwise) because this is covered by the objectives of the *Union*.[37]

In general, however, CFSP objectives are to be attained through CFSP means. Apart from the instruments listed in Article 12, which all find their basis in different provisions (Articles 14 and 15 in particular), other legal bases can be found in Article 17 (concerning defence issues) and Article 18(5) (concerning the appointment of special representatives).[38] Furthermore, practice has revealed the frequent use of the instrument of declarations.[39] This implies that there are different

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[37] CFI, Cases T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation* v. *Council and Commission* and T-315/01 *Yassin Abdullah Kadi* v. *Council and Commission* [2005] *ECR*, nyr.

[38] Practice revealed the possibility of using Article 18(5) as an autonomous legal basis. See, for instance, Council Decision 1999/361/CFSP of 31 May 1999 implementing Common Position 98/633/CFSP defined by the Council on the basis of Article J.2 of the Treaty on European Union concerning the process on stability and good-neighbourliness in South-East Europe, *OJ* 1999 L 141/1.

[39] For example: Declaration by the Presidency on behalf of the European Union on the situation in Togo, 6 June 2005, 9750/05; Declaration by the Presidency on behalf of the European Union on Belarus, 27 September 2004, 12735/04; Declaration by the Presidency on behalf of the European Union on the parliamentary elections and the referendum of 17 October 2004 in Belarus, 20 October 2004, 13728/04.

instruments as well as different legal bases at the disposal of the Union to shape its policy, while at the same time the enumeration of means in Article 12 must be considered non-limitative.[40]

The competences relating to Police and Judicial Cooperation in Criminal Matters can be found in Article 34(2) which allows the Council to:

> … take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:
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> (a) adopt common positions defining the approach of the Union to a particular matter;
> (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;
> (c) adopt decisions for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union;
> (d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council.

Although the external dimension of these competences in Title V and VI TEU is obvious, it is ironic to note that – once again – they basically relate to the relationship between the Union and its Member States rather than its relationship with third states and other international organisations. This means that explicit external competences are largely absent in these areas as well and that external action should be connected to the internal competences, ranging from the representation of the Union by the High Representative or the Presidency in CFSP matters to the emerging defence dimension.[41] The only explicit competence concerns the treaty-making power of the Union (see below).

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[40] This would seem to be confirmed by Article 23(2), first indent, which refers to joint actions, common positions or any other decision taken on the basis of a common strategy.

[41] See more extensively Wessel, loc. cit. n. 16, at pp. 533-536.

The question of the division of competences between the Union and the Member States (or the possible exclusivity of Union competences) is more difficult to answer. The EU Treaty is silent on this issue and case law is obviously absent. Most probably, the answer is to be found in the nature of the legal regime governing the non-Community parts of the Union. The CFSP obligations are largely procedural in nature and only foresee a common policy (read: Union policy) to the extent that this is supported by the Member States. The key principle underlying the CFSP is Article 16, which provides enough leeway to the Member States to prevent issues from being placed on the Union's agenda in the first place. Irrespective of the obligation in Article 16 for Member States to 'inform and consult one another within the Council on any matter of foreign and security policy', the subsequent words 'of general interest' indicate a large margin of discretion on the side of (individual) Member States. And although there is an obligation to try and reach a common policy, in the case of a failure to do so the Member States remain free to pursue their own national policies.[42] A similar starting point may be found in Article 34(1) in relation to Police and Judicial Cooperation in Criminal Matters.

3. THE CONCLUSION OF INTERNATIONAL AGREEMENTS AND THEIR STATUS IN THE UNION

3.1 **The EC Treaty**

In the Community, international agreements are concluded according to the procedural provisions of Article 300 TEC, with derogations for agreements on the exchange-rate system for the ECU, monetary or foreign exchange regime matters relating to Article 111(1) and (3) TEC and the Common Commercial Policy in Article 133 TEC.[43] Article 300 TEC clarifies the division between external and internal competences. It does not constitute a competence norm but implies external competences without specifying them.[44] It addresses the internal division of competencies among the Community institutions and the procedural dimension of treaty making. Negotiations are conducted by the Commission according to the guidelines set by the Council; the conclusion and implementation of agreements

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[42] One may argue, however, that at one moment this may conflict with Article 11(2), which provides that 'The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity.' On the other hand, there must first be something to support in that case. In the absence of any Union policy, this provision seems less relevant.

[43] Article 101 of the outdated but still applicable Euratom Treaty contains a separate provision on the conclusion of international agreements with third states.

[44] See, for instance, A. Wünschmann, *Geltung und gerichtliche Geltendmachung völkerrechtlicher Verträge im Europäischen Gemeinschaftsrecht* (Berlin, Duncker & Humblot 2003) p. 31.

fall under the responsibility of the Council. Nevertheless, the Commission, on the basis of Article 302 TEC, is responsible for the relations with international organisations. The legal question of whether and to what extent the Commission is allowed to conclude international agreements, especially executive agreements, on its own initiative has already been addressed. Article 300(1) TEC provides the Commission's mandate to conduct negotiations.[45] The Court clarified that the expression 'agreement' in Article 300 TEC (then Article 228 TEC) was to be understood in a broad sense. On the other hand, Article 300(2) sets the boundary ('subject to the powers vested in the Commission in this field…') and the Commission's powers are clearly limited to administrative or working agreements, which implement the working relations with international organisations in accordance with Article 302.[46] Consequently, the role of the Commission is strictly limited to the management of external relations under the auspices of the Council, and negotiations take place on the basis of a mandate given by the Council. Recent case law reveals that this mandate may also include the negotiation of guidelines that create no legally binding effect and have a clearly defined scope.[47]

Compared to national parliaments and their classical pivotal role in the ratification process of international treaties, the role of the European Parliament is restricted, although it has evolved over the years thanks to successive treaty reforms.[48] Particularly striking is the limited role of the European Parliament in the important field of the Common Commercial Policy on the basis of Article 133 TEC. Contrary to the wording of Article 300(3), the European Parliament is at least consulted in practice. In other areas – in particular those having important budgetary implications – the collaboration of the European Parliament in the form of assent is necessary. This is the case also for Association Agreements on the basis of Article 310 and agreements that entail amendments to an act adopted under the procedure outlined in Article 251 TEC. This list reflects the parallelism of internal-external competences, which was addressed above. Adding to the complexity, the European Court of Justice not only assesses the legality of international agreements through the preliminary rulings procedure outlined in Article 234 TEC but may also render an opinion on the legality of an envisaged agreement

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[45] ECJ, Case C-327/91 *French Republic* v. *Commission* [1994] *ECR* I-3641. See also W. Hummer, 'Enge und Weite des "Treaty making Power" der Kommission der EG nach dem EWG-Vertrag', in A. Randelzhofer, R. Scholz and D. Wilke, eds., *Gedächtnisschrift für E. Grabitz* (Munich, Beck Verlag 1995) pp. 195-226.

[46] ECJ, Case C-327/91 *French Republic* v. *Commission* [1994] *ECR* I-3641, paras. 24-37; C. Tietje, 'Artikeln 302-304 EGV Absatz 7', in E. Grabitz and M. Hilf, eds., *Das Recht der Europäischen Union* (Munich, Beck 2000).

[47] On the Guidelines negotiated between the Commission and the United States of America, which were based on an Action Plan for the Transatlantic Economic Partnership between the European Union and the United States, see ECJ, Case C-233/02 *France* v. *Commission* [2004] *ECR* I-2759.

[48] See S. Krauss, 'The European Parliament in External Relations: The Customs Union with Turkey', 5 *EFA Rev* (2000) pp. 215-237.

before it comes into force on the basis of Article 300(6). This legal instrument of compliance control before ratification has been used quite frequently ever since the European Community resorted to mixed agreements, with the conclusion of extensive Association Agreements in different policy fields, involving both the European Community and Member States to bridge competence conflicts internally.[49]

As a final observation in this section, it should be noted that the treaty-making capacity is not restricted to the European Community as such. Apart from the capacity of the European Central Bank to enter into legal relations with third actors (on the basis of Article 23 of the ECB Statute),[50] it could be argued, on the basis of the general legal personality of most of the agencies in the Community, that they are meant to be able to act in the international public sphere as well.[51]

3.2 The Treaty on European Union

With regard to international agreements concluded by the Union, Article 24 TEU is the applicable provision. This provision is modelled after Article 300 TEC, as indicated for instance by its paragraph 6,[52] and has undergone changes with the Nice Treaty revision.[53] However, as will be shown below, there are clear differences between the Community and Union procedures. Article 24 TEU provides:

> When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title, the Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency.

The scope of this provision extends to Police and Judicial Cooperation in Criminal Matters, as the cross-references in Articles 24 (CFSP) and 38 (PJCC) indicate. This turns the provision into the general legal basis for the Union's treaty-making. The debate on whether such agreements are concluded by the

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[49] See, for instance, the following legal opinions: ECJ, Opinion 2/92 *OECD* [1995] *ECR* I-521; ECJ, Opinion 1/92 *EEA* [1992] *ECR* I-2821.

[50] See D.-C. Horng, 'The European Central Bank's External Relations with Third Countries and the IMF', 9 *EFA Rev.* (2004) pp. 323-346.

[51] R. van Ooik, 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance', in D.M. Curtin and R.A. Wessel, eds., *Good Governance and the European Union: Reflections of Concepts, Institutions and Substance* (Antwerp, Intersentia 2005) pp. 125-152.

[52] Compare with Article 300(7) TEC.

[53] Namely the inclusion of paragraph 6 and an extension of qualified majority voting. See E. Regelsberger and D. Kugelmann, 'Artikel 24 EUV Absatz 1', in R. Streinz, *EUV/EGV* (Munich, Beck 2003).

Council on behalf of the Union or on behalf of the Member States[54] seems to be superseded by practice now that the Union has become a party to a number of international agreements on the basis of Article 24.[55] The regime of Article 24 and the connected Declaration No. 4 adopted by the Amsterdam IGC[56] reflects the multilevel character of the external relations regime. Article 24 provides that the Council concludes international agreements after its members (the Member States) have unanimously agreed that it can do so.[57] The above-mentioned Declaration does not seem to conflict with Article 24 TEU. Since the right to conclude treaties is an original power of the Union itself, the treaty-making power of the Member States remains unfettered. The Declaration can only mean that this right of the Union must not be understood as creating new substantive competences for it.[58] The Nice Treaty underlined the separate competence of the Union to conclude treaties. According to modified paragraphs 2 and 3 of Article 24, the Council shall still act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions, but it will act

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54 See, in particular, N. Neuwahl, 'A Partner with a Troubled Personality: EU Treaty-Making in Matters of CFSP and JHA after Amsterdam', 3 *EFA Rev*. (1998) pp. 177-196; Cremona, loc. cit. n. 13, at p. 168. Cf., also J.W. de Zwaan, 'Community Dimensions of the Second Pillar', in T. Heukels, et al., *The European Union after Amsterdam: A Legal Analysis* (The Hague, Kluwer Law International 1998) p. 182. See also J.W. de Zwaan, 'The Legal Personality of the European Communities and the European Union', 30 *NYIL* (1999) pp. 75-113. It has even been argued that Article 24 agreements are 'not legally binding' and not to be viewed as treaties. See the opinion of the Dutch Government in the documents of the Second Chamber, TK 1997-1998, 25 922 (R 1613), No. 5, at p. 51.

55 The first treaties were concluded in 2001 and concerned agreements with the Federal Republic of Yugoslavia and Macedonia concerning the activities of the EU observer mission in that country. Agreement between the European Union and the Federal Republic of Yugoslavia, *OJ* 2001 L 125/2. The agreement with Macedonia can be found in *OJ* 2001 L 241/2. Subsequent treaties include the participation of third states in operations in the framework of the Union's security and defence policy. Apart from agreements with states, the Union may also engage in a legal relationship with another international organisation, as shown by the agreements concluded with NATO on defence cooperation in 2003. See Council Decision 2003/211/CFSP of 24 February 2003 concerning the conclusion of the Agreement between the European Union and the North Atlantic Treaty Organisation on the Security of Information, *OJ* 2003 L 80/35, which includes the text of the Agreement. See further R.A. Wessel, 'The State of Affairs in EU Security and Defence Policy: The Breakthrough in the Treaty of Nice', 8 *Journal of Conflict & Security Law* (2003) pp. 265-288.

56 Declaration No. 4 reads: 'The Provisions of Article J.14 and K.10 [now Articles 24 and 38 TEU] of the Treaty on European Union and any agreements resulting from them shall not imply any transfer of competence from the Member States to the European Union.'

57 The explicit reference to the unanimity rule (as a *lex specialis*) seems to exclude the applicability of the general regime of constructive abstention in cases where unanimity is required as foreseen in Article 23 TEU. Furthermore, as indicated by G. Hafner, 'The Amsterdam Treaty and the Treaty-Making Power of the European Union: Some Critical Comments', in G. Hafner, et al., *Liber Amicorum Professor Seidl-Hohenveldern – in Honour of his 80th Birthday* (The Hague, Kluwer Law International 1998) p. 279, the application of the constructive abstention to Article 24 would make little sense, since Article 24 already provides the possibility of achieving precisely the same effect insofar as Member States, by referring to their constitutional requirements, are entitled to exclude, in relation to themselves, the legal effect of agreements concluded by the Council.

58 As also submitted by Hafner, op. cit. n. 57, at p. 272.

by a qualified majority whenever the agreement is envisaged to implement a joint action or common position. Finally, paragraph 6 sets out that the agreements concluded by the Council shall also be binding on the institutions of the Union. This explicitly answers the question of whether the Union may have obligations under international law apart from the obligations of the Member States.

According to its second paragraph, and in conjunction with Article 38 TEU, Article 24 also applies to international agreements concluded in the area of Police and Judicial Cooperation in Criminal Matters.[59] The Council has so far made use of the treaty-making capacity of the Union in this area in a number of cases.[60] However, Article 24 TEU displays obvious differences to the structure of Article 300 TEC.[61] The Commission has a subordinate role in assisting the Presidency in negotiations, where appropriate, and the Council decides unanimously in cases where the internal adoption would require unanimity. In other cases, qualified majority voting is possible. The same holds true when an agreement is envisaged in order to implement a joint action or common position. Qualified majority voting takes place in accordance with the special procedure laid down in either Article 23(2) (CFSP) or Article 34(3) (PJCC) TEU. Neither the European Parliament nor the European Court of Justice has a role in the conclusion or control of agreements concluded by the Union.

A maybe somewhat confusing provision can be found in Article 34(2)(d), which authorises the Council to establish 'conventions' in the field of Police and Judicial Cooperation in Criminal Matters, which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. However, this provision only applies to agreements among Member States and not to agreements between Member States and third countries.[62] They are part of the Union's primary law, which defines their interpretation.[63] Nevertheless external effects are not completely absent. Thus, the Convention on Mutual

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[59] On this issue, see Monar, loc cit. n. 28.

[60] See the EU-US Agreement on Extradition, *OJ* 2003 L 181/27, the EU-US Agreement on Mutual Legal Assistance, *OJ* 2003 L 181/34, and the Agreement between the European Union and Iceland and Norway on the application of certain provisions of the EU Convention on Mutual Assistance in Criminal Matters, *OJ* 2004 L 26/3.

[61] For example, the Agreement between the European Union and the Federal Republic of Yugoslavia on the activities of the European Union Monitoring Mission (EUMM) in the Federal Republic of Yugoslavia, *OJ* 2001 L 125/2-4. On Article 24 TEU, see S. Marquardt, 'The Conclusion of International Agreements under Article 24 of the Treaty of the European Union', in V. Kronenberger, *The European Union and the International Legal Order: Discord or Harmony?* (The Hague, T.M.C. Asser Press 2001) p. 333.

[62] See further W. Brechmann, 'Artikel 34 Absatz 11', in C. Calliess and M. Ruffert, eds., *Kommentar zu EU-Vertrag und EG-Vertrag* (Neuwied, Luchterhand 1999). Since the entry into force of the Amsterdam Treaty in 1999, the use of conventions has become less popular. The further integration in this policy area called for more decisions of the Council rather than agreements between the Member States. See also P.J. Kuijper, 'The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects', 41 *CMLRev*. (2004) pp. 609-626.

[63] H. Satzger, 'Artikel 34 EUV Absatz 12', in Streinz, op. cit. n. 53.

Assistance in Criminal Matters between the Member States, for instance, forms the basis for the agreement between the European Union, Iceland and Norway on the application of certain provisions of this Convention between them.[64]

The difference with treaties concluded on the basis of the EC Treaty is further relevant in relation to the role of the Court. While the Court currently has no control over the CFSP, Article 35 TEU, in conjunction with Article 46 TEU, enables some legal control by the ECJ when it comes to aspects of Police and Judicial Cooperation in Criminal Matters. The limits and tasks of the ECJ in this area are under-explored, and it was only in a 1998 case concerning air transit visas that the judges emphasised that the jurisdiction of the Court extends to ensure that acts concluded on the basis of former Article K.3 TEU (now Article 30 TEU) do not affect the provisions of the EC Treaty.[65] In principle, both areas – the Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters – can come under scrutiny by the ECJ when legal acts have implications for first pillar matters. A second pillar example can be found in the case concerning a sanctions measure relating to the Federal Republic of Yugoslavia which also found its legal base in the EC Treaty (Article 301).[66]

Furthermore, external effects can be found on the basis of what is probably the Union's most famous convention, namely the Europol Convention. It is particularly striking that Europol can negotiate and sign agreements with non-EU countries or bodies in its own right, but with approval by the Council. Article 42(2) of the Europol Convention enables the organisation to establish and maintain relations with third states and third bodies. Ever since 2001, Europol has made full use of this competence.[67]

Finally, Article 49 TEU deserves to be mentioned, as it refers to Accession Treaties concluded between current and new Member States. This type of treaty is characterised by the ECJ as an international agreement and is also to be regarded as forming part of the Union's primary law.[68] It needs to be ratified by all parties,

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64 Agreement between the European Union and Iceland and Norway on the application of certain provisions of the Convention on Mutual Assistance in Criminal Matters, *OJ* 2004 L 26/3-9. See chapter 4 on the EEA countries in this volume.

65 ECJ, Case C-170/96 *Commission* v. *Council* [1998] *ECR* I-2763.

66 See, for instance, ECJ, Case C-317/00 P *'Invest' Import und Export GmbH and Invest Commerce* v. *Commission* [2000] *ECR* I-9541. On this topic, see more extensively R.A. Wessel, 'Fragmentation in the Governance of EU External Relations: Legal Institutional Dilemmas and the New Constitution for Europe', in J.W. de Zwaan, et al., eds., *The European Union – An Ongoing Process of Integration – Liber Amicorum Alfred E. Kellermann* (The Hague, T.M.C. Asser Press 2004) pp. 123-140.

67 The first agreement was signed on 6 December 2001 and concerned an exchange of information in the fight against international crime between Europol and the United States (Council Doc. 14586/01). For an extensive survey, see S. Peers, 'Governance and the Third Pillar: The Accountability of Europol', in Curtin and Wessel, op. cit. n. 51, at pp. 253-276.

68 ECJ, Case C-171/96 *Rui Alberto Pereira Roque* v. *His Excellency the Lieutenant Governor of Jersey* [1998] *ECR* 4607; ECJ, Case C-445/00 *Republic of Austria* v. *Council* [2003] *ECR* I-8549, para. 62.

but not by the Union. The complex relationship (or coexistence) between primary European law and international law among the current and new Member States simultaneously has consequences for legal review.[69] In the *LAISA* case, the Court denied legal review – on the basis of an annulment procedure – on the grounds that the Act of Accession would not fall under the broad definition of a binding act with legal effect.[70] This was further refined by *Republic of Austria* v. *Council* in 2003, in the sense that the protocols and annexes to an act of accession constitute primary law which, unless that act provides otherwise, may not be suspended, amended or repealed otherwise than in accordance with the procedure established for review of the original Treaties.[71] In other cases, however, the Act of Accession came under scrutiny in line with the legal proceedings at stake.[72] Therefore, the Act of Accession and the Accession Treaty came under legal review only when a preliminary ruling was given on their scope,[73] when the Act of Accession had been infringed or when the Court examined secondary law that had been modified by the Act of Accession. These conditions have to be seen in the context of procedural Community law and the subject under review. Article 234 TEC is meant, *inter alia*, for the interpretation of the Treaty, including the Accession Treaties,[74] whereas the annulment procedure of Article 230 TEC reviews the legality of acts[75] on the grounds of an infringement of the EC Treaty, including the Accession Treaties.[76]

3.3 The status of international law in the Union and its Member States

The ECJ has regularly been confronted with international agreements and their legal consequences, in particular through preliminary questions on the basis of Article 234 TEC, when EU citizens, companies or third-country nationals residing in a Member States have invoked provisions of international agreements such as free trade agreements and Association Agreements. Depending on the

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69 ECJ, Joined Cases 194 and 241/85 *Commission* v. *Greece* [1988] *ECR* 1037.

70 ECJ, Joined Cases 31 and 35/86 *LAISA* [1988] *ECR* 2285, para. 15. It has to be pointed out that in this case the Advocate General came to the opposite conclusion based on the reasoning that it results from an adjustment of secondary law that is of immediate concern to the applicant. See Opinion AG Lenz, *LAISA* v. *Council* [1988] *ECR* 2285.

71 ECJ, Case C-445/00 *Republic of Austria* v. *Council* [2003] *ECR* I-8549, para. 62.

72 CFI, Case T-187/99 *Agrana Zucker und Stärke AG* v. *Commission* [2001] *ECR* II-1589; ECJ, Case C-30/00 *Hinton Ltd*. v. *Fazenda Publica* [2001] *ECR* I-7511; ECJ, Case C-27/96 *Danisco Sugar* [1997] *ECR* I-6653; ECJ, Case C-3/87 *The Queen* v. *Ministry of Agriculture* [1989] *ECR* 4459.

73 ECJ, Case C-233/97 *KappAhl Oy* [1998] *ECR* I-8069.

74 This is not so clear in K. Lenaerts and D. Arts, *Procedural Law of the European Union* (London, Sweet & Maxwell 1999) p. 116, but see B. Wegener, 'Artikel 234 Absatz 5', in Calliess and Ruffert, op. cit. n. 62.

75 This excludes primary law but includes all measures which intend to have legal effect.

76 Lenaerts and Arts, op. cit. n. 74, at p. 197.

direct effect of these provisions, the facts of the case were considered. In cases involving Member States, Article 230 TEC (the annulment procedure) has been used to establish the invalidity of secondary law that infringes international agreements. In the famous *Banana* case involving the WTO Agreement, the Court even required proof of the direct effect of these provisions in relation to the privileged applicant Member State.[77]

There is no coherent picture of the legal impact of international agreements in the legal order of the Community/Union and its Member States. It is not even addressed in Article 300 TEC. While paragraph 7 provides that agreements concluded under the conditions of this article shall be binding on the institutions of the Community and on Member States, it does not say anything on its legal effect in Community or Member State law. It has been stated that this phrase cannot be seen as a mere repetition of international treaty law, because it also mentions the Member States and consequently means that they are also bound by international agreements that fall under the exclusive competence of the Community.[78] The question of legal effect was addressed by the *Haegeman* decision of the ECJ in 1974, in which the judges explained that international agreements form an integral part of the EC legal order.[79] Consequently, international agreements share the 'legal destiny' of European Community law in the form of primary and secondary law. Their legal destiny and special characteristics are defined by their direct effect and the supremacy of EC/EU law.[80] These findings have been extended to principles of international law that the European Communities must respect.[81] In the *Kadi* and *Yusuf* cases, the CFI recently emphasised the primacy of UN obligations under the UN Charter, which prevail over obligations of domestic law or the ECHR but also obligations arising from the EC Treaty. The Court even confirmed the fact that the Community is bound by the UN Charter – not on the basis of public international law but through its own constituting document.[82] However, the fundamental Community principle of direct effect – providing enforceable rights for the individual *vis-à-vis* the European Community and its Member States – cannot automatically be extended to international agreements. The direct effect of international agreement

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[77] ECJ, Case C-280/93 *Germany* v. *Council* [1994] *ECR* I-4973. This was later refined in Case C-149/96 *Portugal* v. *Council* [1999] *ECR* I-8395, by referring to the general political and economic argument of the lack of reciprocity.

[78] See further W. Weiss, 'International Agreements in the European Community Legal Order and in the Legal Orders of the Member States', in A. Ott and K. Inglis, eds., *Handbook on European Enlargement* (The Hague, T.M.C. Asser Press 2002) pp. 201-204.

[79] ECJ, Case 181/73 *Haegeman* v. *Belgian State* [1974] *ECR* 449.

[80] See A. Ott, 'Fundamental and Basic Principles of the EC and the EU', in Ott and Inglis, op. cit. n. 78, at p. 17.

[81] ECJ, Case C-162/96 *Racke* [1998] *ECR* I-3655, para. 45.

[82] CFI, Case T-315/01 *Yassin Abdullah Kadi* v. *Council and Commission*, nyr, para. 181; Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation* v. *Council and Commission*, [2002] *ECR* II-2387, para. 243.

provisions, including Association Council decisions, is evaluated by interpreting the wording, purpose and nature of the agreement, as well as the preciseness and clarity of the obligation.[83] The Court has developed a two-step approach in which it starts by analysing whether and to what extent a provision could be considered directly effective. Subsequently, it examines whether the directly effective provisions of an international agreement can be interpreted in the same way as provisions of the EC Treaty. The Court does not opt for a simple analogy with other Community law, but instead claims that the direct effect of international agreements depends on the aim pursued by each provision of the agreement in comparison with the aims pursued by the EC Treaty.[84] Once the direct effect of an international law provision is established, the hierarchy of norms becomes relevant. In the Community perspective, Community law ranks above national law, and international agreements concluded by the Community rank above secondary but below primary law.[85]

The interpretation of international agreements thus depends on their context and wording. It is questionable whether international agreements, which form part of the Community legal order as a result of their integration, retain their characteristics as international law or whether they are transformed into Community law. As we have seen, they can have the same effect as other Community law, albeit subject to some limitations. One legal principle which has to be considered when interpreting international law is the principle of good faith, which derives from common international law principles and forms part of the general legal order of Community law. The principle that Community law is to be interpreted in conformity with international law is reflected in several decisions of the ECJ.[86] Another pivotal and important principle is the loyalty principle laid down in Article 10 TEC, which gains special importance in relation to the conclusion, implementation and even interpretation of mixed agreements.[87] This also extends to mixed agreements that are concluded on the basis of mixed competences,

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[83] ECJ, Case C-87/95 *Bresciani* v. *Amministrazione Italiana delle Finanze* [1976] *ECR* 129, para. 16; ECJ, Case C-192/89 *Sevince* v. *Staatsecretaris van Justitie* [1990] *ECR* I-3461, para. 15; ECJ, Case C-469/93 *Chiquita Italia* [1995] *ECR* I-4533, para. 25; CFI, Case T-115/94 *Opel Austria* v. *Council* [1997] *ECR* II-39, para. 101; ECJ, Case C-162/96 *Racke* v. *Hauptzollamt Mainz* [1998] *ECR* I-3655, para. 31.

[84] ECJ, Case 225/78 *Procureur de la République de Besançon* v. *Bouhelier* [1979] *ECR* 3151, para. 6; ECJ, Case 104/81 *Hauptzollamt Mainz* v. *Kupferberg & Cie KG* [1982] *ECR* 3641, para. 30; ECJ, Case C-312/91 *Metalsa* [1993] *ECR* I-3751, paras. 10-11; ECJ, Case C-469/93 *Amministrazione delle Finanze dello Stato* v. *Chiquita Italia* [1995] *ECR* I-4533, para. 52; ECJ, Opinion 1/91 *EEA* [1991] *ECR* I-6079, para. 14; ECJ, Cases C-114 and 115/95 *Texaco et al.* v. *Middelfart havn et al.* [1997] *ECR* I-4263, para. 28.

[85] Clarified in ECJ, Case C-179/97 *Spain* v. *Commission* [1999] *ECR* I-1251, para. 11.

[86] ECJ, Case C-162/96 *Racke GmbH & Co.* v. *Hauptzollamt Mainz* [1998] *ECR* I-3655; ECJ, Case C-69/89 *Nakajima* [1991] *ECR* I-2069; ECJ, Case 70/87 *Fediol III* [1989] *ECR* 1805.

[87] See, for instance, ECJ, Opinion 1/94 *WTO* [1994] *ECR* I-5267, para. 108; ECJ, Case C-25/94 *Commission* v. *Council* [1996] *ECR* I-1469 para. 48.

cross-pillar effects and – in the case of parallel international agreements concluded by Member States – in areas of remaining competences. It is open to debate to what extent the general principle of reciprocity also finds its way into Community law. In any event, the Court has stated clearly – again referring to good faith – that legal reciprocity cannot by itself exclude the direct effect of international agreements in the Community legal order.[88] This does not seem to be contradicted *a priori* by the Court's decision in *Portugal* v. *Council*, in which the judges emphasised that, due to the principle of reciprocity, the lack of direct effect in the interpretation of the WTO Agreement by the main trading partners of the European Community would lead to a denial of the direct effect of WTO law in the Community legal order.[89] This judgment should be seen in the light of judgments on GATT/WTO law in which the Court consistently held that GATT and WTO law is not capable of conferring rights on the individual due to its lack of direct effect. Instead, it emphasised a form of political reciprocity that restrains the ECJ when ruling on the legal impact of these agreements, with the justification that otherwise the Community's and Member States' negotiating powers within the WTO forum would be reduced and such trade policy instruments as the Trade Barriers Regulation put at risk.[90]

The status of international agreements that were not concluded by the European Community but by the European Union will remain somewhat unclear until the ECJ has the competence to scrutinise these agreements. As far as the Member States are concerned, it may be assumed that they do not have any direct rights or obligations on the basis of Union agreements *vis-à-vis* third parties. After all, and perhaps ironically, the agreements are concluded exclusively by the Union; no mixed agreements have yet been concluded. This means that the legal relationship exists between the Union and the Member States and not directly between the Member States and the contracting third party. On the other hand, it is clear that the agreements form an integral part of the Union's legal order and that they bind the institutions (cf., Article 24(6) TEU). In this respect, the principle of consistency as reflected in Articles 1, 3 and 11 TEU should be mentioned.[91] The notion that '[t]he Union shall in particular ensure the consistency of its external activities as a whole' (Article 3 TEU) could link the Union agreements to agreements or other external actions based on the EC Treaty. It is disputed whether we are

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88 ECJ, Case 104/81 *Hauptzollamt Mainz* v. *Kupferberg* [1982] *ECR* 3641.

89 ECJ, Case C-149/96 *Portugal* v. *Council* [1999] *ECR* I-8395. See also A. Ott, 'Der EuGH und das WTO-Recht: Die Entdeckung der politischen Gegenseitigkeit – altes Phänomen oder neuer Ansatz?', 38 *Europarecht* (2003) p. 504.

90 Ott, loc. cit. n. 89. On these issues, see in general R. Leal-Arcas, 'The European Court of Justice and the EC External Trade Relations: A Legal Analysis of the Court's Problems with Regard to International Agreements', 72 *Nordic Journal of International Law* (2003) pp. 215-251.

91 See more extensively R.A. Wessel, 'The Inside Looking Out: Consistency and Delimitation in EU External Relations', 37 *CMLRev*. (2000) pp. 1135-1171.

dealing with a judiciable principle.[92] The principle of consistency may be regarded as a special form of the loyalty principle laid down in Article 10 TEC, as it emphasises institutional coordination and the coordination of actions among institutions and Member States.[93]

3.4 Case law on the European Community/Union's neighbours

Since the 1960s, the Community has created an intricate web of trade agreements and Association Agreements with its neighbours.[94] This has resulted in extensive case law on the provisions of some of these international agreements and their legal consequences in the Community legal order.[95] In particular, the so-called Accession Association Agreement with Turkey, the Europe Agreements with the candidate countries from Central and Eastern Europe and the special Association Agreement with the EEA have raised interesting legal questions on the effect and scope of these agreements. Extensive case law was developed by the ECJ on the legal effects of the Ankara Agreement and Association Council Decisions 2/76, 1/80 and 3/80 for Turkish nationals and their family dependents residing in one of the Member States. It was concluded, *inter alia*, that certain provisions may have direct effect and that specific employment rights also imply the existence of a corresponding right of residence.[96]

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[92] See, for instance, B. Weidel, 'The Impact of the Pillar Construction on External Policy', in S. Griller and B. Weidel, eds., *External Economic Relations and Foreign Policy in the European Union* (Vienna, Springer Verlag 2002) p. 23 at p. 34.

[93] See C. Calliess, 'Artikel 1 EU Absatz 43', in Calliess and Ruffert, op. cit. n. 62. In addition, its influence is reflected in the context of the unity of law, which is generally seen as a guiding obligation in relation to the interpretation of Community law rather than] overall Union law. On this issue, see especially T. Oppermann, 'Die Dritte Gewalt in der Europäischen Union', 109 *Deutsche Verwaltungsblatt* (1994) p. 901; and further A. Hatje, 'Europäische Rechtseinheit durch einheitliche Rechtsdurchsetzung', in J. Schwarze and P-C. Müller-Graff, eds., 'Europäische Rechtseinheit durch einheitliche Rechtsdurchsetzung', *Europarecht*, Beiheft 1/1998, p. 7; U. Becker, 'Differenzierungen der Rechtseinheit durch "abgestufte Integration"', in Schwarze and Müller-Graff, ibid., p. 29.

[94] The so-called 1963 Athens Agreement with Greece and the still applicable 1964 Ankara Agreement with Turkey are examples of early Association Agreements that were concluded with neighbouring countries (Agreement establishing an association between the European Economic Community and Greece, *OJ* 1963 L 26/294; Agreement establishing an Association between the European Economic Community and Turkey, *OJ* 1973 C 113/1).

[95] The free trade agreements with Portugal and Spain and the free trade agreements with former EFTA countries Austria and Sweden have thus come under scrutiny.

[96] Article 2(1)(b) of Decision No. 2/76 has direct effect: ECJ, Case C-192/89 *Sevince* [1990] *ECR* I-3461, para. 26; Article 7 of Decision 2/76: ECJ, Case C-192/89 *Sevince* [1990] *ECR* I-3461, para. 26; Article 6 of the Decision 1/80 has direct effect: ECJ, Case C-192/89 *Sevince* [1990] *ECR* I-3461, para. 26; ECJ, Case C-355/93 *Eroglu* v. *Land Baden-Württemberg* [1994] *ECR* I-5113, para. 11; ECJ, Case C-171/95 *Tetik* v. *Land Berlin* [1997] *ECR* I-329, para. 24; ECJ, Case C-386/95 *Eker* v. *Land Baden-Württemberg* [1997] *ECR* I-2697, para. 18; ECJ, Case C-36/96 *Giinaydin* v. *Freistaat Bayern* [1997] *ECR*, para. 61; ECJ, Case C-98/96 *Ertanir* v. *Land Hessen* [1997] *ECR* I-5179; ECJ, Case C-1/97 *Birden* [19981 *ECR* I-7747, para. 67; ECJ, Case C-340/97 *Nazli* v. *Stadt Nürnberg* [2000] *ECR* I-937, para. 28; Article 7 of Association Council Decision 1/80 has direct effect: ECJ, Case

Another generation of accession Association Agreements, the Europe Agreements, first became subject to review in relation to their establishment provisions and later in relation to their provisions on workers, which are not only directly effective but also provide a right of non-discrimination and residence to the respective third-country nationals once they are legally established or legally employed in one of the EU Member States.[97]

3.5 An integrated external policy?

Irrespective of the function of the principle of consistency, the fragmentation of EU external relations is striking. This situation is rooted in many causes, one obviously being the current pillar structure.[98] In the first pillar, the external economic or Common Commercial Policy forms one of the core responsibilities of the European Community. Ever since 1968, the European Community constitutes a customs union and has been actively involved in the most important trade regime to be established since the 1960s, namely the GATT.[99] In 1995, the European Community – as the only regional trade arrangement – became a member of the WTO.[100] The Common Commercial Policy in Article 133 TEC falls within the scope of the exclusive competences of the Community,[101] and the European Commission is endowed with extensive functions for the management of this important external policy field, including monitoring the market access strategy[102] and concluding and negotiating trade agreements with third countries.

C-355/93 *Eroglu* v. *Land Baden Ulm* [2000] *ECR* I-1487, para. 34; ECJ, Case C-65/98 *Eyüp* v. *Landesgeschaftsstelle des Arbeitsmarktservice Vorarlberg* [2000] *ECR* I-4747; Article 13 of Decision No. 1/80: ECJ, Case C-192/89 *Sevince* [1990] *ECR* I-3461, para. 26, Article 3(1) of Decision No. 3/80 establishes a precise and unconditional principle: ECJ, Case C-262/96 *Sürül* v. *Bundesanstalt für Arbeit* [1999] *ECR* I-2685, para. 74, ECJ, Joined Cases C-102 and C-211/98 *Kocak* v. *Landesversicherungsanstalt Oberfranken und Mittelfranken* [2000] *ECR* I-1287, para. 35.

97 ECJ, Case C-63/99 *The Queen* v. *Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk* [2001] *ECR* I-6369; ECJ, Case C-235/99 *The Queen* v. *Secretary of State for the Home Department, ex parte Eleanora Ivanova Kondova* [2001] *ECR* I-6427; ECJ, Case C-257/99 *The Queen* v. *Secretary of State for the Home Department, ex parte Julius Barkoci and Marcel Malik* [2001] *ECR* I-6557; ECJ, Case C-268/99 *Aldona Malgorzata Jany and Others* v. *Staatssecretaris van Justitie* [2001] *ECR* I-8615.

98 And the various forms of decision making and law-making in the first pillar.

99 Since the successful establishment of the customs union in 1968, the European Community had a *de facto* institutional status in the *de facto* international organisation known as the GATT. See, for instance, A. Ott, *GATT und WTO im Gemeinschaftsrecht* (Cologne, Carl Heymanns Publisher 1997) p. 111.

100 For regional trade arrangements in the form of a customs union or free trade area, the relevant provision is Article XXIV of the GATT Agreement. See Article XI of the Agreement establishing the WTO. On this issue, see A. ter Heegde, 'The EC and Member States in International Organisations: GATT and WTO', in Ott and Inglis, op. cit. n. 78, at p. 61.

101 ECJ, Case 41/76 *Donckerwolke and Schou* v. *Procureur de la République* [1976] *ECR* 1921.

102 On the market access strategy, see G.M. Berrisch and H-G. Kamann, 'The European Community's Trade Barriers Regulation and the new Market Access Strategy of the European Commission', *EWS* (2001) p. 461.

The current management of external relations in the European Commission is divided between four different Directorates General – Trade, External Relations, Development and Enlargement – with overlapping responsibilities.[103] DG Development is responsible for development policy and has direct responsibilities for Community relations with sub-Saharan Africa, the Caribbean, the Pacific and the Indian Ocean; DG Trade defines its mission as conducting the Union's commercial policy; DG Enlargement is responsible for the enlargement process and its financial instruments; and DG External Relations is responsible for managing bilateral relations with third countries that do not form part of the wider enlargement process such as the EEA countries and Switzerland and for the new European Neighbourhood Policy.

As we have seen, other aspects of external relations relate to the European Union's Common Foreign and Security Policy (the 'second pillar'), which hands a leading role to the Council of the European Union and its High Representative Javier Solana rather than to the Commission. To complicate matters, other examples such as the European Union's reaction to the Helms-Burton Act,[104] legislation on dual-use goods[105] and legislation on terrorism[106] demonstrate the cross-pillar effects of certain measures by combining legal instruments from the different pillars, which further complicates decision making and law-making and threatens coherent implementation.[107] A solution is mostly found in a combination of two governance regimes, as in the case of the Union's reaction to extraterritorial application of legislation on the basis of the Helms-Burton Act. The classic example is of course the case of economic sanctions, where the CFSP and EC measures are presented as complementary. Despite the obvious differences in the separate decision-making procedures needed – the most striking ones being the need for a Commission proposal under Article 301 TEC,[108] the possibility of qualified majority voting under the same provision and the requirement of unanimity under Article 23(1) TEU – this combination of legal bases is still the way

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103 See the website of the Commission, available at: <http://europa.eu.int/comm/world>.

104 Council Regulation (EC) No. 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, *OJ* 1996 L 309/1-6; Joint Action of 22 November 1996 adopted by the Council on the basis of Articles J.3 and K.3 of the Treaty on European Union concerning measures protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, *OJ* 1996 L 309/7.

105 Council Regulation (EC) No. 1504/2004 of 19 July 2004 amending and updating Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology. On this issue, see P. Koutrakos, *Trade, Foreign Policy and Defense in EU Constitutional Law* (Oxford, Hart Publishing 2001).

106 See, for instance, Council Common Positions 2001/930/CFSP and 2001/931/CFSP of 27 December 2001, *OJ* 2001 L 344.

107 See more extensively Wessel, loc. cit. n. 66; Koutrakos, op. cit. n. 105; P. Gauttier, 'Horizontal Coherence and the External Competences of the European Union', 10 *ELJ* (2004) pp. 23-41.

108 On this issue, see K. Osteneck, 'Artikel 301 EG', in J. Schwarze, ed., *EU-Kommentar* (Baden-Baden, Nomos 2000).

in which the legal institutional dilemma is being approached, apart from the possibility of using either a single CFSP legal basis (arms embargoes)[109] or a single EC legal basis (many sanctions regimes based on UN resolutions). As pointed out above, the consequences of the current pillarisation on economic and financial sanctions imposed on individuals or entities are somewhat softened by the *Yusuf* and *Kadi* cases, in which the CFI accepted the recourse to the cumulative legal bases of Articles 60, 301 and 308 TEC for a regulation fighting international terrorism and freezing the funds and financial resources of certain persons and entities associated with the Al Qaeda network and the Taliban. The Court exceptionally extended the conservative reading of Article 308 EC to supplement the Union's powers to adapt 'to those new threats'.[110]

The same complexity occurs with regard to unilateral measures adopted by the Union in the case of a violation of international obligations by a third state (e.g., withdrawal of benefits, suspension of development assistance or flight bans) or in the case of a suspension of treaty obligations (e.g., suspending a Cooperation Agreement because of a fundamental change in circumstances or invoking the human rights clauses in bilateral cooperation or trade agreements).[111] Whereas the latter may only be based on the EC Treaty (Article 300(2), second subparagraph), in the former case one may come across single CFSP or EC decisions, or combinations of the two, on the basis of Article 301 TEC and Articles 14 or 15 TEU. In the Union's formative years, a similar example could be found in the regime concerning the export of dual-use goods: the economic decision on the export ban was taken on the basis of Article 133 TEC, whereas the actual list of goods falling under the regime, as well as their destinations, was established on the basis of Article 14 TEU.[112] In 2000, this situation largely came to an end with the introduction of a new regulation, bringing the CFSP parts of the regime within the Community field of competence.[113] Nevertheless, the tension between the Common Commercial Policy (EC) and national security measures (CFSP) continues to exist as the control of technical assistance related to certain military end-uses continues to be based on the second pillar.[114]

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[109] The rationale for not using Article 301 TEC in this situation is to be found in Article 296(1)(b), which permits Member States to take the necessary measures for the protection of their essential security interests connected with the trade in arms.

[110] CFI, Case T-315/01 *Yassin Abdullah Kadi* v. *Council and Commission*, nyr, paras. 130-132.

[111] See more extensively E. Paasivirta and A. Rosas, 'Sanctions, Countermeasures and Related Actions in the External Relations of the EU', in E. Cannizzaro, *The European Union as an Actor in International Relations* (The Hague, Kluwer Law International 2002) pp. 207-218.

[112] For an overview, see P. Koutrakos, 'Inter-Pillar Approaches to the European Security and Defence Policy: The Economic Aspects of Security', in Kronenberger, op. cit. n. 61, at pp. 435-480.

[113] Council Regulation (EC) No. 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, *OJ* 2000 L 159.

[114] See Council Joint Action 2000/401/CFSP of 22 June 2000 concerning the control of technical assistance relating to certain military end-uses, *OJ* 2000 L 159.

As we have seen, external relations in the area of Police and Judicial Cooperation in Criminal Matters (the 'third pillar') are booming as well. An obvious reason for this is the fast development of the Justice and Home Affairs domain in general. Over the past few years, the Council has adopted almost ten texts per month on JHA issues.[115] Since 2001, external relations in the JHA domain can be found in the so-called 'multi-presidency programmes',[116] and a number of agreements have been concluded on the basis of Article 38 TEU as well as on the basis of Article 42(2) of the Europol Convention.[117] These agreements reveal a serious shortcoming in the treaty-making procedure of Articles 24 and 38 TEU, as it does not include consultation of the European Parliament, irrespective of the potentially major implications for citizens' rights and freedoms. The fact that different procedures are used in the third pillar, as compared to the Community, adds to the fragmentation of the Union's external relations, as Article 300 TEC does call for consultation of the Parliament. But cross-pillar problems are not limited to parliamentary control. The competences of the Community on the basis of Title IV TEC (asylum, immigration, border controls and judicial cooperation in civil matters) have a clear relationship with EU competences under Title VI TEU.

Community competences on the basis of Title IV TEC occasionally overlap with EU competences in the third pillar. Obvious examples may be found in relation to the Schengen *acquis*. Agreements have been concluded or are under negotiation with Switzerland, Norway and Iceland regarding the free movement of persons, covering both Community and third pillar issues. Switzerland has concluded an international agreement associating itself with the implementation, application and development of the Schengen *acquis*, which involved the participation of the European Community and the European Union. Modelled after similar agreements concluded with Norway and Iceland in 2001,[118] it differs in that the agreement needs to be adopted by two Council decisions based on the EC Treaty and the Treaty on European Union (Arts. 24 and 38 TEU and Arts. 63, 66 and 95 TEC)[119] and consequently constitutes a special type of 'internal' mixed

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115 On this issue and on the external relations of the third pillar in general, see Monar, loc. cit. n. 28.

116 For a recent update, see Council of the European Union, JHA External Relations Multi-Presidency Programme, Council Doc. 5001/05 of 3 January 2005.

117 See also Council Act of 8 November 1998 laying down rules governing Europol's external relations with third States and non-European Union related bodies, *OJ* 1999 C 26/19, providing for an explicit treaty-making power of Europol. See also H.G. Nilsson, 'Organs and Bodies of the Third Pillar as Instruments of External Relations of the European Union', in G. De Kerckhove and A. Weyembergh, *Sécurité et justice: enjeu de la politique extérieure de l'Union européenne* (Brussels, Éditions de l'Université de Bruxelles 2003) p. 201 at pp. 205-209.

118 Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis – Final Act, *OJ* 1999 L 176/35. See chapter 4 on the EEA countries in this volume.

119 European Commission, Proposal for a Council Decision, 14 September 2004, COM (2004) 593 final. See also Council Decision of 25 October 2004 on the signing, on behalf of the European

agreement. Monar but also the Commission point to the fact that this has the effect that, in one and the same article of an international agreement, one aspect falls under Title IV TEC and another under Title VI TEU. This necessitates an enormous effort to coordinate between the Commission, the Presidency and the Member States,[120] as well as between the different legal natures of Community and Union law, which are subject to the ECJ's jurisdiction to different degrees.[121] Nevertheless, recent case law reveals that the separation between the first and the third pillars may not be as strict as one might have thought. The Court accepted a Community competence in the area of criminal law once this is necessary to make use of an explicit Community competence, in this case Article 175 on environmental protection measures.[122]

After the terrorist attacks of 11 September 2001, in particular, the relationship between the second and the third pillar has grown closer as well. At present, third pillar anti-terrorism issues are part and parcel of 'political dialogue' meetings, which generally take place on the basis of the CFSP and agreements with third states, and combine policies on the basis of both (or even all three) pillars.[123]

With regard to the participation of Member States and the European Community/Union in international agreements, one may thus differentiate between international agreements involving only the European Community (such as trade agreements) or the European Union (on CFSP matters), agreements involving all Member States and the European Community (such as the GATS and TRIPS Agreements) and agreements involving some or all of the Member States that are concluded either within or outside the framework of the European Community/ Union. The latter are the so-called partial or parallel agreements.[124] They may also include third countries. The original Schengen Agreement and its follow-up serve as an example of this,[125] as the Member State of Denmark and non-members Iceland and Norway participate in the Schengen regime on the basis of international

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Community, and on the provisional application of certain provisions of the Agreement between the European Union, the European Community and the Swiss Confederation, concerning the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, *OJ* 2004 L 386/26 and 370/78. For the text of the agreement, see <http://www.europa.admin.ch/nbv/off/abkommen/e/schengen.pdf>. See also chapter 5 in this volume.

120 Monar, loc. cit. n. 28. See also E. Barbe, 'L'influence de l'Union européenne dans les enceintes internationals', in De Kerckhove and Weyembergh, op. cit. n. 117, p. 211 at p. 213.

121 European Commission, Proposal for a Council Decision, 14 September 2004, COM (2004) 593 final.

122 ECJ, Case C-176/03 *Commission* v. *Council*, nyr.

123 See, for example, the Political Dialogue and Cooperation Agreements, available at: <http://europa.eu.int/comm/external_relations>.

124 See B. de Witte, 'Chameleonic Member States: Differentiation by means of partial and parallel international agreements', in B. de Witte, D. Hanf and E. Vos, eds., *The Many Faces of Differentiation in EU Law* (Antwerp, Intersentia 2001) p. 231 at p. 232.

125 Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, *OJ* 2000 L 239/13.

law.[126] Part of the fragmentation in this field flows from the fact that the European Community and the European Union still have separate legal personalities. Nevertheless, theoretical as well as empirical evidence of the Union's legal personality (as based on the large number of international agreements to which the Union as such is now a party) seems to have paved the way to an explicit recognition of the Union's international legal personality in the Treaty establishing a Constitution for Europe.[127]

4. REDEFINING EXTERNAL RELATIONS IN THE EXPANDING EUROPEAN UNION

4.1 **The impact of enlargement**

The impact of enlargement on external relations has a legal as well as a political dimension. With respect to the legal consequences, the European Union already tried to make sure that the new Member States would bring their international obligations in line with the requirements of EU membership before accession. From the perspective of Community law, primary EC law ranks above international law and the EC Treaty emphasises that Member States are obliged to eliminate incompatibilities between international agreements and the EC Treaty (Article 307, second paragraph). The *pacta sunt servanda* principle, reflected in the first paragraph of this provision, neither creates direct effect, which works to the advantage of EU citizens by enabling them to rely on favourable international agreements,[128] nor does it give Member States a right to refer to existing international law obligations, which works to their advantage. After all, it does not apply to intra-Community relations, and Community law in principle takes preference over international law and obligations towards third countries.[129] This paragraph only confirms the existing rights of third countries under international

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126 Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis, *OJ* 1999 L 176/36; Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway, *OJ* 2001 L 93/40; Agreement between the European Union and the Republic of Turkey on the participation of the Republic of Turkey in the European Union-led forces in the Former Yugoslav Republic of Macedonia, *OJ* 2003 L 234/ 23.

127 There was a broad consensus in the Working Group on Legal Personality established by the Convention that the European Union is endowed with legal personality. See the result in Article I-7 TCE.

128 ECJ, Case 812/79 *Burgoa* [1980] *ECR* 2787.

129 ECJ, Case 121/85 *Conegate Limited* [1986] *ECR* 1007, para. 25; ECJ, Case C-473/93 *Commission* v. *Luxembourg* [1996] *ECR* I-3207; ECJ, Case C-62/98 *Commission* v. *Portuguese Republic* [2000] *ECR* I-5171.

law (see also Article 30 of the Vienna Convention on the Law of Treaties), namely that existing treaty obligations shall not be breached, and Article 307, second paragraph, is a special expression of the loyalty principle laid down in Article 10 TEC.[130] In addition, both the European Community and its Member States are members of the WTO and need to coordinate their trade policies in this forum.[131] With the accession of Bulgaria and the Baltic States to the WTO in 1996, 1999 and 2001, the institutional need to coordinate Community trade policy in the WTO has been strengthened.[132]

The accession of the new EU Member States in 2004 has also had consequences for their external relations. Article 6(1) of the Act of Accession refers to the principles of law applicable in Community law[133] and underlines that new Member States are bound by international agreements concluded in accordance with Article 300 TEC or Articles 24 or 38 TEU and that they undertake to accede to these agreements or conventions. The subsequent paragraphs list agreements that form part of the external relations *acquis*, such as the Cotonou Agreement, the EEA Agreement and association and trade agreements with countries such as Algeria, Georgia and South Korea.[134] Article 6(10), second paragraph, of the Act of Accession paraphrases Article 307, second paragraph, TEC. Going one step further, in accordance with the result of the accession negotiations, the Act of Accession forces the new Member States to withdraw from any free trade agreements with third countries, including the Central European Free Trade Association.

Politically, the success of the enlargement and the related policies can be seen as a role model for a more structured approach to the Union's policies towards its neighbours. As one observer notes, it was, after all, the 'most successful ever instrument of the EU foreign policy'.[135] Setting clear targets and priorities and giving incentives seems to be a recipe for having a sustainable influence on third countries in their policy making. It remains to be seen whether this concept will succeed in the long run without the 'accession incentive' but with financial

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130 On this issue, see M. Cremona, 'The Impact of Enlargement: External Policy and External Relations', in M. Cremona, ed., *The Enlargement of the European Union* (Oxford, Oxford University Press 2003) p. 161 at p. 170.

131 See Article XI of the Agreement establishing the WTO.

132 On this issue, see A. ter Heegde, 'The Candidate Countries in International Organisations: GATT and WTO', in Ott and Inglis, op. cit. n. 78, at p. 75.

133 On Article 6 of the Act of Accession, see also K. Inglis, 'The Union's Fifth Accession Treaty: New Means to Make Enlargement Possible', 41 *CMLRev* (2004) p. 940.

134 Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, *OJ* 2003 L 236/33.

135 M. Cremona, 'Enlargement: A Successful Instrument of Foreign Policy?', in T. Tridimas and P. Nebbia, *European Union Law for the Twenty-First Century*, Vol. I (Oxford, Hart Publishing 2004) p. 397, citing Wim Kok.

support and an extension of the internal market principles. Much will also depend on the individual countries and their interest in the European integration process. Enlargement formed an important part of the external relations of the Union and the successful strategies tested during the pre-accession process are now being used to structure the relations with third countries in the Wider Europe and beyond.[136]

4.2 The European Neighbourhood Policy: new policy making after enlargement?

Enlargement and its impact are regularly viewed through the prism of the Copenhagen criteria, including the Union's institutional ability to accept new members. At first sight, this inward-looking criterion lacks external relations aspects, but the whole pre-accession process with its legally binding Association Agreements structured by Accession Partnerships and the bundling of the financial and political aid for the new members, has shaped the future planning of external relations beyond the first wave of enlargement in May 2004.

The new European Neighbourhood Policy (ENP)[137] attempts to follow the pre-accession path and uses its flexible but nevertheless structured approach. The Treaty establishing a Constitution for Europe puts it as follows in Article I-57:

> 1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.
> 2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

This approach was tested in practice over a period of many years and certainly paved the way for the successful accession of an initial group of ten countries into the European Union.[138] The pre-accession strategy, with its 'multi-coloured bundle'

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136 See generally Cremona, loc. cit. n. 130.

137 The Commission defines the scope of this policy very broadly – or even vaguely – as a region which, due to its geographical proximity, should not be completely included but also not excluded because of geopolitical interests. On the ENP, see M. Cremona, 'The European Neighbourhood Policy: Legal and Institutional Issues', CDDRL Working Papers (2 November 2004); E. Lannon and P. van Elsuwege, 'The EU's Emerging Neighbourhood Policy and its Potential Impact on the Euro-Mediterranean Partnership', in P.G. Xuereb, ed., *The Mediterranean's European Challenge*, Vol. 4 (Malta, European Documentation and Research Centre, University of Malta 1998); M. Emerson, 'The Shaping of a Policy Framework for the Wider Europe', CEPS Policy Brief No. 39 (September 2003).

138 See also Cremona, op. cit. n. 137, p. 4.

of strategy papers, partnership regulations and progress reports, seems to have found its resurrection in the ENP. The Commission initiated the ENP in March 2003 and produced a strategy paper in May 2004, a number of individual country reports and action plans.[139] Currently, these mutually agreed instruments need to be monitored through the existing Partnership and Cooperation Agreements and Association Agreements (and their joint institutional structures) and will be supplemented by a European Neighbourhood and Partnership Instrument to structure the financial assistance.[140]

In 1997, the European Union already became aware of the need to address the relationship with its future neighbours, but specific policies or measures were not yet adopted. This only changed with the development of a proximity policy through the Council in 2002 and developed a more definite shape through the proposed framework for relations with the European Union's eastern and southern neighbours in 2003 and the adoption of a report by the European Parliament.[141] Following the successful enlargement in May 2004, the Commission started to concentrate on including all its new neighbours in Eastern Europe (Russia, Ukraine, Belarus, Moldova, Georgia, Armenia and Azerbaijan) and on integrating the existing Euromed cooperation with the countries of Southern Europe and beyond (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Syria, Tunisia and Palestine) into the ENP.[142]

One major difference with the enlargement process is that its conditionality is not built around accession but around the long-term plan of extending the internal market *acquis* to these neighbouring countries. However, what has worked with countries such as Norway, Iceland and Liechtenstein in the European Economic Area and, with minor differences, with Switzerland[143] will not necessarily succeed with countries such as Azerbaijan, Ukraine or Egypt. The two groups, consisting of the EEA and Switzerland on the one hand and the wider Europe countries on the other, could not be further apart. The European Union has never disputed the rights and the place of the former in the Union, and due to their economic

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139 Communication from the Commission, European Neighbourhood Policy – Strategy Paper, COM (2004) 373 final; Cremona, op. cit. n. 137, p. 1.

140 Proposal for a Regulation of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood and Partnership Instrument, COM (2004) 628 final.

141 European Parliament, Report on 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (Napoletano Report), 20 November 2003; Communication from the Commission to the Council and the European Parliament, 'Wider Europe – Neighbourhood': A New Framework for Relations with our Eastern and Southern Neighbours, Brussels 11 March 2003, COM (2003) 104 final.

142 G. Harpaz, 'Enhanced Relations between the European Union and the State of Israel under the European Neighbourhood Policy: Some Legal and Economic Implications', 31 *LIEI* (2004) pp. 257-274.

143 On Switzerland, see S. Breitenmoser, 'Sectoral Agreements between the EC and Switzerland: Contents and Context', 40 *CMLRev* (2003) pp. 1137-1186. See also chapter 5 in this volume.

strength they have been contributing to the Union's budget and are willing to voluntarily adapt to EU law. A mutual interest exists between the EU and the EFTA countries to contribute to further European integration and harmonise their interests. The internal market is exported to these countries in order to give them a fair share of the benefits of the Union while accepting their reservations against paying into the budget for all the policies or participating in new ones, including the Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters.[144]

In contrast, the candidates for Wider Europe are presented with an abstract perspective of participation in the internal market and a promise on the part of the Union to bring stability and prosperity to the region, but with a clear mix of advantages and disadvantages. And while the four EFTA countries clearly belong to Europe and have even been applying for membership (but for political and economic reasons have 'frozen' their application for accession),[145] only some of the Wider Europe countries – such as Ukraine – geographically belong to Europe, but their membership is not (yet) seriously being considered by the European Union.[146] It should be noted however, that the European Parliament has voted overwhelmingly in favour of Ukraine's accession.[147] Despite these caveats, something seems to be encouraging the Commission to stick to a mix of legal, political and financial instruments and to use the instruments of conditionality and funding to influence the internal policies and reforms of its new neighbours in a peaceful manner.[148] From the experience gained during ten years of pre-accession strategy, it is clear that some flexibility can be added to more static and legally binding instruments such as Association Agreements by means of additional financial and political tools. In addition, by using the action plans and the future European Neighbourhood Policy Instrument (ENPI), the former modelled on the Accession Partnerships for the Central and Eastern European countries, the ever-

144 In practice, Norway or Switzerland participate in certain CSFP or PJCC cooperation schemes on a voluntary and international law basis: Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis – Final Act, *OJ* 1999 L 176/36-62; Agreement between the European Union and the Government of the Swiss Confederation, represented by the Federal Department of Foreign Affairs, on the participation of Switzerland in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH), *OJ* 2003 L 239/14-16.

145 In Norway, the population turned down membership twice. Its causes seem to be a mix of political, cultural and economic reasons. Switzerland has not pursued its membership application since the Swiss population rejected EEA participation.

146 On Ukraine's policy intention to join the European Union, see 'Ukraine wants to join the European Union', 26 January 2005, available at: <http://www.euobserver.com>; 'Ukraine reinforces its commitment to EU', 24 January 2005, available at: <http://www.euractiv.com>.

147 European Parliament resolution on the results of the Ukraine elections, P6_TA (2005) 0009 adopted on 13 January 2005.

148 Cremona describes this as 'to repeat the perceived success of the accession process by setting some of same targets and by using similar instruments and methodologies, including conditionality and differentiation, but without the goal of accession to provide the incentive.'

changing process of approximation and the mix of policy, financial and legal instruments[149] can be given some structure. With the conditionality tool, a convincing incentive is created to steer these countries in the direction intended by the European Union. Another appealing aspect is the role of the European Commission in policy making in this area. As in the case of the enlargement process, the Member States have assigned the Commission an active role in the guiding and monitoring of the ENP, which in turn enables the Commission to represent the Union's interests as an independent 'broker' in the region, thereby preventing the individual Member States' different interests in the neighbouring regions from prevailing and creating anxieties and envies among the participating third countries.

4.3 The Constitution for Europe and external relations: new law-making after enlargement?

It can be claimed that one of the prominent goals of the mission to draft a Constitutional Treaty was the consolidation of external relations. This is reflected in the Laeken Declaration and in the establishment of two working groups by the European Convention to address the issue of legal personality and external relations.[150] Indeed, as discussed above, the Union's external relations have been strongly influenced by the case law of the ECJ and therefore reflect a piecemeal approach. In addition, external relations have been the main representative of incoherence in the current structure of the European Union/Communities, with legal personalities assigned to the different European Communities, the European Union (implicitly) and even some of the sub-organisations of the Community and the Union.[151] The different legal characteristics of the three pillars, as well as their diverging instruments and decision-making procedures, add immensely to the complexity of the Union's external relations. In that respect, the abolishment of the pillar structure and the merger of the Communities and the current European Union could only be welcomed, as it would leave us with a single international organisation – the Union – with competences in the former Community areas as well as in the areas of the CFSP and PJCC. In the Constitutional Treaty, in the area of external relations, no division is made between economic and political (foreign affairs) issues. Title V of Part III of the EU Constitution is labelled 'The Union's External Action' and covers all the Union's external policies. In addition,

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[149] The ENP is characterised by international agreements, financial instruments MEDA and TACIS, the Barcelona Process policy instrument and new instruments including the planned ENP Regulation and ENP strategy papers and country reports.

[150] See further C. Herrmann, 'Die Außenhandelsdimension des Binnenmarktes im Verfassungsentwurf von der Zoll- und zur Weltordnungspolitik', in A. Hatje and J.P. Terhechte, eds., 'Das Binnenmarktziel in der europäischen Verfassung', *Europarecht* Beiheft 3/2004, p. 186.

[151] On this subject, see D.M. Curtin and I.F. Dekker, 'The EU as a "Layered" International Organization: Institutional Unity in Disguise', in Craig and de Búrca, op. cit. n. 13, at pp. 83-136.

the external objectives of the Union are no longer scattered over different treaties. Instead Article I-3(4) provides:

> In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter.

Other provisions add to the idea of the integration of the different external policies as well. Firstly, Article III-194 codifies the existing practice according to which the former 'common strategies' (the term is no longer used) may cover all aspects of the Unions' external action: they are no longer restricted to the CFSP. Secondly, consistency is being pursued with the introduction of a Union Minister for Foreign Affairs, who not only chairs the Foreign Affairs Council but also serves as Vice-President of the Commission and is supported by a European External Action Service in accordance with Article III-296(3).[152] Thirdly, the legal personalities of the Community and the European Union are merged into one legal personality of the new Union. This certainly simplifies matters in relation to the conclusion of treaties and questions of accountability and responsibility. Article III-227 applies to all agreements concluded by the Union and no distinction is made, either in procedure or in legal nature, between the different external policies. Finally, the Constitutional Treaty puts an end to the different types of instruments for the CFSP aspect of external relations. Common strategies, joint actions and common positions make way for the European decision, an instrument which may also be used in other (former Community) areas of external relations.

Another improvement is that the fundamental principles of external relations law, which have slowly evolved from the case law of the ECJ over the past thirty years, have been included in Part I of the Constitutional Treaty. This can be considered the most obvious part of the process of tidying-up and consolidating the external relations provisions.[153] Article I-12 defines the categories of competences in such a way that only the Union may adopt legally binding acts in areas where it has exclusive competence, the Member States being competent only if so empowered by the Union or for the implementation of Union acts. According to Article I-13, these exclusive competences relate to the customs union, the establishing of the competition rules necessary for the functioning of the internal

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[152] For a critical view on this double-hatting, see A. Dashwood, 'The Impact of Enlargement on the Union's Institutions', in C. Hillion, ed., *EU Enlargement* (Oxford, Hart Publishing 2004) p. 45 at p. 52.

[153] On this exercise, see generally B. de Witte, 'Simplification and Reorganisation of the European Treaties', 39 *CMLRev* (2002) pp. 1255-1287.

market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the Common Fisheries Policy and the Common Commercial Policy. Paragraph 2 of this provision may be seen as a codification of the *ERTA* doctrine.[154] The Union's external action is defined in Part III of the Constitutional Treaty. Article III-292 clarifies the guiding principles of external relations, namely 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 UN Charter and international law. More specifically, paragraph 2 states that the Union shall pursue common policies and actions in this area, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;
(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
(g) assist populations, countries and regions confronting natural or man-made disasters;
(h) promote an international system based on stronger multilateral cooperation and good global governance.

The most important provision in external relations, Article 133 TEC, has been revised since the Treaty of Amsterdam, when the Member States decided to codify bits and pieces defined by the ECJ's case law. Further refinements by the Treaty of Nice, however, have resulted in substantial legal uncertainty.[155] A new and necessary revision is found in Article III-315 of the Constitutional Treaty.

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[154] 'The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in the 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.'

[155] See C. Herrmann, 'Common Commercial Policy after Nice: Sisyphus Would Have Done a Better Job', 40 *CMLRev*. (2003) p. 1315; P. Eeckhout, *External Relations of the European Union* (Oxford, Oxford University Press 2004).

Next to agreements relating to trade in goods and services, the first paragraph now includes the commercial aspects of intellectual property and foreign direct investment. The unclear text of paragraph 6 of Article 133 on shared competences with regard to certain agreements and the misleading reference to paragraph 5 will be substituted by a new version. New paragraph 4 expressly mentions the conclusion of agreements in the field of trade in cultural and audiovisual services and in the field of trade in social, education and health services, which require unanimity, while agreements in the field of trade in services and the commercial aspects of intellectual property and foreign investment require unanimity when the adoption of internal rules requires this. It could be argued that the scope of objectives and principles of the Common Commercial Policy is broadened through its linkage to Article III-292, which specifies the general principles guiding external actions and thereby includes new aspects of trade policy such as the protection of human rights, sustainable development and environmental development.[156]

As stated before, one achievement of the Constitutional Treaty is that it codifies the external relations *acquis*. This intention to structure and simplify the existing bits and pieces spread out over the EC Treaty and the Treaty on European Union and defined in the ECJ's case law becomes particularly visible when the provisions regarding treaty making are compared. Articles III-323, III-325 and III-326 will substitute the treaty-making provision of Articles 300, 111[157] and 310[158] TEC. The mixture in Article 300 TEC of procedures (paras. 1 to 5), division of competences (paras. 1 to 3), legal consequences (paragraph 7) and legal review (paragraph 6) is unravelled by splitting it up into two provisions: Articles III-323 and III-325. Article III-323 specifies the competence of the Union to conclude international agreements in line with the *ERTA* doctrine when either the Constitutional Treaty or a legally binding Union act provides for it or is likely to affect common rules or alter their scope. Identical to Article 300(7), Article III-323(2) repeats that international agreements concluded by the Union are binding on the Union and its Member States. Article III-325 lays down the procedure for concluding international agreements. Paragraph 1 refers to the successor of current Article 133 TEC, Article III-315, which specifies the treaty-making procedure in the area of the Common Commercial Policy. The first seven paragraphs of Article III-325 list the division of competences between the Union's institutions. The confusing second paragraph of Article 300 TEC ('subject to the powers vested in the Commission in this field') is replaced by

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156 See M. Krajewski, 'External Trade and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy', 42 *CMLRev*. (2005) p. 91 at p. 107.

157 Article 111 TEC is the specific provision on the conclusion of international agreements involving formal agreements on an exchange rate system for the euro in relation to non-Community currencies.

158 Provision establishing association policy cooperation.

paragraph 3 of Article III-325, according to which the Commission submits recommendations to the Council. The Council's central role in the management of external relations is confirmed by paragraphs 2 and 3 of Article III-325. The Council mandates the opening of negotiations and the respective negotiating directives, authorises the signing of agreements and finally concludes them. When the subject of the international agreement concerns the Common Foreign and Security Policy, the new Union Minister for Foreign Affairs submits recommendations to the Council. The choice between the Commission or the Foreign Minister seems to depend on the gravity of the issue: the Foreign Minister takes the lead on issues that exclusively or principally relate to the CFSP. If and when the Constitutional Treaty enters into force, this division will no doubt lead to questions about how to define the demarcation line between 'principally' and 'marginally'.

The participation of the European Parliament is regulated in Article III-325(6) and simplifies the structure in comparison to Article 300(3) TEC. It unites the participatory rights of the European Parliament in one paragraph stating that its consent is required in cases involving Association Agreements or agreements with budgetary implications. Paragraph 9 concerns the procedural process for the suspension of an international agreement. Finally, paragraph 11 facilitates the legal review of international agreements before they become legally binding by requesting a legal opinion from the European Court of Justice.

It is difficult to assess whether these overall changes infuse more coherence or consistency into the external relations *acquis*. Some changes, such as giving the Union explicit legal personality and codifying the medley of external relations competences and procedures, form a necessary exercise that is long overdue. In other matters, such as the merging of the pillars and policies, more coherence is not necessarily created in cases where differences in the decision-making process prevail and legal review by the European Court of Justice is still restricted. In contrast to Police and Judicial Cooperation in Criminal Matters, the Common Foreign and Security Policy partially remains a *domaine réservé*. According to Article III-376, the ECJ has no jurisdiction to rule on matters relating to Articles I-40, I-41 and III-293, which concern the formulation of strategy and objectives on external relations by the European Council. However, the exception applies that compliance control in regard to procedures and competences is enabled, in line with Articles I-13, I-15 and I-16. This means that, according to Articles III-376 and III-293, legal control is possible in regard to the procedural side of exercising competences (Article 308 TEC) and the legality of European decisions providing restrictive measures against natural or legal persons adopted by the Council on the basis of the Common Foreign and Security Policy. In practice, this distinction might turn out to be blurred. In certain other cases, the complexity is merely shifted from the different pillars into the individual provisions and procedures. Indeed, a number of provisions indicate that the drafters of the

Constitutional Treaty were not willing to go all the way as far as the integration of the pillars was concerned. The CFSP continues to have a distinct nature under the Constitutional Treaty.[159] One element concerns the categories of competence that exist in the CFSP area. Article I-12 describes the competences of the Union in different areas as exclusive, shared or supporting and supplementary. However, none of these competences relates to the CFSP, as Article I-12 includes a separate paragraph referring to a 'competence to define and implement a Common Foreign and Security Policy, including the progressive framing of a common defence policy.' As Cremona has already indicated, it is a little difficult to see what kind of competence this could be if it does not belong to one of the other categories.[160] However, the simple fact that once again a special status is introduced is striking.

Similar confusion results from the available instruments. Indeed, the CFSP is going to be developed on the basis of one type of instrument, the 'European decision', which is defined in Article I-32(1) as 'a non-legislative act, binding in its entirety'. However, the procedure for adopting European decisions in the area of the CFSP still differs from other areas of external relations and comes close to the current situation: a limited role for the Commission and the European Parliament and an important (even enhanced) role for the European Council and the Council of Ministers. The Court's jurisdiction continues to be excluded. In addition, despite the overall simplification of the instruments, the Treaty even seems to hold on to the former CFSP instruments, albeit disguised as European decisions. Thus, we can easily discover the common strategy ('European decisions on the strategic interests and objectives of the Union', Articles I-39 and III-194), the common position ('European decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature', Article III-199) and the joint action ('Where the international situation requires operational action by the Union, the Council of Ministers shall adopt the necessary European decisions', Article III-198(1)). The chances are high that, in practice, the current fragmentation of instruments will continue to exist.

Former Community and CFSP policies thus still occupy separate positions in the Constitutional Treaty. Title V of Part I contains a separate chapter (II), entitled 'Special Provisions', in which the institutional provisions and procedures in the area of the CFSP and the common defence and security policy are laid down. In addition, Article III-209 underlines the separation by providing that the implementation of the CFSP shall not affect the other competences of the Union, and vice versa. Finally, the fragmentation returns in the external representation of the Union. While it is a general task of the Commission to 'ensure the Union's external representation' (Article I-25), this role is excluded in the area of the

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159 For an evaluation of the external relations under the Constitution, see in general M. Cremona, 'The Draft Constitutional Treaty: External Relations and External Action', 40 *CMLRev.* (2003) pp. 1347-1366.

160 Ibid., p. 1353.

CFSP, where the Union Minister for Foreign Affairs is to take the lead. One may argue that consistency is ensured by the 'double-hatting' construction (the Union Minister for Foreign Affairs is at the same time a member of the Commission). On the other hand, given the fact that the preparation of CFSP policies will continue to be distinct from other policies, there remains a potential for conflicting policies or even institutional conflicts of interests.[161] In addition, practice would have to reveal whether the Foreign Minister would be able to avoid schizophrenia while serving the Commission and the Council at the same time. However, the likelihood that the Constitutional Treaty as we know it today will ever enter into force has greatly decreased in the wake of the negative outcomes of the referenda in France and the Netherlands.[162]

5. CONCLUSION

The recent enlargement had an obvious impact on the external relations of the Union. It has even been considered the most successful tool of EU foreign policy. After all, many former neighbours now fall under the *internal* relations regime, which calls for a redefinition of both the Unions' relations with its immediate surroundings and its position on the international plane. In addition, the pre-accession strategy for these new members has been turned into a neighbourhood strategy for some of the European Union's new and old neighbours in order to promise the extension of policies and law (in the form of the internal market *acquis*) to these countries without completely integrating them.[163] The Union has simply become bigger and its external relations regime has further developed on the basis of both treaty modifications and case law. At the same time, in practice, it has had to cope with a fragmented external policy. To the traditional problems of vertical consistency and delimitation (often resulting in 'mixity'), the pillar structure had added the problem of horizontal consistency and delimitation. Practice shows that, although competences are generally strictly divided, both vertically and horizontally, issues cannot always be handled within the safe boundaries of one pillar. Ironically, the legal institutional dilemmas caused by this situation seem to have resulted in a strengthening of the unity of the Union's legal order, as practice forced the Union to shoot holes in the dividing walls between the pillars as agreed upon in Maastricht. This, in turn, seems to have paved the way towards an integration and consolidation of the external policy elements of the Community and the Union in the Constitutional Treaty.

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[161] For this argument, see E. Denza, 'Lines in the Sand: Between Common Foreign Policy and Single Foreign Policy', in Tridimas and Nebbia, op. cit. n. 135, p. 259 at p. 271.

[162] See chapters 1 and 19 in this volume.

[163] Former Commission President Romano Prodi described this as 'sharing everything but institutions'. This description might be misleading because, as the example of the EEA shows, new joint institutions can be created. On this issue, see also Cremona, loc. cit. n. 135, at p. 410.

More prominently than ever before, the enlargement of the European Union has raised the question of whether and to what extent the current Member States still have powers to formulate and implement an external policy of their own and engage in relations with their immediate neighbours. After all, the complex division of competences between the Union and its Member States in this field has been extended from fifteen to twenty-five states. The main principles governing the multilevel regime of external relations have been codified in the Constitutional Treaty. Thus, Articles I-12 and I-13 clarify the division of competences in the case of exclusive powers. At the same time – and perhaps contrary to popular belief – it remains clear that external relations are the responsibility of both the Union and the Member States.[164] This means that even the new European Neighbourhood Policy is to be approached from a multilevel perspective. Irrespective of the provision in Article I-57(2), which states that 'the *Union* may conclude specific agreements with the countries concerned' (emphasis added), Member State participation seems to remain needed in the areas not falling under the Union's exclusive competence. Under the Constitutional Treaty, however, Member State action in this field would be restricted to areas not covered by a legislative act of the Union or to cases in which it does not harm the Union's ability to exercise its internal competence (Article I-13(2)). With the further development of the external relations of the new Union, for example triggered by the coming of age of the internal market, the introduction of the Union Minister for Foreign Affairs and the establishment of a diplomatic External Action Service,[165] a redefinition of the position of the Member States in the Union could be foreseen. Whether the Union should be regarded as 'a constitutional order of sovereign states' or even 'a federation of sovereign states'[166] is left open by the Constitutional Treaty, but so far the development of the external relations regime has revealed its limits whenever the issue of exclusivity or the invocability of international agreements has been at stake. The Constitutional Treaty codifies

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[164] Ironically, no 'mixed' agreements have been concluded by the current European Union. Treaty-making in the area of the CFSP and PJCC is 'exclusively' in the hands of the Union.

[165] Cf., Article III-328 TCE and the Declaration on the External Action Service adopted by the European Convention: 'To assist the future Union Minister for Foreign Affairs, introduced in Article I-27 of the Constitution, to perform his or her duties, the Convention agrees on the need for the Council of Ministers and the Commission to agree, without prejudice to the rights of the European Parliament, to establish under the Minister's authority one joint service (European External Action Service) composed of officials from relevant departments of the General Secretariat of the Council of Ministers and of the Commission and staff seconded from national diplomatic services.

The staff of the Union's delegations, as defined in Article III-230, shall be provided from this joint service.

The Convention is of the view that the necessary arrangements for the establishment of the joint service should be made within the first year after entry into force of the Treaty establishing a Constitution for Europe.'

[166] A. Dashwood, 'The Relationship between the Member States and the European Union/European Community', 41 *CMLRev*. (2004) pp. 355-381 at p. 356.

major principles of the bits and pieces of the external relations *acquis* and simplifies provisions. However, when we combine this with the continuation of the separation in the Constitutional Treaty of the economic and foreign policy areas in terms of procedures and competences, the external relations domain is bound to remain a complex legal regime, which even makes acquaintance difficult for our new neighbours.