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Fifty Years of EC/EU External Relations: Continuity and the Dialogue Between Judges and Member States as Constitutional Legislators

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Pieter Jan Kuijper

Abstract

First, the progressive development of the Common Foreign and Security Policy (“CFSP”) and European Security and Defense Policy (“ESDP”) in the successive Treaty amendments will be sketched in its character as heritage of the French Fouchet Plan of 1961-62. Second, the idea of a dialogue between the European Court of Justice (“ECJ”) and the Member States as constitutional law-givers will be sketched in greater detail. This presumably will enable us to recognize some kind of continuity in these developments and the final question to be answered will be whether this continuity is also apparent in the considerably amended provisions on external relations of the Reform Treaty.

ESSAYS

FIFTY YEARS OF EC/EU EXTERNAL RELATIONS: CONTINUITY AND THE DIALOGUE BETWEEN JUDGES AND MEMBER STATES AS CONSTITUTIONAL LEGISLATORS

*Pieter Jan Kuijper**

INTRODUCTION

Anyone studying the evolution of the external relations powers of the European Community (“EC” or the “Community”) and later the European Union (“EU” or the “Union”) will be struck by the considerable role played by a series of judgments of the European Court of Justice (“ECJ”). These judgments, beginning in the 1970s have been rendered in two domains: (1) the general external relations power of the Community/Union and in particular its exclusive character, and (2) the common commercial policy of the Community and in particular its scope. The continuity with which the ECJ returns to these issues and in doing so further refines and adjusts its case law is remarkable. In the area of the general foreign relations power, the series of cases stretches from the early 1970s, *Commission of the European Communities v. Council of the European Communities*,¹ establishing an implied powers approach in the external relations domain, until the recent Opinion 1/03 on the Lugano Convention.² With respect to the scope of trade policy the evolution starts in the mid-to-late 1970s with Opinions 1/75³ and 1/78,⁴ laying down the exclusive and broad character of trade policy powers,

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1. *Commission v. Council*, Case 22/70, [1971] E.C.R. 263 [hereinafter ERTA].

2. *Competency of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, Opinion 1/03, (ECJ Feb. 7, 2006) (not yet reported).

3. *Opinion of the European Court of Justice (“ECJ”) Given Pursuant to Article 228 of the E.E.C. Treaty*, Opinion 1/75, [1975] E.C.R. 1355.

4. *International Agreement on Natural Rubber*, Opinion 1/78, [1979] E.C.R. 2871.

and has now reached *Commission of the European Communities v. Council of the European Union*⁵ on the interpretation of the Nice version of Article 133 of the Treaty Establishing the European Community ("EC Treaty") on trade policy (still pending).

This last reference to the Treaty of Nice serves to remind us that the ECJ is not developing the external relations powers of the Community/Union in splendid isolation. The Member States as treaty makers, as constitutional legislators, are also in this game. They react to the interpretations of the ECJ and the ECJ has to take into account and interpret the texts that they produce in their role of "masters of the Treaty." In short, since the treaty reforms started back in 1986 with the Single European Act ("Single Act"), there is a kind of dialogue between the ECJ and the Member States acting as "constituante" on the powers of the Community in the field of foreign relations. The limitation to the Community is conscious here, because it is only in the Community domain that the voice of the ECJ, also on external relations and trade policy, is heard. Next to that, there is the secular trend that started with the codification of the European Political Cooperation ("EPC") in the Single Act, followed by the second pillar in the Maastricht Treaty and culminating, for the moment, in a Common Foreign and Security Policy ("CFSP"). According to the Treaty of Lisbon ("Reform Treaty"), CFSP is an integral part of one single Union external policy, but nevertheless governed by special procedures and kept carefully isolated from the Community "acquis" by a double barrier, one that is supposed to keep the "intergovernmental" CFSP out of other (formerly Community) policies of the Union and to protect the CFSP from the (supposedly) nefarious influence of "supranational" decision-making.

This Essay seeks to develop these two trends in greater detail. First, the progressive development of the CFSP and European Security and Defense Policy ("ESDP")⁶ in the successive Treaty amendments will be sketched in its character as heritage of the French Fouchet Plan of 1961-62. Second, the idea of a dialogue between the ECJ and the Member States as constitutional law-givers will be sketched in greater detail. This presuma-

5. *Commission v. Council*, Case C 13/07 (pending case).

6. The European Security and Defense Policy ("ESDP") is a major element of the Common Foreign and Security Policy ("CFSP") pillar of the European Union ("EU").

bly will enable us to recognize some kind of continuity in these developments and the final question to be answered will be whether this continuity is also apparent in the considerably amended provisions on external relations of the Reform Treaty.

I. *THE FOUCHET PLAN AND THE COMMON FOREIGN AND SECURITY POLICY ("CFSP")*

The first trend in the development of the external relations of the European communities is part of the broader trend, initially primarily supported by the France of De Gaulle, but later also by other Member States, to control the so-called supranational communities by superimposing on them an intergovernmental structure,⁷ consisting of a Council of Heads of States and Governments, that would basically provide for the broad political impulsions of European cooperation.⁸ The right of initiative in the communities was too important to be left (entirely) to the European Commission (the "Commission") that might too easily escape the Member States' grip from time to time. This intergovernmental approach should in particular be guaranteed in the field of foreign relations and defense. If it was sometimes said in jest, that the process of European integration consisted of the ministers of foreign affairs giving away the powers of their colleagues in the national governments, the Fouchet plan made clear that the ministers of foreign affairs were going to stop where their own powers were at stake.

It is remarkable to what extent especially the second French version of the Fouchet plan contains in embryonic form many of the following characteristics that later return in the second pillar (and also in the Communities themselves): the European Council, the multiplicity of Councils of Ministers, and the Political Commission or Committee. This is not to say that the version that was opposed to it by the other five Member States differed that much from Fouchet's ideas. In it, one recognizes elements that later returned in either the Single Act, such as cooperation

7. But see Article 1 of the Reform Treaty, according to which the Treaty on European Union ("TEU") and the future Treaty on the Functioning of the European Union ("TFEU") are of the same value, an assurance that was missing in earlier drafts. Draft Treaty of Lisbon (Reform Treaty), O.J. C 305/01, arts. 1, 2(b) (2007), *opened for signature* Dec. 13, 2007 (not yet ratified) [hereinafter Reform Treaty].

8. In De Gaulle's vision, no doubt, the existing Communities might better be replaced entirely by this "Europe des patries."

in the field of science and technology, or in the third pillar in the Maastricht Treaty, such as harmonization and unification in the field of civil law.⁹

Europe had to wait nearly twenty-five years to see some of these ideas return in the Single Act of 1986, which of course opened with an Article that established the European Council (the “Council”) and ended with a title that codified the EPC, which had hitherto existed at a purely informal level.¹⁰ In the terms of Article 1 of the Single Act, the European communities and the EPC shall “contribute together to making concrete progress towards European unity.”¹¹ In line with this it also contained a provision that seeks to ensure the consistency between “the external policies of the European Community and the policies agreed in European Political Co-operation”¹² (note that the external policies of the Community are still mentioned first)—a provision that was to come back in a different form later on. The Single Act also heralded the beginning of what was then called the Political Committee and established “a secretariat based in Brussels,” the embryonic beginning of the now massive CFSP side of the Council Secretariat.¹³ However, the contents of the title on EPC of the Single Act were kept out of the Community treaties as such.¹⁴

This changed in Maastricht¹⁵ where, after an overly “supranational” draft of the Dutch Presidency had been discarded, the first steps were set towards the fateful mix of the intergovernmental and Community approaches in two closely linked treaties, serviced by the same Institutions, but separated by the “Chinese wall” of Article 47 of the Treaty on European Union (“TEU”). This mix affected in particular the sector of external relations because Maastricht meant a further development of the

9. The different versions of the Fouchet Plan can be found on the website of European Navigator, <http://www.ena.lu/> (last visited Apr. 4, 2008).

10. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] (amending Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]).

11. See SEA, *supra* note 10, art. 1, O.J. L 169/1, at 4.

12. See *id.* art. 30(5), O.J. L 169/1, at 13.

13. See *id.* art. 30(10)(g), O.J. L 169/1, at 14.

14. See *id.* art. 30, O.J. L 169/1, at 13-14.

15. Consolidated Version of the Treaty on the European Union, O.J. C 321 E/1 (1992) [hereinafter Maastricht Treaty]. The changes in the Maastricht Treaty have been incorporated into the most recent consolidated version of the Treaty Establishing the European Community (“EC Treaty”) and the TEU.

following provisions on EPC into the CFSP, though still with some hesitation: no (international) personality for the Union, no treaty-making power yet under the CFSP, and no High Representative for the CFSP. However, the second pillar was by now equipped with the possibility of taking legal acts and the embryonic institutions announced in the Single Act were now integrated into the Community Institutions which became Institutions of the Union. Both the Political Committee and the EPC Secretariat are now part of the Council machinery. The Commission was merely “associated” with the CFSP.

The “Chinese wall” provision (current Article 47 of the TEU) is drafted in such a way as to first protect the “Community” method against the intergovernmental method, but it is interesting to note that the consistency provision has already changed from the Single Act and is now drafted in neutral terms. The provision no longer states that Community external policies and Union policies, including those of the CFSP, have to be consistent with the Community policies mentioned first, but that the Union shall ensure the consistency of its external activities as a whole.¹⁶

It is well to recall that the Single Act was negotiated and adopted and entered into force during the time when the changes in what soon turned out to be the former Soviet Union and Eastern Europe became palpable. The time when the consequences of these changes worked themselves out and became fully clear, most notably the unification of Germany and the violent disintegration of former Yugoslavia, was precisely the time when the Treaty of Maastricht was prepared, agreed, and ratified. On the trade side, this was also the time when the long drawn-out negotiations of the Uruguay Round were going on.

It is only after the Treaty of Amsterdam,¹⁷ that the CFSP really took off. That is mainly because Amsterdam gave the CFSP a head, namely the High Representative/Secretary-General of the Council—a post that was immediately filled by Xavier Solana, the Secretary-General of the North Atlantic Treaty Organization (“NATO”).¹⁸ In addition, the Council was given

16. See Maastricht Treaty, *supra* note 15, art. C, ¶ 2, O.J. C 321 E/1, at 11 (1992).

17. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam].

18. See Common Foreign & Security Policy-Overview-Other Institutional Roles in

treaty-making power under the second pillar, though the text did not make it clear whether any treaties so concluded would bind the collectivity of Member States or the Union (which still did not get international personality at Amsterdam). In spite of this ambiguity, the Council was not deterred from soon concluding a considerable number of international agreements, especially in the field of CFSP, in an effort to gain a certain international recognition of the personality of the EU. Amsterdam also considerably developed the military side of the CFSP through a provision that seemed to be drafted to permit the Union to work with or through the Western European Union (“WEU”), but in reality turned out to be the clarion call for the *de facto* integration of the WEU Secretariat into the Council Secretariat through the personal union of the two Secretaries-general in Mr. Solana.¹⁹ One of the most visible results of the entry into force of the Treaty of Amsterdam in 1999 was the sudden appearance of a large number of military uniforms of the most staggering variety in the Council building.

These realities were also reflected in the Treaty of Nice,²⁰ as the Political Committee was renamed the Political and Security Committee and was specifically charged with crisis management.²¹ This was an area, where the Community was already active, as there were instruments relating to civilian crisis management in the area of man-made and natural disasters inside the Community and also in third countries.²² In addition, it was now clarified that the international agreements concluded by the Council in the framework of the second and third pillar were supposed to be agreements of the Union.

The period of the Amsterdam and Nice treaties was one of increasing legal activity in the field of the CFSP and the creation

the CFSP process, http://ec.europa.eu/external_relations/cfsp/intro/index.htm (last visited Apr. 4, 2008).

19. See generally PETER CROSS & OTFRIED NASSAUER, BRITISH AMERICAN SECURITY INFORMATION COUNCIL [BASIC], EUROPEAN SECURITY: SHARKS AND MINNOWS OFF HELSINKI (2001), http://www.basicint.org/europe/confprev/ES-Sharks_Minnows-1999dec.htm.

20. See Consolidated Version of the Treaty Establishing the European Community, O.J. C 325/33 (2002) [hereinafter 2002 Consolidated EC Treaty], as amended by the Treaty of Nice, Mar. 10, 2001, O.J. C 80/1 (2001) [hereinafter Treaty of Nice].

21. See Treaty of Nice, *supra* note 20, art. 1(5), O.J. C 80/1, at 8. Article 1 of the Treaty of Nice is now the current Article 25 of the TEU.

22. See generally Council Decision No. 2007/779/ EC, O.J. L 314/9 (2007).

of a large number of police and military operations.²³ It also became a habit of the Council to use the “consistency clause” ever so gently in a way that pushed the Community into action in the service of the CFSP. To this end, a formula was developed which was based on the consistency clause of Article 3 and which carefully avoided breaking through the “Chinese wall” clause of Article 47. This formula reminded the Community that the Council intended to do what was necessary under the EC Treaty in line with the CFSP action undertaken.²⁴ These were the signs of a gentle subordination of the Community to the Union that was beginning to take shape. There were also moments, however, where the Council was less subtle and seemed bent on preempting Community action by going ahead with Union action. This overt Council movement can be seen in the case of the EUJUST action in Georgia²⁵ or the action with respect to Small Arms and Light Weapons (“SALW”) in West-Africa. The SALW action even provoked the Commission into a case against the Council, arguing that it had crossed the frontier with Community powers in the field of development, thus breaching Article 47 of the TEU.²⁶

Summarizing the crucial points of this brief historical sketch of the successive stages of development of the CFSP, the major point that can be made here is that the intergovernmental Union comes ever closer to the Community. There are areas, such as Schengen and the third pillar which make the full transition to the Community method, but in external relations that transition, unsurprisingly, is not made. There the CFSP, remaining clearly intergovernmental, comes ever closer to being a leading influence on Community external relations. That is exactly as many Member States want it, since in their view—a view that

23. See Ricardo Gosalbo Bono, *Some Reflections on the CFSP Legal Order*, 43 COMMON MKT. L. REV. 337, 337-94 (2006).

24. The standard formula reads as follows: “[t]he Council notes the intention of the Commission to direct its action towards achieving the objectives of this Joint Action, where appropriate, by relevant Community instruments.” Council Joint Action No. 2004/523/CFSP, art. 11(1), O.J. L 228/21, at 23 (2004).

25. See *id.* arts. 1-14, O.J. L 228/21, at 21-24 (2004).

26. See Opinion of Advocate General Mengozzi, *Commission v. Council*, Case C-91/05, ¶ 23 (ECJ Sept. 19, 2007) (not yet reported), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005C0091:EN:HTML>. The Advocate-General went along with the Commission on many points of principle, but in the end advised the ECJ that the Council had properly taken the action under the CFSP and not under the development cooperation provisions of the Treaty. See *id.* ¶¶ 213-21.

some have held ever since the Fouchet plan—they need a firm grip on anything that is foreign policy.

II. *THE “DIALOGUE” BETWEEN THE EUROPEAN COURT OF JUSTICE (“ECJ”) AND THE MEMBER STATES AS CONSTITUTIONAL LEGISLATORS*

A. *The ECJ’s first judgment in the external relations field*

It was the ECJ that opened this dialogue with its path-breaking judgments in the field of general external relations powers and the common commercial policy. The first domain in *Commission of the European Communities v. Council of the European Communities* (“ERTA”) and Opinion 1/76 established the principle that, in spite of the scanty references to substantive external powers in the Treaty Establishing the European Economic Community (“EEC Treaty”), the Community had such powers in all areas covered by the EC Treaty.²⁷ This potential power could become exclusive to the Community if any internal legislation that had been enacted was affected or its scope altered by an international agreement pertaining to that legislation was to be concluded by a Member State or collectively by all the Member States.²⁸ Such exclusivity could also arise if the conclusion of the agreement in question was necessary to reach an objective of the Community.²⁹ Obviously these cases were in need of further explanation and precision which would take many years and many new cases. Yet, their power is best illustrated by the fact that the ERTA case was capable of slowing down internal legislation, since Member States in the Council repeatedly expressed anxiety about losing external powers once they would have decided on internal legislation in the Council.

In the field of commercial policy the 1970s were characterized by the two blockbuster opinions, Opinion 1/75 and Opinion 1/78, which laid down the exclusive and evolving character of the Community power with respect to the common commercial policy.³⁰ These opinions also demonstrated the broad and

27. See ERTA, Case 22/70, [1971] E.C.R. 263, ¶ 14; Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels, Opinion 1/76, [1997] E.C.R. 741, ¶ 4.

28. See ERTA, Case 22/70, [1971] E.C.R. 263, ¶ 17.

29. See Opinion 1/76, [1997] E.C.R. 741, ¶ 4.

30. See Opinion of the ECJ Given Pursuant to Article 228 of the E.E.C. Treaty, Opinion 1/75, [1975] E.C.R. 1355, ¶ 2.

evolving character of this power, by encompassing all trade instruments in other areas of external relations, such as development. This broad power made it impossible for Member States, or so it seemed at the time, to escape the strictures of the Community commercial policy by using new or different instruments in this area.³¹

If one adds to this mix of different cases, the *International Fruit Company NV v. Produktschap voor Groenten en Fruit*³² (which posited the principle that in all the areas where the Member States had transferred exclusive external powers to the Community, the Community was destined to replace the Member States in the international organizations working in that field, in this case the General Agreement on Tariffs and Trade), it is clear that this made for a heady mix for those working inside the Community external relations machinery and a rather scary one for those in the Member States' foreign policy bureaucracies. Since it was now conceivable that by dint of the operation of the ERTA doctrine or by direct resort to exclusive external competence pursuant to Opinion 1/76, different areas of external relations powers would successively acquire an exclusive character. That being the case, Member States would then be inexorably driven from one international organization after another, thus losing a vital manifestation of their continuing external sovereignty. Obviously the threat was not immediate, since the Community, in particular the Commission, in the 1970s and 1980s lacked the manpower and the expertise to assume such a "succession" to its Member States in many international organizations, but the perspective as such was worrying enough for many.

Moreover, Member States, in practice, found a way of restraining the logic outlined above by obliging the Community to conclude so-called "mixed agreements." Sometimes there was a

31. See International Agreement on Natural Rubber, Opinion 1/78, [1979] E.C.R. 2871, ¶¶ 45-46.

32. See *Int'l Fruit Co. NV v. Produktschap voor Groenten en Fruit*, Joined Cases 21-24/72, [1972] E.C.R. 1219, ¶¶ 16-18. These cases applied the so-called "succession doctrine" initially to the General Agreement on Tariffs and Trade only. For its possible extension to, for instance, the area of United Nations ("UN") sanctions against Southern-Rhodesia in the early 1970s, see P. J. Kuijper, *Sanctions Against Rhodesia: The EEC and the Implementation of General International Legal Rules*, 12 COMMON MKT. L. REV. 231, 238 (1975). The application of the "succession doctrine" to the realm of UN sanctions was recently revived by the Court of First Instance. See *Kadi v. Council*, Case T-315/01, ¶¶ 194-204 (CFI Sept. 21, 2005) (not yet reported).

justification for this, when there were indeed subjects outside exclusive Community competence, included in the agreements. In others there was not, such as the conclusion of mixed association agreements, which became the norm in spite of the fact that it was clear that this was unnecessary as the Association Agreements with Cyprus and Malta were concluded as exclusive Community agreements. The late 1970s and early 1980s were when this phenomenon really took off.³³

B. *The Single European Act and the Treaty of Maastricht*

One might say that in response to this case law, the Single Act and the Maastricht Treaty not only followed the old lead of the Fouchet Plan by developing the EPC into the CFSP, but also created specific powers in the field of external relations, which were explicitly declared to be shared powers right from the start. This was the case for the external aspects of the areas of research, technology,³⁴ and the environment³⁵ in the Single Act. Later, in the Maastricht Treaty, development policy³⁶ was added. In that case it was explicitly stated that Member States could continue to act on the international level and conclude agreements with respect to development cooperation, as long as that was not in contradiction with Community policy and Community agreements.³⁷ This exceptional permission, contrary to the ECJ's ERTA doctrine, could be considered acceptable, since development policies and agreements—especially as long as they concentrate on core development policy instruments, such as technical and financial assistance—can be easily complementary and would probably increase the total amount of development assistance.

However, it was not the intended goal in the Maastricht Treaty to do away outright with the ERTA doctrine. A declaration accompanying the Maastricht Treaty stated that the articles which laid down external relations in the field of the environment, research and technology, and in external monetary policy

33. The first major conference and book on mixity dates from 1982. *See generally* MIXED AGREEMENTS (David O'Keefe and Henry G. Schermers eds., 1983).

34. *See* SEA, *supra* note 10, art. 130f, O.J. L 169/1, at 10.

35. *See id.* art. 130r(5), O.J. L 169/1, at 12.

36. *See* Maastricht Treaty, *supra* note 15, art. 130y, O.J. C 321 E/1 (1992). Article 130y of the Maastricht Treaty is now current Article 181 of TEU.

37. *See* Council Decision No. 69/494/EEC, O.J. L 326/39, 39-42 (1969).

were shared competence and thus did not stand in the way of the ERTA doctrine applying in these areas. On the other hand, the Maastricht Treaty, with respect to the treaty-making power in the field of external monetary policy, laid down that the normal procedural rules did not apply and that it was up to the Council to decide who would be the negotiator of such agreements.³⁸ In other words, the traditional role of the Commission as the external “face” of, and negotiator for, the Community was clearly being undermined in this new important area of Community competence without any clear justification.

These new, explicit, and shared external relations powers introduced in the Maastricht Treaty clearly responded to the external and internal needs of the Community. They were part and parcel of new internal powers, with the exception of development policy. Monetary policy apart, they had been exercised partially on the basis of internal market provisions, including harmonization, and partially on the basis of the “flexibility” provision (current Article 308 of the EC Treaty).³⁹ Apart from the internal need for these powers, there also was a clear external reason: science, technology, environment and development were, in the early 1990s, on the threshold of a treaty-making explosion that was strongly fed in environment and development by the notion of sustainable development. Nevertheless, their codification as shared competences served to rob these areas of the kind of dynamism in the development of external relations powers that had existed in the 1970s and 1980s on the basis of the ERTA doctrine and the case law on common commercial policy. In spite of the Maastricht declaration on ERTA, it became much easier for the Member States in the Council to insist on a mixed character of international agreements in these fields, and it required much persistence from the Commission and a constant willingness to go to the ECJ to invoke that declaration and to insist on exclusive competence. In the daily reality of external relations, where time is short and questions of competence have to be decided quickly, these were qualities that were difficult to muster.⁴⁰

38. See Maastricht Treaty, *supra* note 15, art. 109, O.J. C 321 E/1 (1992). Article 109 of the Maastricht Treaty is current Article 111 of the TEU.

39. See Consolidated Version of the Treaty Establishing the European Community art. 308, O.J. C 321 E/37, at 179 (2006) [hereinafter EC Treaty].

40. See, e.g., Convention Number 170 of the International Labour Organization

Finally, the Maastricht Treaty introduced the first explicit “bridge” between the CFSP and the trade policy powers of the Community in the form of Article 228a (current Article 301 of the EC Treaty) of the Maastricht Treaty.⁴¹ Basing itself on earlier informal practice, trade sanctions decided by the Security Council, or even decided autonomously, were implemented on the basis of the trade policy powers of the Community, only after consultation between the Member States under the (near-obsolete) Article 224 (current Article 297) of the EC Treaty or within the framework of the EPC.⁴² The inter-governmental conference fashioned this new provision that—notwithstanding the separation between the pillars imposed by Article 47 of the TEU—demanded that the community follow the lead of the Union (CFSP) in matters of trade sanctions.⁴³

C. *The ECJ steps on the brakes*

In the light of these developments at the intergovernmental level, it is striking how much more cautious, not to say restrictive the ECJ became directly after the conclusion of the Single Act and during the negotiation and ratification procedure of the Treaty of Maastricht, both in respect of general external relations powers and of trade policy powers.

In Opinion 2/91, which concerned the power of the Community to become a party to an International Labor Organization (“ILO”)⁴⁴ Convention concerning safety in the use of chemicals at work (Convention No. 170),⁴⁵ the ECJ applied a starkly

Concerning Safety in the Use of Chemicals at Work, Opinion 2/91, [1993] E.C.R. I-1061.

41. See Maastricht Treaty, *supra* note 15, art. 228a, O.J. C 321/01. Article 228a of the Maastricht Treaty is current Article 301 of the EC Treaty.

42. See P.J. Kuijper, *European Economic Community*, in *INTERNATIONAL LAW OF EXPORT CONTROL, JURISDICTIONAL ISSUES*, 57, 57-77 (Karl M. Meessen ed., 1992).

43. It is striking how much weight is attached to this sanctioned subservience of the Community to the Union both by the Court of First Instance. See *Kadi v. Council*, Case T-315/01, [2005] E.C.R. II-3649, ¶¶ 122-35; *Opinion of Advocate General Maduro*, *Kadi v. Council*, Case C-402/05 P, ¶¶ 14-15 (ECJ, Jan. 18, 2008) (not yet reported). In the first case to argue that this extends the scope of Article 308 of the EC Treaty to include certain objectives of the Union CFSP in its ambit; in the second case in order to give a broader scope to Article 301 itself.

44. The International Labor Organization is a tripartite UN agency that brings together governments, employers, and workers of its member states in an effort to promote decent work conditions throughout the world.

45. See Opinion 2/91, [1993] E.C.R. I-1061.

diverging analysis to two different aspects of the ILO Convention in light of the existing Community legislation in the field covered by the ILO Convention. The end result is a severe restriction of the ERTA doctrine. On the one hand, when the relevant Community legislation falls in the domain of the internal market and is of a normal harmonization character, the ECJ is prepared to take the following broad view: it is an area which is already covered to a large extent by Community rules progressively adopted over a long period of time with a view to harmonizing rules for the protection of human health and the environment. Hence, even if there was no complete identity in the matters covered by the ILO Convention and the relevant Community rules, that particular part of the ILO Convention could not be concluded by the Member States on their own, since Community law would be affected and, under the ERTA doctrine, Community competence was therefore exclusive.⁴⁶ On the other hand, in respect of the pure social policy provisions in Community law and in the ILO Convention, these were on both sides largely based on minimum norms. The consequence was that logically, if it turned out that the Community and/or national law was falling below the ILO minimum standard, Member States could make up for the difference, since they had the freedom to do so under Community law. Hence, Community law would not be affected, if Member States concluded an ILO convention of this nature on their own and the ERTA doctrine did not apply.⁴⁷

The result of this reasoning was not only that ILO conventions, but also many other international agreements (not only in the social domain, but also in the environmental sector, where minimum norms are also widely applied in both Community law and in international conventions) would not fall under exclusive Community competence. This meant that in important areas densely covered by Community law, in particular the environment, the Community was not guaranteed a place on the international scene and might not be able even to participate in mixed agreements. That is unless there was another element in the Convention that was of exclusive Community competence (as was the case with ILO Convention No. 170) or the Council was willing to have resort to potential Community competence—

46. *See id.* ¶¶ 24-26.

47. *See id.* ¶¶ 16-18, 21.

a rarity. This case thus probably also contributed to the climate where the Commission was often only too happy to opt for the mixed option in respect of international environmental agreements.

Opinions 2/92⁴⁸ and 1/94⁴⁹ heralded a further restrictive interpretation of both trade policy powers and the ERTA doctrine. They put an end to any illusion that might have been harbored to the effect that Opinion 1/78 implied that the ECJ would go for an automatically expanding concept of the common commercial policy in line with the evolution of the concept in international relations generally.⁵⁰ That was not to be. The common commercial policy and its concomitant exclusive Community powers would essentially need to be restricted to the following matters for which the Community had a single regime at a natural external border: goods and direct cross-frontier services. For other services and the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS")⁵¹ there was no single external border regime, unless it had been laid down somehow in individual cases in internal Community legislation. Thus, the ERTA doctrine applied in those areas, and the World Trade Organization ("WTO") Agreements and the Organisation for Economic Co-Operation and Development ("OECD") Decisions on National Treatment were to be mixed agreements.⁵² It is not necessary critically to comment on these aspects of the opinions any further.

What is striking about Opinion 1/94 is that it also restricted the scope of Opinion 1/76 and of the ERTA doctrine by choosing an "objective" approach, excluding the exercise of political or economic judgment by the Council. Especially the use of the

48. Competence of the Community or one of its Institutions to Participate in the Third Revised Decision of the OECD on National Treatment, Opinion 2/92, [1995] E.C.R. I-521.

49. Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property—Article 228(6) of the EC Treaty, Opinion 1/94, [1994] E.C.R. I-5267.

50. See International Agreement on Natural Rubber, Opinion 1/78, [1979] E.C.R. 2871, ¶¶ 36-60.

51. Administered by the World Trade Organization ("WTO"). Specifically, the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") contains provisions that govern all aspects of intellectual property law including copyright rights and trademarks.

52. See Opinion 2/92, [1995] E.C.R. I-521, §§ IV-V; Opinion 1/94, [1994] E.C.R. I-5267, ¶¶ 98, 105.

term “necessary” in Opinion 1/76 gave rise to the idea that the Council might be the one to determine whether recourse should be had to exclusive external Community competence, as it deemed that such recourse was economically or even politically “necessary for the attainment of one of the objectives of the Community.”⁵³ However, the ECJ ruled in Opinion 1/76 that “necessary” referred to some kind of objectively ascertainable necessity, comparable to the factual situation in that case—namely the impossibility to diminish shipping capacity on the Rhine without concluding an agreement with the Swiss about it.⁵⁴

The ERTA doctrine was similarly cut off from the possibility of turning its application into an economic or even a political judgment call. The fact that the absence of an international agreement at the Community level would probably lead to competitive distortions within the internal market for services or goods (in the latter case caused by differences in legislation on intellectual property) was not enough to be considered an affectation or an alteration of the scope of Community legislation within the meaning of the ERTA case. Probable factual distortions in the internal market were not equivalent to actual legal affectation of Community law.⁵⁵

It is to be noted that among the external relations cases coming before the ECJ, after Maastricht and beginning to be decided during the period leading up to the Treaties of Amsterdam and Nice (but continuing thereafter), there is an increasing number of cases that concern the demarcation among different external policies, especially between trade and environmental policies.⁵⁶ This is a natural outcome of the proliferation of different external policies recognized in the EC Treaty after the Single Act and Maastricht.

53. See Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels, Opinion, 1/76, [1977] E.C.R. 741, ¶ 4.

54. See Opinion 1/94, [1994] E.C.R. I-5267, ¶ 86.

55. See *id.* ¶¶ 78-79.

56. See *generally* Cartagena Protocol–Conclusion–Legal Basis–Articles 133 EC, 174(4) EC and 175(1) EC–Living Modified Organisms–Environmental Protection–Common Commercial Policy, Opinion 2/00, [2001] E.C.R. I-9713; Commission v. Council, Case C-281/01, [2002] E.C.R. I-12049; Opinion of Advocate General Kokott, Commission v. Council, Case C-94/03, [2006] E.C.R. I-1. All three discuss the Prior Informed Consent Convention with each having different outcomes.

D. *The Amsterdam and Nice Intergovernmental Conferences ("IGCs")*

In the light of these restrictive tendencies in the ECJ's case law on external relations in the 1990s, it was interesting to see the main amendments to the EC Treaty during the Amsterdam and Nice Intergovernmental Conferences ("IGCs") that followed this period. It has already been mentioned how Amsterdam spelled another leap forward for the CFSP, in particular with the introduction of the Secretary General/High Representative and the modification of the treaty-making power. In respect to Community external relations, Amsterdam primarily meant further perfection in the treaty-making provisions. Signature, provisional application, and suspension of international agreements of the Community are provided for and follow the same procedure as conclusion.⁵⁷ A new provision on the position to be taken on a decision of an Association Council, which would have legal consequences, is also added.⁵⁸ This latter provision is further adapted during the Nice IGC, where the notion of a decision of an Association Council is expanded to encompass decisions with legal effects on organs of all international organizations.⁵⁹

57. See EC Treaty, *supra* note 39, art. 300(2), O.J. C 321 E/37, at 176.

58. See *id.* art. 300, ¶ 2, O.J. C 321 E/37, at 176. This amendment was actually based on a long-standing practice in the Council of Ministers with respect to decisions of Association Councils. Since the Community Presidency representative was invariably one of the Presidents of the Association Council, normally the decisions, after negotiation with the Association partner(s) were drawn up by the Council Secretariat that assisted the Council Presidency.

59. One may well wonder whether this change was decided after sufficient thought had been given to the different modalities of decision-making and negotiation in other international organizations than associations, especially as the procedure laid down in the new provision is rather heavy, including a full-fledged proposal by the Commission. In some international organizations, such as the WTO and fisheries organizations, negotiations continue until the last minute before a "decision" is taken. This is not ideal for giving the Commission the time to come forward with a formal proposal, to put it mildly. In many organizations decisions having legal effect are only reached after opt-out or opt-in procedures have been applied, so that it is unclear when the Community should actually take its position. In other organizations there can be total ambiguity about whether the decision actually does have legal effects. This provision has already given rise to a ferocious debate in the Council on how to apply it, when certain stages of the WTO negotiations in the Doha Development Agenda are passed. Is such a stage in the negotiations which is officialized in an instrument of the WTO Ministerial Conference or General Council merely a phase in the negotiations that the Council can only stop by changing the negotiating directives, requiring a qualified majority? Or does it require a Council decision in which case a mere blocking minority can stop the course of events?

The Treaty of Nice also introduced a new power, Article 181a, in the field of technical and financial assistance to countries other than developing countries so as to avoid in the future having to have recourse to the flexibility provision of Article 308 of the EC Treaty.⁶⁰ This provision was of importance especially for relations with the countries of the former Soviet Union that did not fall in the category of aspiring new Members.⁶¹

The provisions introduced into the EC Treaty by the IGCs of Amsterdam and Nice can be seen on one hand as representing a tendency among the Member States to ensure that the Community institutions in their external relations should be subject to stricter and more detailed rules with respect to both the substantive and procedural aspects of external relations. On the other hand, these IGCs also gave signals that the ECJ's restraint in the field of trade policy might have gone too far. At Amsterdam, a first opening was made so that services and TRIPS could after all be covered by Community competence in the field of trade, but a unanimous decision in the Council would be needed for that.⁶² In Nice, the IGC went further down this road, including services and TRIPS in the common commercial policy in principle, but surrounding this with many caveats, in particular relating to certain services sectors which were considered particularly sensitive—such as health, educational and audiovisual services—and by creating a new kind of trade agreement, the so-called horizontal agreement—such as trade agreements of the WTO, that relate horizontally to all services and TRIPS sectors, including the sensitive sectors.⁶³ However, the relevant paragraphs 5 and 6 of Article 133 on trade policy are so badly and vaguely drafted that it is very difficult to say whether such horizontal agreements remain within the exclusive Community competence in trade policy and “merely” require unanimity or still fall into mixed competence, as before Nice.⁶⁴

60. See Treaty of Nice, *supra* note 20, art. 2(16), O.J. C 80/1, at 21. Article 2(16) is the current Article 181a of the EC Treaty.

61. See EC Treaty, *supra* note 39, art. 181a, O.J. C 321 E/37, at 127.

62. See *id.*, *supra* note 39, art. 133, O.J. C 321 E/37, at 105.

63. See Treaty of Nice, *supra* note 20, art. 2(8), O.J. C 80/1, at 15. Article 2(8) of the Treaty of Nice is current Article 133 of the EC Treaty.

64. See *Commission v. Council*, Case C-13/07 (pending case).

E. The ECJ vacillates on its ERTA doctrine

After these mixed signals in the field of external relations from Amsterdam and Nice, the ECJ seems also rather uncertain of the line it should follow in this domain, especially with respect to the ERTA doctrine. In the so-called "Open Skies" aviation agreements with the United States, the ECJ was quite restrictive in its application of its own ERTA case law.⁶⁵ However, four years later in Opinion 1/03, concerning the exclusive competence of the EC to adhere to the Lugano Convention (an agreement with a number of neighboring States), which extended the operation of Regulation 44/2001 on the recognition of judgments and jurisdiction in private international law, the ECJ was ready to show a somewhat broader approach to its own case law.⁶⁶

The *Commission v. United Kingdom of Great Britain* [hereinafter Open Skies] case is so detailed, almost "pontilistic" in its reasoning that it would be beyond the scope of this essay to analyze it in detail. The fact that these were all infringement cases and that it was, therefore, necessary for the Commission to prove in detail at which points the respective Member States had breached the Treaty (in particular as interpreted by the ECJ in its ERTA case) probably contributed to this approach. Let it suffice here to say that the Commission, for instance, tried to argue that, even though the two main regulations on the Community aviation market were restricted to Community carriers, the granting of such fifth freedom rights through individual Member States' aviation agreements to third States' air carriers caused the latter to compete on a market regulated by Community legislation and thus affecting this Community regulation directly. However, the ECJ rejected this once more as a pure economic consequence of Community regulation and not an objective legal affectation within the meaning of its ERTA case.⁶⁷

On the whole, the ECJ's approach to ERTA, in the wake of Advocate-General Tizzano, was an extremely meticulous and

65. See *Commission v. United Kingdom and Northern Ireland, Denmark, Sweden, Belgium, Luxembourg, Austria, and Germany*, Joined Cases 466, 469, 471, 472, 475, 476/98, [2002] E.C.R. I-9427, ¶¶ 123-45.

66. See Competency of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Opinion 1/03, (ECJ Feb. 7, 2006) (not yet reported).

67. See *Commission v. Belgium*, Case 471/98, [2002] E.C.R. I-9681, ¶ 101-04.

painstaking finding against the Commission's complaints on some points and in favor of them on others. In the end, therefore, the Member States were condemned and such Open Skies agreements henceforth had to be concluded as mixed agreements. The very detailed application of the ERTA doctrine made many in the Commission and Council despair about their ability to achieve agreements between the institutions on the dividing line between exclusive Community competence and mixed agreements without going to the ECJ every time. However, in this particular context of Community aviation policy, it turned out that another aspect of the case was much more important than the further application and development of the ERTA doctrine—namely the ECJ's declaration that the reservation of the rights under these agreements to the air carrier(s) of the Member State concerned was contrary to the freedom to provide services.⁶⁸ Since this was the main reason why Member States wanted to conclude these agreements on their own, the particular points which according to the ERTA analysis the Member States had retained their external powers (notwithstanding considerable internal Community legislation) counted for much less. Thus a new Open Skies agreement with the United States ("U.S.") was in the end concluded as a pure Community agreement.⁶⁹ Below we will return to another aspect of Community treaty-making in the aviation sector.

Opinion 1/03 on the Lugano Convention was in many ways a result of the Open Skies case. Emboldened by the very detailed approach followed by the ECJ in those cases, the Member States in the Council felt encouraged to question the exclusive competence of the Community, even in respect of an international agreement that was near *identical* to a Community regulation. It was also to be a first judicial test of the application of the ERTA doctrine in the field of justice and home affairs which had been transferred from the third pillar to the Community with the Treaty of Amsterdam.

Opinion 1/03 stands out because it ventures to give a full restatement of the ERTA doctrine before actually applying it to the Lugano Convention.⁷⁰ In passing, the ECJ also further re-

68. *See id.* ¶ 131-32.

69. *See* Commission Decision No. 2007/339/EC, O.J. L 134/1, at 1 (2007).

70. *See* Opinion 1/03, ¶¶ 43-95 (ECJ Feb. 7, 2006) (not yet reported).

stricts the possibility of direct obligatory recourse to external powers under the doctrine of Opinion 1/76.⁷¹ Thus, after having briefly recalled that in principle the (potential) external powers of the Community extend all the way across the spectrum covered by the EC Treaty, the ECJ reduces the concept of “objective necessity” to exercise external competences for the realization of internal objectives of the Community, to simultaneity of the exercise of external and internal competence.⁷² The notion of simultaneity has been criticized by the author elsewhere.⁷³ Moreover, one wonders what remains the distinguishing feature of the approach of Opinion 1/76 compared to the ERTA doctrine. The corresponding external power will simply be exercised at the same time or hard on the heels of the internal legislation and would no longer be an obligatory first recourse to a potential external power. Thus the approach of Opinion 1/76 is simply absorbed by the ERTA doctrine.

First of all, the ECJ cites point 17 of the ERTA judgment in order to recall a core idea, namely that every time common rules have been adopted, Member States no longer had the right, individually or collectively, to undertake obligations with third States which affect those rules.⁷⁴ In other words: in such situations the Community has exclusive external competence.⁷⁵ Secondly, the ECJ then turns to Opinion 2/91 in order to recall that the Community rules which cover a specific area—especially in the case of progressive harmonization on the road to the internal market under simultaneous upholding of such values as the environment and human health—could be considered affected

71. *Id.* ¶ 114-15.

72. *Id.* ¶ 115.

73. P.J. Kuijper, *The Opinion on the Lugano Convention and the Implied External Relations Powers of the European Community*, in *JUSTICE, LIBERTY, SECURITY: NEW CHALLENGES FOR THE EXTERNAL RELATIONS OF THE EUROPEAN UNION* (B. Martenczuk & S. van Thiel eds.) (forthcoming 2008).

74. *See* Competency of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Opinion 1/03, ¶ 44, (ECJ Feb. 7, 2006) (not yet reported).

75. The ECJ also recalls in passing that this applies also in areas falling outside common policies and that this is underpinned by the principle of Article 10 of the EC Treaty. *See* Opinion 1/03, ¶¶ 115-18, quoting from ERTA, Case 22/70, [1971] E.C.R. 263, ¶ 17, and Convention Number 170 of the International Labour Organization Concerning Safety in the Use of Chemicals at Work, Opinion 2/91, [1993] E.C.R. I-1061, ¶¶ 10-11.

by international obligations in that area.⁷⁶

The ECJ, however, continues to accept the minimum standards exception; but, only in cases where both the Community law and the international convention contain minimum standards,⁷⁷ as well as the economic affectation exception. In this connection the ECJ places great emphasis on the need for a specific analysis of both the agreement envisaged and the relevant Community law in force possibly affected thereby.⁷⁸ What is important is to ensure a uniform and consistent application of Community rules and the proper functioning of the system they establish. This may not be touched by international obligations accepted by the Member States. The purpose of the exclusive external competence of the Community is primarily to maintain the integrity of Community law and the effectiveness of the Community system, according to the ECJ.⁷⁹

This is clearly a minimalist approach by the ECJ and confirms that the continued existence of the external sovereignty of the Member States is of prime importance, as opposed to the full parallelism between internal and external powers of the Community. The exception for minimum standards remains a clear sign in this connection.

It is not useful here to summarize at any length the way in which the ECJ applies this restatement of the ERTA doctrine, but the impression one retains from reading this part of the opinion is that it brings some improvement in the application of that doctrine. In particular, the ECJ here seems to be ready to make a less formalistic analysis of the probable situation that would result from the Member States concluding the projected agreement on their own than it did in the *Open Skies* cases.⁸⁰

76. See Opinion 1/03, ¶ 120, (ECJ Feb. 7, 2006) (not yet reported), referring to the opinion on the Convention Number 170 of the International Labour Organization Concerning Safety in the Use of Chemicals at Work, Opinion 2/91, [1993] E.C.R. I-1061, ¶¶ 25-26.

77. In the author's view only the presence of minimum standards on the Community side is legally relevant, even in the approach of the ECJ.

78. See Opinion 1/03, ¶ 124, (ECJ Feb. 7, 2006) (not yet reported).

79. See Opinion 1/03, ¶¶ 128, 131, (ECJ Feb. 7, 2006) (not yet reported).

80. This is particularly clear from the way in which the ECJ treats a favorite Member State argument for the proposition that even Regulation 44/2001 left a certain amount of power to the Member States, namely that Article 4(1) contained a reference to the Law of Member States. See *Competency of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, Opinion 1/03, ¶¶ 148-50, (ECJ Feb. 7, 2006)

On the other hand the same realistic approach has not yet taken hold with respect to the problem of Community legislation containing minimum rules. On that point, it remains rather odd that the ECJ almost seems to encourage a total or partial absence of the Community at the international level in areas where Community legislation may be very broad and important, simply because it is based on minimum rules.⁸¹

F. *By way of Interim Conclusion*

The preceding paragraphs of this section have ventured to sketch a dialogue, or at the very least a pattern of action/reaction, between the case law of the ECJ in respect of foreign relations powers generally, and trade policy powers in particular, on the one hand and the results of the IGCs beginning with the one on the Single Act. It is clear that after the early case law of the ECJ of the 1970s, which opened up an enormous potential expansion of the Community's powers in external relations, the Member States acted to bring matters back under control. On the one hand, this was done through the progressive development of the intergovernmental EPC and later the CFSP—of which the latter explicitly shared the institutional framework with the Community. On the other hand, the Single Act and then the Maastricht Treaty laid down more explicit external relations powers (in such fields as science and technology, environment and development), which were declared “shared” in the Treaty provisions themselves. The fact alone that these explicit external relations powers were enacted and were declared to be shared served to circumscribe and limit the scope for expansion of the common commercial policy, which had been declared exclusive by the ECJ. Determining in the Treaty itself that external powers were mixed, even though it was not the intention to kill off the ERTA doctrine as such, contributed to the inexorable rise of mixity in external relations—a phenomenon that also permitted the Member States to reassert their control over Community external relations.

Perhaps not in direct reaction to these developments at the “constitutional” level (though one should never forget that the

(not yet reported). *But see* Commission v. Belgium, Case 471/98, [2002] E.C.R. 9681, ¶ 103.

81. *See* Opinion 1/03, ¶¶ 123-27, (ECJ Feb. 7, 2006) (not yet reported).

ECJ was deliberating on Opinion 1/94 during the period of ratification of the Maastricht Treaty, at a time when several ratifications threatened to go sour), the ECJ became considerably more circumspect in the first half of the 1990s, when it rejected an expansive interpretation of the common commercial policy and also became more restrictive in its interpretations of Opinion 1/76 and of the ERTA case in the domain of general external relations powers.

After this, the IGCs of Amsterdam and Nice not only bring a further important development of the EU/CFSP side of external relations (Treaty of Amsterdam), but also further provisions on explicit treaty-making powers and further detailed procedural rules. On the other hand, as we have seen, the Member States in the IGC were ready to reconsider their own preference and that of the ECJ for a narrowly defined commercial policy. The outcome, however, is sometimes rather internally contradictory, as exemplified by the largely vain attempts of the IGC of Nice to extend and clarify the scope of the commercial policy powers of the Community.

It is within that context that one can place the ECJ's hesitation over the interpretation, or rather the application, of its own ERTA decision in two successive big cases: Open Skies and Lugano. On the whole, the ERTA doctrine remains a difficult instrument to apply so that one can say with sufficient certainty that the choice the institutions make for exclusivity or mixity will be upheld by the ECJ.

III. *THE PRECEDING HISTORICAL ANALYSIS VIEWED FROM ANOTHER ANGLE*

It is also possible to analyze the facts and analysis set out above from a different angle. The continuous expansion of external relations activities of the EC/EU, either through the application of the ECJ's various implied powers or by the addition of new explicit external relations powers in the EC Treaty, can also be interpreted as a natural response to the worldwide trend to want to regulate matters with a global impact (trade, world finance, environmental problems, health problems, etc.) at a supra-regional level. As a kind of compensation for this expansion in scope of EC/EU external relations, Member States de-

mand an ever-stronger grip on EC/EU external relations. They realize this stronger influence in three ways.

First, this is done through intergovernmental mechanisms. In this respect, one can mention the "bridge" between the "political" sanctions decision in the framework of CFSP and the "trade" decision within the community (Articles 301 and 60 of the EC Treaty). However, in a much more indirect way the coordination requirement of Article 3 of the TEU can also be used in order to make the Community march in lockstep with the Union's CFSP. Earlier, we signaled the specific formula that had been developed to this effect in the Council.

Secondly, it is well documented in a long line of literature—and we have briefly referred to it above—that mixity is also an effective instrument to ensure that Member States are not confronted with measures in the external relations field that they could not stomach. Since mixity *de facto* brings about, if not formal unanimity, at least a kind of veto in relation to international agreements, it can be an effective negative instrument for the Member States in Community external relations. The big practical problem that mixed agreements now encounter is obviously the growth in Member States' numbers and the concomitantly growing need to get national ratifications done within a decent period of time. Already with fifteen Member States, the entry into force of mixed agreements is routinely delayed by three to four years. The provisional application of the part of the agreement that falls under Community competence can have great disadvantages inherent in the instrument of provisional application, such as the possibility of instantaneous termination of the provisionally applied agreement.⁸²

The third way in which Member States, as constitutional legislators, have tried to improve their hold on Community external relations is by stronger control inside the Community domain. The increased differentiation and precision of the procedural rules on treaty-making, laid down in current Article 300 of the EC Treaty, is a good example.⁸³ The discussions on Article 133 of the EC Treaty (commercial policy) are a great illustration of

82. An agreement that is provisionally applied can be terminated at any time without providing reasons. See Vienna Convention on the Law of Treaties, art. 25(2), May 23, 1969, 1155 U.N.T.S. 331.

83. See EC Treaty, *supra* note 39, art. 300, O.J. C 321 E/37, at 176-77.

the following contradictory tendencies described here: expansion of the scope of trade policy into the areas of trade in services and TRIPS and attempts (successful or not)⁸⁴ to guarantee that Member States will at the very least need to muster unanimity in order to approve the most important, so-called “horizontal,” agreements in this sector, or even guarantee mixed competence.

However, by successfully pushing for these guarantees as a condition for granting a wider and wider scope for EC/EU external relations, the Member States as a constitutional assembly have created a number of problems for the Community/Union. First of all the separation between Community and Union has now arrived at the point where *de facto* they have become two separate international personalities. This means that Community/Union negotiators have to explain to their third State counterparts that for different subject matters they need to conclude an agreement with either the Community or the Union and that to do so with both at the same time may well be very difficult, if not impossible because of the “Chinese wall” of Article 47 TEU.⁸⁵

Secondly, as a consequence of Member States’ insistence on mixity, it may have to be explained to third country negotiators that even if they decide to go ahead with the Community alone, there may be areas which do not fall under (exclusive) competence of the Community, necessitating the presence of twenty-seven Member States or co-contracting parties to the future agreement, resulting in a very long ratification period and complications relating to provisional application. Finally, as an extra, “small” complication, there is geographical variability as a consequence of the existing opt-outs and opt-ins for the United Kingdom, Ireland and Denmark. This involves an explication to negotiating partners that the agreement on issues relating to asylum, immigration, illegal aliens and readmission, shall not apply to Denmark in any case, and probably will not, but still might, apply to the United Kingdom and Ireland, depending whether they will opt-in the agreement or not (which they can only do,

84. This will depend on the outcome of *Commission of the European Communities v. Council of the European Union*, Case C 13/07 (pending case).

85. Maastricht Treaty, *supra* note 15, art. 47, O.J. C 321 E/1, at 34 (2006).

following ERTA's logic backwards, if they have opted into the underlying internal legislation in the past).

Finally, the EC/EU is increasingly confronted with a lack of understanding about its structure and functioning, especially on the Community side. Because of the increased intensity of international (commercial) relations, States become more and more interested in the implementation that treaty partners give of their international obligations. Because of the specific structure of the Community, which in terms of comparative federalism studies, practices a kind of "executive federalism," (i.e., Community law is not implemented, applied and enforced by a separate layer of "federal" administration, police and judiciary present in all Member States, but is directly applicable in all Member States and thus applied and enforced by the relevant national authorities), third States run into national authorities when there are problems with the application and enforcement of international agreements concluded by the Community alone. This has given rise to such (possible) misunderstandings as the United States attacking the United Kingdom and Ireland in the WTO about difficulties concerning the treatment of computer equipment⁸⁶ and Russia cornering Poland and other neighbors over sanitary issues in the trade of bovine meat in late 2006.⁸⁷ Here is an interesting problem of international responsibility that will not be discussed in any depth here,⁸⁸ but that has contributed to reflection inside the Community on how to exercise its external relations powers, in particular its treaty-making powers, and possibly re-delegate some of these powers back to the Member States within clear parameters set in Community legislation, or even

86. See generally Appellate Body Report, European Communities—Customs Classification of Certain Computer Equipment, WT/DS62/R (June 5, 1998); Appellate Body Report, United Kingdom—Customs Classification of Certain Computer Equipment, WT/DS67/R (June 5, 1998); Appellate Body Report, Ireland—Customs Classification of Certain Computer Equipment, WT/DS68/R (June 5, 1998). In the end the panel and the Appellate Body accepted that the European Community was the responsible WTO Member in this case, but the impression is that this decision by the panel rested perhaps more on the unilateral assumption of responsibility by the Commission on behalf of the Community.

87. See Commission Press Release, MEX/06/1220, (Dec. 20, 2006); Press Release issued at the "Midday Express" conference of the Commission on December 20, 2006, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEX/06/1220>.

88. See Esa Paasivirta & Pieter Jan Kuijper, *Does One Size fit All? The European Community and the Responsibility of International Organizations*, 36 *NETH. YEARBOOK INT'L L.* 169, 169-226 (2005).

leave some of these powers entirely to the Member States since they are really questions of execution.

Obviously the first reflex of the Community will be to reclaim its rights as the international treaty partner in question, but as the Community discovered in respect to aviation agreements and readmission questions, there are a number of big issues and/or big partners that the Community should be interested in itself. Thus on aviation, as was mentioned earlier, the big aviation agreement was concluded between the EC and the U.S.,⁸⁹ while aviation agreements with smaller partners, in which only a few Member State carriers would be interested, could be left to these Member States, constrained by some rules of principle of Community law laid down in a regulation.⁹⁰ Similarly, in respect to readmission agreements, the basic conditions of readmission of illegal aliens, that are nationals of or residents of the partner country, are laid down in the Community readmission agreement with the country concerned,⁹¹ whereas the necessary details concerning the actual readmission operations can be better agreed between the Member State that will be actually sending back illegal aliens and the readmitting country. Thus the Community sees what has sometimes been called its multi-level governance reflected in a multi-level conclusion of international agreements.

IV. *TRENDS CONFIRMED BY THE REFORM TREATY?*

The intertwining between the CFSP—which will remain firmly intergovernmental—and the rest of the EU (i.e., the ex-Community portion of it) will become more pronounced, now that the Reform Treaty institutes a single Union with one legal

89. *See* Air Transport Agreement, United States-European Community, Apr. 30, 2007, 46 ILM 470, O.J. L 134/4 (2007).

90. *See* Council Regulation No. 847/2004, O.J. L 157/7, at 8 (discussing negotiation and implementation of air services agreements and third countries).

91. *See* Agreement Between the European Community and the Former Yugoslav Republic of Macedonia on the Readmission of Persons Residing Without Authorization, O.J. L 334/7 (2007); Agreement between the European Community and the Republic of Moldova on the Readmission of Persons Residing without Authorization, O.J. L 334/149 (2007) [hereinafter *Moldova Agreement*]. Readmission agreements are all drafted along the same lines and contain an article on implementing protocols to be concluded between the partner State and a Member State. *See* *Moldova Agreement*, art. 19, O.J. L 334/149, at 155 (2007).

personality on the international scene.⁹² Nevertheless, there will remain two treaties within the one Union, which will be of equal value⁹³ and of which the different decision-making methods will be mutually protected from each other.⁹⁴

Given the single international personality of the Union, it will conclude agreements with third states which might go across the whole spectrum of powers of the Union under the TEU and under the Treaty on the Functioning of the European Union (“TFEU”).⁹⁵ How this can be possibly squared with the continuing existence of an even stronger “Chinese wall” between CFSP and the rest of the Union remains somewhat of a mystery.

Another indication that the trend of the Fouchet Plan to superimpose political cooperation on the Community is still alive is provided by the provisions on the High Representative for the CFSP who shall be President of the Foreign Affairs Council and at the same time Vice President of the European Commission.⁹⁶ Thus the representative par excellence of the intergovernmentalism of the CFSP shall have a seat in the last remaining bulwark of the “*méthode communautaire*,” where he/she is supposed to get a coordinating grip on his/her Commission colleagues who lead the other (previously Community) subjects of external relations. In order to make this dominance of the political cooperation side over the formerly Community side of external relations even clearer, the President of the European Council has an independent foreign affairs power in the CSFP domain.⁹⁷ What will come of the Commission’s ensuring the Union’s external representation, now formally recognized for the first time,⁹⁸ in these circumstances is a big question.

The propagation of mixity as a means for the Member

92. See TEU, *supra* note 15, arts. 1, 47, O.J. C 321 E/1, at 10, 34.

93. See *id.*, *supra* note 15, art. 1, O.J. C 321 E/1, at 10.

94. See Reform Treaty, *supra* note 7, art. 25b, O.J. C 306/01, at 32; TEU, *supra* note 85, art. 47, O.J. C 321 E/1, at 34 (2006). Article 25b (becoming Article 40 of the TFEU, if ratified) unlike Article 47 of the TEU, does not only protect the Community against the CFSP, but also the CFSP against the Community.

95. If ratified, the amendments of the Treaty of Lisbon to the TEU and the EC Treaty will be consolidated in the Treaty on the Functioning of the European Union.

96. See Reform Treaty, *supra* note 7, art. 9e, O.J. C 305/01, at 21 (becoming Article 18 of the TFEU, if ratified).

97. See *id.*, *supra* note 7, art. 9b, O.J. C 305/01, at 17 (becoming Article 15(6)(d) of the TFEU, if ratified).

98. See *id.*, *supra* note 7, art. 9d, O.J. C 305/01, at 19 (becoming Article 17(1) of the TFEU, if ratified).

States to maintain at least a veto over external relations remains firmly rooted in the Reform Treaty, as is the increasing trend of giving Member States the possibility of continuing to conclude treaties of their own, even in areas where the ERTA doctrine would still continue to work.⁹⁹ A good (or rather, bad) example is Declaration 36 to the Reform Treaty, which gives Member States this possibility in the area of freedom, security and justice. However, that sector can in no way be compared to development cooperation where Community and Member State technical and financial assistance can easily co-exist, as long as they are well-coordinated. The ERTA doctrine will normally apply in freedom, security and justice and hence there will be sectors that are largely covered by substantial Community legislation and thus presumably fall under exclusive Community competence. In those circumstances Member State agreements next to Community agreements or legislation will simply continue to be illegal.¹⁰⁰

In the same way the tendency to strictly regulate the Community/Union powers in external relations and the conditions of their application continues unabated in the Reform Treaty. There are now clear objectives laid down in the external relations field, both at the general level with Article 3 and Article 5 of the TEU, and more specifically in Article 21 of the TEU. The latter Article, directly taken over from the Treaty on the European Constitution, is remarkable because, though placed in the Treaty on European Union, it also contains objectives which would normally belong in the "Community" part of external relations (now in the, yet to be ratified, Treaty on the Functioning of the European Union), such as objectives in the field of development, abolition of the obstacles in the field of international trade and sustainable use of the earth's natural resources.¹⁰¹

This is a clear demonstration that the initial goal of a single treaty on the European Constitution still leaves its traces that the

99. The Maastricht Treaty stated that in the areas of monetary policy, environment and development, Member States retain their competence to negotiate and to conclude agreements, despite the treaty-imposed shared powers and provisions such as those in Article 174(4) and Article 181 of the EC Treaty, second alinea. So far the ECJ has not yet had to rule on the relationship between those provisions and the declaration.

100. See Opinion 1/03, ¶ 124, (ECJ Feb. 7, 2006) (not yet reported).

101. See Reform Treaty, *supra* note 7, art. 188a-f, O.J. C 305/01, at 91 (becoming Articles 205-07 TFEU, if ratified).

real integration of ex-Community external relations into the CFSP is still the final objective, in spite of the equal value of the two Treaties and the reinforced “Chinese wall” provision of Article 40 of the Reform Treaty.

On the other hand, this being the case, the IGC was ready to continue its reform of the common commercial policy by taking two clear steps forward. First, foreign direct investment is now fully included among the powers of the Community in this domain. This step was somewhat overdue, since after Nice, foreign direct investment in services was covered *de facto* by Article 133, thus leaving a gap with respect to foreign direct investment in manufacturing. Secondly, the notion of mixity has been banished from the common commercial policy and unanimity restricted to a few clearly drafted exceptions. In respect to trade in services and foreign direct investment, unanimity is required when it is also necessary for the adoption of internal rules. In respect to the well-known sensitive services sectors (cultural and audiovisual services, social, education and health services), unanimity is required when agreements risk prejudicing the Union’s cultural and linguistic diversity, or where agreements risk seriously disturbing social, education or health services in the Member States and prejudicing the responsibility of the Member States to deliver them.¹⁰² It is also with a view to most of these special sectors that trade agreements cannot lead to harmonization where the treaties exclude such harmonization.¹⁰³ It must be admitted that these exceptions in favor of unanimity seem to be miracles of clarity compared to the Nice version of the Community’s trade policy powers.

The trend to lay down more and more detailed rules on the procedures for concluding treaties and in this way discipline the Community institutions also continues unabated. The Article on the negotiation, signature, and conclusion of international agreements now contains eleven paragraphs, some of them with many sub-paragraphs. This is in part the result of the increased democratization of external relations, including commercial pol-

102. *See id.*, *supra* note 7, art. 188c(4), O.J. C 305/01, at 92 (becoming Article 207(4) TFEU, if ratified).

103. *See id.*, *supra* note 7, art. 188c(3), O.J. C 305/01, at 92 (becoming Article 207(4) TFEU, if ratified).

icy,¹⁰⁴ and in part the consequence of the more elaborate rules on who will have the right to make recommendations for the negotiation of an agreement and who will be chief negotiator for the Union during the negotiations. This right will depend on where the emphasis lies in the proposed agreement. If it is in the field of the CFSP, it will be the High Representative; if it is in the field of the other policies of the Union, it will presumably be the Commission.¹⁰⁵ There is quite some room for interpretation in this provision and it is more than likely that it will give rise to some disputes before some kind of balance is found—which given the dynamics of the last years may well be more favorable to the intergovernmental side.

Finally the trend to lay down more and more precise rules tying down the Community/Union in external relations is also apparent in a rather clumsy attempt to codify the treaty-making power of the Union, based on the case law of the ECJ described earlier in this essay. It is useful to quote Article 216(1) TFEU here:

The Union may conclude an agreement with one or more third countries or international organizations where the Treaty so provides or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the treaties,¹⁰⁶ or is provided for in a legally binding act of the Union or is likely to affect common rules or alter their scope.¹⁰⁷

The oddity of this provision is that, except for the words “where the Treaty provides,” it takes elements from the case law of the ECJ on the *exclusive* external Community competence to define the *potential* treaty-making power of the Union. This is basically contrary to the case-law of the ECJ which, as we saw at the beginning of this essay, has determined that the Community disposes of potential treaty-making power across the whole spectrum cov-

104. See *id.*, *supra* note 7, art. 188N, O.J. C 305/01, at 97 (becoming Article 218b(a) TFEU, if ratified).

105. See *id.* (becoming Article 218(3) TFEU, if ratified).

106. See *id.*, *supra* note 7, art. 188L(1), O.J. C 305/01, at 96 (becoming art. 216(a) TFEU, if ratified). This part of the provisions seems to originate in the opinion on the Draft Agreement Establishing a European Laying-up Fund for Inland Waterway Vessels, Opinion 1/76, [1977] E.C.R. 741.

107. See Reform Treaty, *supra* note 7, art. 188L(1), O.J. C 305/01, at 96. This part of the provisions seems to originate in *Béguelin Import Co. v. S.A.G.L. Import Export*, Case 22/71, [1971] E.C.R. 949.

ered by the Community treaty and not only “where the Treaty so provides,” or to passages adapted from Opinion 1/76 and ERTA. It is another example of how the interpretative dynamism of the ECJ in external relations is or will be stifled by codification in the Reform Treaty.

It must be hoped that this strange provision is at least partially corrected insofar as the exclusive Union competence is concerned, by Article 3 of the TFEU, the provision listing the exclusive powers of the Union (customs union, competition, monetary policy of the euro, conservation of marine biological resources and the common commercial policy are mentioned in paragraph 1) which contains the following second paragraph:

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.

Again this is a rather awkward mixture of language from the ERTA case and Opinion 1/76,¹⁰⁸ this time to define the exclusive treaty-making competence.

Reverting to the theme of the dialogue between the ECJ and the constitutional legislator, it is more than likely that the two provisions of Articles 216(2) and 3(2) TFEU will again stimulate this dialogue. Is the ECJ going to adhere to the awkward and selective quotations from its old case law of thirty years ago and become a strict constructionist on this basis or will it regard these quotations as a justification of its case law and continue to develop it, as before? It is to be hoped that the ECJ will opt for the latter approach.

108. See *supra* note 107 and accompanying text.