

The European constitution. Changes in the reform of competences with a particular focus on the external dimension.

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**The European Constitution:
Changes in the Reform of Competences
with a Particular Focus on the External Dimension**

March 2005

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**The European Constitution:
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with a Particular Focus on the External Dimension***

Angelika Hable¹

March 2005

Abstract

One of the core issues in the debate on a future Constitution within the framework of the European Convention was the reform of competences. On 29 October 2004, the Heads of State or Government signed the outcome of the reform process, the Treaty establishing a Constitution for Europe. With regard to the fundamentals of the competence system, namely the attribution and control of competences, as well as the definition of competence categories, the Constitutional Treaty essentially codifies the present *acquis communautaire*. In the field of external action, however, it introduces significant amendments that might have a considerable impact on the balance of powers within the European Union. This paper analyses these changes. It looks at the potential implications of the institutional amendments regarding the new post of the Union Minister for Foreign Affairs and the strengthened role of the European Council, as well as the newly defined principles and objectives of the Union's external action. Further emphasis is placed on the scope of the Union's external powers following the incorporation of the principle of implied powers, as well as an analysis of the individual competence provisions in Title V of the Constitutional Treaty.

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The European Constitution: Changes in the Reform of Competences with a Particular Focus on the External Dimension

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I. Introduction

One of the core issues in the debate on a future Constitution within the framework of the European Convention was the reform of competences. The mandate in the Laeken Declaration¹ for this section of the constitutional debate was broad: It called for more transparency in the division of competences and requested an evaluation of the need for any reorganisation of competence. Furthermore, while preserving the European dynamic, it called for a guarantee that a redefined division of competence would not lead to a creeping expansion of the Union's competences or to encroachment upon the exclusive areas of competence of the Member States or regions. Regarding external relations, the Laeken Declaration postulated a more coherent approach and raised the question of whether Europe, being finally unified, has a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples.

The result of the reform procedure, the Treaty establishing a Constitution for Europe² (hereafter: "CT" or "Constitutional Treaty") was signed by the Heads of State or Government on 29 October 2004. Subject certainly to a positive outcome of the ratification procedure and, particularly, the referenda held in different Member States, the CT might constitute the future legislative framework determining the Member States' economic and political margin of manoeuvre. With a view to the reform of competences, it may be argued that the CT does not contain substantive changes regarding the foundations of the system, namely the constitutional structure of the distribution and control of competences. Also with regard to the definition of competence categories and the attribution of competences, the Constitutional Treaty mainly codifies the present *acquis communautaire* and the distinction developed by academia.³ It thereby essentially contributes to enhancing clarity and transparency, but does not entail important changes to the system of competences. Significant amendments, however, have been introduced in the field of external action that yield considerable impact on the balance of powers within the European Union.

The objective of this paper is, thus, an analysis of the Union's external competences in the Treaty establishing a Constitution for Europe. It addresses the proposed institutional changes in the field of external relations and the newly defined principles and objectives of the Union's

* The author wishes to thank Professor Stefan Griller for his valuable suggestions and support.

¹ European Council, Declaration on the Future of the European Union, 15 December 2001, SN300/01.

² Official Journal 2004/C 310/01 of 16 December 2004.

³ Compare, for example, Bogdandy/Bast, 2002, Craig, 2004, Dougan, 2004, Lenaerts/Desomer, 2002; Pernice, 2002, de Witte, 2002 and 2003, Mayer, 2004, CONV 375/1/02, REV 1, 2002; Lamassoure-Report, 2002.

external action. Further emphasis is placed on the scope of the Union's external powers following the incorporation of the principle of implied powers in the Constitutional Treaty. The final and most comprehensive chapter deals with the individual competence provisions in Title V, Part III of the CT, the section on the Union's external action and the relevant changes proposed in each field.

A closer look at the Laeken Declaration reveals that the mandate for reform regarding the Union's external relations was more than challenging. It calls the Union "*to shoulder its responsibilities in the governance of globalisation, [...] to play the role of a power wanting to change the course of world affairs in such a way as to benefit not just the rich countries but also the poorest [...] and a power seeking to set globalisation within a moral framework, in other words to anchor it in solidarity and sustainable development*". Within the European Convention, three Working Groups dealt specifically with external relations, namely the Groups on Legal Personality, as well as Defence and External Action focusing on the nature of the Union and its role in the outside world. In addition, the Working Groups on Complementary Competences and Simplification also touched upon the Union's external competences and the respective applicable instruments, specifically in the field of CFSP.⁴

As a result of deliberations, the CT entails a new structure and considerable amendments in the field of the Union's external relations. In the light of a stronger coherence, the CT now regulates the thrust of the Union's competences in the external sphere in one chapter in Part III, Title V on "The Union's external action" (Art III-292 to III-329 CT). Yet, beyond this chapter, there are several provisions referring to the Union's external relations. They concern, on the one hand, the basic principles, objectives, and institutional aspects contained in Part I of the draft. On the other hand, the Constitutional Treaty contains a range of competence provisions outside Title V that confer external powers upon the Union. Several important changes that will apply to the Union's external competences may be attributed to the amendments in Part I CT as well as to the general provisions applicable to the Union's external relations regulated in Part III. Moreover, the inclusion of new competence provisions in Part III and the amendment of existing ones, such as particularly the provision on the conclusion of international agreements yield the potential to alter the Union's position in the outside world.

II. Principles and Objectives of the Union's External Action

In accordance with the general structure of the CT, Part I contains the constitutional foundations for the Union's external competences. Several amendments included in this Part

⁴ Regarding the final reports and the working documents of the different Convention Working Groups, please refer to http://europa.eu.int/futurum/documents/contrib/conv_en.htm.

have a direct impact on the Union's external competences, its underlying procedures and implementation.

A pivotal point regarding the Union's future external relations is certainly the proposal to introduce a single legal personality, which assumes the rights and obligations of the European Community and the Union (Art I-7 CT). It comes together with the merging of the pillars, the consolidation of the EC- and EU-Treaties and the consequential embedding of the CFSP in one single legal framework. In line with the organisational restructuring, the ambition to provide for better coherence has also extended to the institutional side, specifically regarding the Union's external representation and a largely uniform procedure for the conclusion and negotiation of international agreements. At the same time, the formulation of common principles and objectives for the Union's external action adds a new tone to the Union's external relations.

As Article IV-438 CT stipulates, the Union will succeed to all the rights and obligations of the European Community and of the European Union, whether internal or resulting from international agreements. This should clarify the Union's current ambiguous position in its representation to the outside world, where legal personality is only explicitly awarded to the European Communities and not to the European Union, despite its competences, *inter alia*, to conclude international agreements under Article 24 TEU. Whilst a single legal personality undoubtedly simplifies the current situation by providing a uniform appearance for the Union, it raises at the same time a number of questions, specifically with regard to the conclusion of international agreements in the field of CFSP under the new regime.

Also, the joint definition of general principles and objectives for all fields of EU external action reflects the Convention's intention to enhance clarity and transparency to the public and the EU's partners. In order to ensure consistency in EU external and internal action, the consideration of these principles and objectives will generally extend to all external aspects of EU internal policies. It finds its first expression in the CT in an amendment to the Union's objectives, stipulating that the Union "*in its relations with the wider world, [...] 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 the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.*" (Art I-3 para 4 CT).

The formulation of these objectives that should inspire the Union's action on the international scene clearly follows the mandate of the Laeken Declaration *to set globalisation within a moral framework*. These principles and values are reiterated in more detail in the general provisions of Title V on the Union's External Action. Article III-292 CT formulates a common

set of objectives for the entire field of external relations. Instead of different objectives for the various fields of external action, such as the CFSP, the CCP, development cooperation, etc., the principles and objectives formulated in Article III-292 CT will generally apply in the development and implementation of the different areas of the Union's external action, as well as the external aspects of its other policies. As Cremona observes, this will in the future require a delicate balancing of possibly conflicting objectives and interests, if for example the CCP will, next to its objective of abolishing restrictions in international trade, in the future also have an explicit sustainable development and human rights mandate (Cremona 2003: 1349).

III. *The Institutions in the Framework of External Relations*

III.1. The Union Minister for Foreign Affairs

The ambition to enhance coherence and efficiency has also extended to the institutional side. Notably, it was envisaged that for stronger consistency and coherence between foreign policy decisions and instruments in the field of external relations would be provided for. To this end, the CT proposes the reconsideration of the roles of the High Representative for CFSP and the Commissioner responsible for external relations and led to the creation of the post of a Union Minister for Foreign Affairs (Art I-28 CT). The Foreign Minister, who is to be appointed by the European Council with the agreement of the Commission President, will simultaneously be one of the Vice-Presidents of the Commission and chair the Foreign Affairs Council.⁵ His/her tasks include conducting the Union's common foreign and security policy, as well as the common security and defence policy, which he/she will carry out as mandated by the Council of Ministers. In his responsibility as Vice President of the Commission, he/she will ensure the consistency of the Union's external action and will be responsible for handling external relations and for coordinating other aspects of the Union's external action (Art I-28 CT). As Griller observes, however, it is doubtful whether the ostensible uniformity of the Foreign Minister's post may compensate for the weaknesses inherent in the draft, as the rules applicable to the CFSP and the other areas of external action forming part of the current first pillar have not been consolidated.⁶ Despite the outwardly unified structure, basically the same (considerable) differences regarding the procedures, legal instruments, and organs involved in the decision making process apply as is presently the case. Given the frequent tensions between the two institutions, the Foreign Minister might face considerable difficulties in reconciling diverging political interests. To represent a coherent picture of the Union towards the outside world will, therefore, constitute the major challenge and, at the same time, the essence of the Foreign Minister's task. To this

⁵ The CT proposes to legally anchor the establishment of a specific Foreign Affairs Council (Art I-24 para 3), formally distinct from the General Affairs formation, which will be headed by the Foreign Minister.

⁶ Compare Griller in de Witte, 2003: 142ff.

end, the Union delegations, which represent the Union in third countries and international organisations, will also be placed under his authority (Art III-328 CT).⁷

Given this considerable workload, much of the Foreign Minister's success will depend on the efficient installation of the European External Action Service, which is foreseen for his assistance. It will be composed of officials from relevant departments of the General Secretariat of the Council and of the Commission, as well as staff seconded from national diplomatic services and will support the Foreign Minister in "*fulfilling his mandate*" (Art III-296 para 3 CT). The institutional embedding of the European External Action Service and the scope of its tasks, however, is not yet specified and will remain subject to European decision. With a view to its composition, it might serve as the ideal forum for the practical realisation of the consistency obligation of Council and Commission in the field of external action (Art III-292 CT). In this respect, it will certainly be enlightening, under whose authority, or respectively structural affiliation, the European External Action Service will be established, the Council's or the Commission's or, alternatively, whether it will rest solely under the authority of the Foreign Minister. In summary, it seems almost needless to say that the Foreign Minister will hold an enormously influential position in the future institutional framework. With a view to the powers unified in this single new post, it must also be observed, however, that the Foreign Minister would hold the potential of policy determination and execution in one hand, which might considerably blur the separation of powers with the Union's institutions (Griller, 2003:147).

In this regard, the Foreign Minister's relationship to the President of the European Council and the Commission President will be an issue of interest for the future inter-institutional balance. Both have considerable competences in the field of external relations and the division of labour is not clearly delimited. The proposed permanent European Council chair will be elected for a, once renewable, two and a half year term. The European Council President "*shall, at his or her level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the Union Minister for Foreign Affairs*" (Art I-22 para 2 CT). The European Commission, in turn, shall, "*with the exception of the common foreign and security policy, and other cases provided for in the Constitution, ensure the Union's external representation*" (Art I-26 para 1 CT). The President of the Commission has to ensure that the Commission acts

⁷ At present, both the Council and Commission represent the EU in third countries – on the one hand by the diplomatic representation of the country holding the Presidency and, on the other hand, by the EU delegations represented in 128 third countries. By introducing a single legal personality, the delegations, which are currently mandated by the Community, would become veritable Union delegations. As Duke, points out, it is not clear under the draft Constitution, who assumes the former role of the Presidency regarding its diplomatic representative function. He argues, however, that the changes in the institutional structure will have the effect of considerably eroding the significance of the Presidency in external relations (Duke, 2002:19).

“consistently, efficiently and as a collegiate body” which will not be an easy challenge to perform, given the vast field of external relations, and even more importantly, given that also the Union Foreign Minister forms part of the Commission (Duke, 2002:17).

III.2. The European Council’s Role in the Field of External Action

The implications of these institutional amendments will not be dealt with in more detail in the framework of this paper. There is one proposal, however, that merits further attention, as it might contribute to significantly shifting the balance of powers between the EU institutions. It concerns the increase of the European Council’s powers in the field of external action. Whilst already under the current regime, the European Council is entitled to define common strategies under Article 13 para 2 TEU, these strategies are, however, limited to the field of CFSP. The CT empowers the European Council to identify, on the basis of the (newly defined) principles and objectives in the field of external relations (Art III-292 CT), the strategic interests and objectives of the Union. The European Council will thereby act by way of European decisions, thus legally binding acts which “*shall relate to the CFSP and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region, or may be thematic in approach*” (Art III-293 para 1 CT). The Union institutions, as well as the Member States, would consequently be subordinated to such decisions of the European Council which set the guidelines for the entire area of external action. Such decisions, though not even legislative acts in the definition of Art I-33 CT, would spearhead the hierarchy of norms in the respective fields. Therefore, even in those areas which now form part of the first pillar and are subject to the so-called “Community method”, the foundations for legislative action are set by an “intergovernmental mechanism”, namely the European Council acting unanimously.⁸ Admittedly, under the current regime, the European Council has not made extensive use of its power under the CFSP. It rather laid down the strategic guidelines applicable in the CFSP under Article 13.1 TEU, thus acted by legally non-binding instruments. On the other hand, it could be suggested that the resolutions adopted by the European Council have frequently transcended a mere guideline-function and established detailed rules for legislative action in the policy fields concerned. This applies even more to the Presidency conclusions, which are likewise legally non-binding, but which the European Council has efficiently used to boost the institutional and legal setting of the CFSP and the CSDP.⁹ With a view to the current

⁸ See Griller in de Witte, 2003: 133-157: ‘If the respective powers of the European Council follow the decision making procedures of the CFSP, such a mechanism would entail, to the extent that the latter would remain intergovernmental in nature, the “intergovernmentalisation” of external policies in general, including what currently comes under the first pillar. In essence, this would not enhance, but rather deteriorate the capacity of the Union to take efficient action in the field of external relations.’

⁹ Compare Blanck 2004:131ff referring in particular to the Presidency Conclusions of Helsinki (1999, Headline Goal), Feira (2000, Civil Headline Goal) and Nice (2000, Establishment of permanent bodies, such as the PSC).

proposal, it thus seems conceivable that the European Council will be tempted to refer to this power more frequently, given that it allows defining the path for the entire field of external relations. With regard to these extensive powers, it constituted a striking, constitutional deficit that in the original version of the CT, acts of the European Council were not subject to review by the ECJ under current Art 230 TCE. This shortcoming was discussed during the IGC. The new Art III-365 para 1 CT provides that legal acts adopted by the European Council, which are intended to produce legal effects vis-à-vis third parties will, in the future, be subject to judicial control by the Court of Justice.¹⁰ This acknowledges the dominant function of the European Council, in its capacity of issuing legally binding decisions, and to some extent mitigates the deficit in the rule of law inherent in the CT. For some time during the negotiations in the IGC, it even seemed that the ECJ's control might apply without restriction, including decisions or parts of decisions that relate to the CFSP. However, in the final version of the CT, the provision excluding jurisdiction of the ECJ in the CFSP (Art III-376 CT) has been once more amended and now refers explicitly to Art III-293 CT.¹¹ Thus, the review of legality is limited to acts by the European Council producing legal effects vis-à-vis third parties, and may only refer to those parts of an act which do not relate to the CFSP. This is highly unfortunate given that a comparable review exists with respect to restrictive measures by the Council against natural or legal persons in the CFSP (Art III-322 and III-376) and given the impressive powers that the CT bestows upon the European Council. The (albeit limited) control of the ECJ could have been regarded as an indispensable counterbalance. Moreover, it is questionable how the ECJ, in the case of a review of legal acts on the basis of Art III-293 will draw a meaningful delimitation between the parts of a European decision which relate to the CFSP and other fields of external relations. With a view to the requirement for unanimity in this provision and the potentially psychological hurdle of adopting legally binding measures, one may hope that this extensive power of the European Council will not also be excessively exploited in the traditional supranational fields.

IV. Implied Competences in the Field of International Agreements

IV.1. Introduction

Whilst the amendments relating to the European Council might imply the danger of a stronger "intergovernmental" influence in external relations, the CT in turn contains proposals that limit the Member States' external powers to a considerable degree. One of these proposals concerns the Common Commercial Policy which will be dealt with below. Another concerns the conclusion of international agreements, one of the key issues regarding the division of competences in the field of external action. The complexity of the system of

¹⁰ CIG 52/1/03 REV1, p.5 and CIG 52/03ADD 1, Annex 7 (Article III-270(1)).

¹¹ CIG 79/04, Annex 24.

external competences is particularly due to the fact that, besides competence provisions explicitly conferring external powers in the Treaty, external competences may also arise implicitly through provisions of the Treaty or secondary law. Since its decision in the AETR Case, it has been acknowledged that external competences may arise not only through 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.*”¹² On the basis of this decision, the ECJ has developed a subtle jurisdiction with its most recent refinement in the Open Skies judgments. The European Convention has apparently resolved to render the implied external competences explicit and attempted to incorporate the jurisprudence of the Court in the CT. In the current version, however, it seems that this codification has resulted either in a not entirely successful translation of the principle or a projected, significant development of the Court's jurisprudence.

Generally, for external competences the same principles and the same definition of competence categories, exclusive and shared competences as well as areas of supporting, coordinating or complementary action, apply. Exclusive external competence, for example the Common Commercial Policy or the monetary policy for the Member States whose currency is the euro (Art I-13 para 1(c) and Art III-195ff CT)¹³ excludes any action by the Member States at the external level, thus the conclusion of international agreements in the fields covered by the CT. In the area of shared external competences, such as for example environment (Art III-233 para 4 CT), Member States may exercise their external competence to the extent that the Union has not exercised or decided to cease exercising its competence. Interestingly, the CT does not foresee specific external competences in the area of supporting, coordinating or complementary action. The area of development cooperation (Art III-316 CT, now amended by an additional humanitarian aid competence) has been assigned as shared competence, with the significant clarification, however, that the exercise of Union competence in that field does not prevent Member States from exercising theirs (Art I-14 para 4 CT). The same applies to the areas of research, technological development and space (Art I-14 para 3 CT). As the essential dividing line between shared competences and supporting, coordinating or complementary action is the exclusion of pre-emption in the latter category (Art I-12 para 5), the competence attribution in this regard is not entirely meaningful.

With regard to implied external competences, it has, through all the Court's deliberations in this context, been difficult to distinguish the existence and the scope of competences. In the Open Skies judgments, the Court has resumed its previous approach and, unfortunately not in an entirely coherent way, listed the situations under which *exclusive* external competences

¹² C-22/70, Commission of the European Communities vs Council of the European Communities, European Agreement on Road Transport, ECR 1971/263, para 16.

¹³ For a thorough discussion on the economic aspects of the EMU and the Union's external representation in this area, compare Breuss (2005).

may arise.¹⁴ In contrast, it is up to the present subject to dispute whether the Court admits the concept of implied concurrent, or under the CT's terminology, shared competences. The following pages will, therefore, provide an outline of the Court's main findings in the development of its jurisprudence on implied competences. It should serve to facilitate the understanding of the Convention's draft on implied competences and at the same time emphasise the scope of its proposal in comparison to the principles developed by the Court.

IV.2. *Excursus: Clarifying Implied External Competences?* The ECJ's Jurisprudence

In the AETR case¹⁵, the ECJ has specified for the first time, in which cases external powers may be conferred upon the Community. *"In particular each time the Community, with a view to implementing a common policy envisaged by the Treaty adopts provisions laying down common rules, whatever forms these may take, the Member States no longer have the right, acting individually or collectively, to undertake obligations with third countries which affect those rules"* (para 17). The Court concludes that *"to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope"* (para 22). It thus implicitly states that in such case, the Member States' power to act is pre-empted.

The existence of implied competences was confirmed in the ECJ's judgment in *Kramer*¹⁶. The reasoning of the Court in this case was, however, essentially determined by the substance of the international agreement in question. It stated that stemming from provisions of the Treaty and of secondary law, the Community possesses powers at the internal level, namely the power to take any measures for the conservation of biological resources of the sea. It stated further that, at an international level, the only way to ensure the conservation of these resources both effectively and equitably was through a system of rules binding on all the States concerned, including non-member countries. The Court concluded that *"in these circumstances it follows from the very duties and powers which the Community law has established and assigned to the institutions of the Community in the internal level that the Community has authority to enter into international commitments [...]"* (Kramer para 30/33).

A further specification and clarification of the foregoing judgements was contained in Opinion 1/76¹⁷. The Court confirms that *"whenever Community Law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific*

¹⁴ Compare as one example for the essentially identical set of judgments C-475/98, *Commission/Austria (Open-Skies-Agreements)*, ECR 2002/ I-9797.

¹⁵ C-22/70, supra note 12; in the following section, the references to paragraphs in the text refer to the respective passages of the analysed judgments.

¹⁶ Cases C-3, 4 and 6/76, Cornelis Kramer and others, ECR 1976/1279.

¹⁷ Opinion 1/76 of 26 April 1977, ECR 1977/741.

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.” (para 3) In confirmation of the AETR doctrine, it states that “*this is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies.*” The Court, however, further clarified that this was not limited to that eventuality. In the underlying case in question, the internal Community measures were only adopted at the same time as the international agreement was concluded. The Court determined that “*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.*” (para 4). Under the cited circumstances, the necessity was rooted in the fact that it would have been impossible to fully attain the objective pursued by internal means, namely to attain the common transport policy and more specifically to organise the navigation on the Rhine, without bringing Switzerland, as a third country into the scheme in question by means of an international agreement. Opinion 1/76 thus determines the requirements for implied external competences on the basis of Treaty provisions, if secondary law has not yet been adopted. Remarkably, neither of these two decisions contained a clear statement as to the scope of the respective implied competence, in particular whether it conferred exclusive competence on the Union.

The subsequent Opinion 2/91¹⁸, relating to the ILO-Convention 170 regarding chemicals in the workplace, also built on these findings. Moreover, it not only contained important clarifications on the scope of the Community’s competence, but also provided strong indications for the existence of concurrent implied competences. The Court firstly set up its scheme of analysis by summarizing its previous findings. It stated that the competence to enter into international agreements may flow implicitly from Treaty provisions, in particular whenever Community law creates Community powers within its internal system for the purpose of attaining a specific objective, insofar as the international commitments are necessary for the attainment of that objective. In referring to Kramer, the Court added that furthermore such competence “*could flow by implication from other measures adopted by the Community institutions within the framework of the Treaty provisions or the acts of accession*” (para 7). In the case in question, the Court referred to Art 118a TEC as internal legislative competence to adopt minimum requirements in the field of social policy. Interestingly, the Court concluded with reference to this internal legislative competence that the Community had competence to conclude Convention 170 (para 17).

¹⁸ Opinion 2/91 of 19 March 1993, ECR 1993/I-1061.

Only in a second step, “for the purpose of determining whether this competence is exclusive in nature”, the Court referred to the AETR doctrine and examined whether the provisions of Convention 170 were of such a kind as to affect rules adopted pursuant to Art 118a (para 9 and para 18).¹⁹ Ultimately, exclusive EC competence was ruled out by the Court (para 18ff), which led several voices in the relevant literature to conclude that the Court, in justifying competence on the basis of the internal legislative competence, must have referred to concurrent implied competences.

This conclusion, therefore, led to the discussion of in which circumstances concurrent implied competences may be based on internal legislative competences, if one excludes that the Court intended to establish an (automatic) parallelism between internal and external legislative competences. Griller and Gamharter suggest that the ECJ’s statement in Opinion 1/76, as developed by Opinion 2/91, results in two concepts of “necessity” for the establishment of implied EC competences.²⁰ Exclusive external competences would arise in the situation of the inland waterway vessels, where the conclusion of an international agreement is “inextricably linked” to the adoption of internal measures for the attainment of a Community objective. Concurrent competence might be implied in all cases “where the attainment of a Community goal is merely facilitated by the conclusion of an international agreement, ensuring the optimal use of an internal competence by the EC.”²¹ This interpretation draws a necessary link to the Treaty objectives, such as for example the internal market objectives. In practice, it particularly addresses the “right of first admittance” of third country nationals in a Member State, i.e. the regulations which determine the conditions for the establishment of third country nationals in a Member State. Under the current regime of external competences with a view to the present concept of the Common Commercial Policy, it is upon the Member States to regulate the “right of first admittance” by national law. Evidently, diverging regulations in the Member States may lead to distortions in competition, for example with regard to the diverging conditions for the establishment of foreign undertakings and might equally impede EC measures to the extent that these refer to the treatment of third country nationals. To the extent that the conclusion of international agreements in such situations usually facilitates the attainment of a Community objective, internal legislative competences will imply an external concurrent Community competence. The systematic implementation of the Court’s previous findings in Opinion 2/91, which had permitted a clearer distinction between the existence and scope of implied competences,

¹⁹ The Court finally also acknowledged that an international agreement may be adopted in an area where competence is shared between the Community and the Member States without, however, providing any guidelines as to the demarcation between exclusive and shared competences (para 12).

²⁰ Griller/Gamharter in Griller/Weidel, 2002, 79f.

²¹ Griller/Gamharter in Griller/Weidel, 2002, 79f, compare also Dashwood/Heliskoski (2000) and Dashwood (2000); differently Eeckhout (2003).

thus opened the door for the discussion on concurrent (implied) competences. It is notable that in its subsequent Opinions and judgments, the Court neither confirmed nor definitely excluded the existence of this competence category.

The most prominent and yet confusing decision regarding the Community's implied competences is undoubtedly Opinion 1/94²² on the competence of the European Community to conclude the WTO Agreement. With respect to implied powers, the Court essentially proceeded in two steps. First, it asserted that, in the AETR judgment, it was on the basis of ex-Article 75(1)(a) *“that it held that the powers of the Community extend to relationships arising from international law, and hence involve the need in the sphere in question for agreements with the third countries concerned.”* It further determined, however, that *“even in the field of transport, the Community’s exclusive external competence does not automatically flow from its powers to lay down rules at internal level. [...] Only in so far as common rules have been established at internal level does the external competence of the Community become exclusive.”* It then submitted that *“unlike the chapter of transport, the chapters on the rights of establishment and on freedom to provide services do not contain any provision expressly extending the competence of the Community to relationships arising from international law”*. It hence concluded that it was not possible to infer from those chapters [in the Treaties] any exclusive external Community competence (para 81). Equally, the Court rejected the Commission’s second contention which was based on Opinion 1/76. It emphasised the essential difference to the situation in Opinion 1/76, as well as in the Kramer-case. In both cases, the Court contended, the international agreement was necessary, in order to (effectively) achieve the respective Community objective. On this basis, the Court concluded that *“it is understandable, therefore, that external powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted”* By choosing this terminology, the Court thus linked its reasoning in Kramer and Opinion 1/76 to the exclusive character of the competence arising pursuant to the ratio of these decisions. At the same time, it excluded that this situation applied to the sphere of services. It contended that *“the attainment of freedom of establishment and freedom to provide services for national of the Member States is not inextricably linked to the treatment to be afforded in the Community to nationals of non-member countries or in non-member countries to nationals of Member States of the Community.”*

Thirdly, the Court also rejected the Commission’s contention as to ex-Articles 100a and 235 as legal bases for exclusive external competence. The Court determined that, where harmonizing powers have been exercised, the measures thus adopted may limit, or even remove, the freedom of the Member States to negotiate with non-member countries. *“However, an internal power to harmonize which has not been exercised in a specific field*

²² Opinion 1/94 of 15 November 1994, ECR 1994/I-5267.

cannot confer *exclusive* external competence in that field on the Community” (para 88). It added with regard to ex-Article 235 that “*save where internal powers can only be effectively exercised at the same time as external powers [...], internal competence can give rise to exclusive external competence only if it is exercised.*” Also with regard to these findings, it is not entirely clear whether the Court established an automatic link to *exclusive* competence as a legal subsumption. It may equally be assumed that the Court, in confining itself to the questions submitted, merely excluded exclusive competence without, however, addressing the question of (implied) concurrent external competence. The Court concluded by referring to several internal legislative acts that had been adopted on the basis of Treaty provisions in the field of services and IP and either relate to the treatment of nationals of non-member countries or expressly confer powers to negotiate with non-member countries. It contended that whenever such provisions were included in its internal legislative acts, the Community acquired *exclusive* external competence in the spheres covered by those acts (para 95). The same should apply, in the absence of any express provision [...], *where the Community has achieved complete harmonization of the rules governing access to a self employed activity, as these common rules could be affected if the Member States retained freedom to negotiate with non-member countries* (para 96).

The subsequent Opinion 2/92²³ of the Court also focused on the definition of exclusive implied competences. It referred to the Community’s competence to participate in the Third Decision on national treatment of the OECD Council, establishing conditions for the participation of foreign-controlled undertakings in the internal economic life of the respective member states in which they operate.²⁴ Similar as in Opinion 1/94, the Commission claimed an exclusive Community competence on the basis of the AETR principle and Opinion 1/76 with a reference to the legal bases in ex-Articles 57 and 100a. The Court sought to ascertain whether the matters covered by the international agreement in question *are either already subject of internal legislation containing respective provisions on the treatment of foreign-controlled undertakings or empowering the institutions to negotiate with non-member countries or effecting complete harmonization of the rules governing the right to take up an activity as a self-employed person.* In those circumstances, according to the Court the Community does have exclusive competence to enter into international obligations. Yet, while the Court conceded that the Community had adopted measures capable of serving as a basis for an exclusive external competence, those measures did not cover all the fields of

²³ Opinion 2/92 of 24 March 1995, ECR 1995/I-521.

²⁴ The measures to which the national treatment rule should apply throughout the OECD member countries were (1) government procurement, (2) official aids and subsidies, (3) access to local finance, (4) tax obligations and (5) rules applicable to investments other than direct investment operations and investment by “direct branches”.

activity to which the Third Decision related. It therefore concluded that the Community and the Member States “share joint competence” to participate in the decision.

IV.3. *Excursus*: Clarifying Implied External Competences? The Court’s Latest Statement in the Open Skies Agreements

The most recent expression of the Court on implied external competences was in the form of its decisions on the Open Skies Agreements, a series of parallel judgments regarding the Member States’ competence to conclude air transport agreements²⁵. Since the beginning of the 1990’s, the Commission had been urging, without avail, the achievement of a comprehensive mandate for the negotiation of a common external air transport system. In the meantime, the United States concluded the so-called “Open Skies Agreements” with several Member States reserving, among others, external traffic rights for the respective domestic carriers. The Commission, having not succeeded in achieving a political mandate, chose to take legal action and argued, in essence, that the agreements violated the Community’s exclusive external competence. In a similar way as in Opinion 1/94, the Commission founded its first claim on Opinion 1/76 and, on similar grounds as in Opinion 1/94, the Court rejected this assertion. It submitted that the institutions, on the basis of their internal powers, could have adopted common rules laying down a concerted action in relation to the USA (para 85). It thus stated that the case in question did not disclose a situation where internal competence could effectively be exercised only at the same time as external competence and, in the light of this, excluded an *exclusive* external competence. Again, the question remained as to whether the Court, when it excluded *exclusive* competence only, implicitly excluded any Community competence on this basis or simply refused to examine whether the Community could have concluded the agreement on the basis of concurrent implied competences.

On the basis of the AETR judgement and the “third package” of legislation in the field of air transport, the Court went on to judge whether the Community had acquired external competence through the exercise of its internal competence. In the context of this analysis, the Court issued its most comprehensive statement to date, “*under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence*” (para 107-110). According to the Court’s preceding case law, this applies

- “*where the international commitments fall within the scope of the common rules* (AETR judgment, para 30),

²⁵ Compare as one example for the essentially identical set of judgments C-475/98, supra note 14.

- *or in any event within an area which is already largely covered by such rules* (Opinion 2/91, para 25). *In the latter case, the Court specified, Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules* (Opinion 2/91, paras 25 and 26) (para 108).
- Thirdly, the Court determined that *"whenever 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, para 95; Opinion 2/92, para 33) (para 109).
- Fourthly, and not entirely conclusively, the Court again referred to the existence of common rules and stated that *"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 AETR judgment if the Member States retained freedom to negotiate with non-member countries* (Opinion 1/94, para 96; Opinion 2/92, para 33). (para 110)

Remarkably, following its examination of the regulations applicable in the field of air transport, the Court concluded that the "third package" is not "complete in character", thus presumably does not constitute complete harmonisation in the understanding of Opinions 2/92 and 1/94, specifically on the grounds that the regulations do not govern the situation of air carriers from non-member countries (para 119). It can be stated that this conclusion results from the fact that the regulations in question specifically address the situation of Community air carriers alone. Otherwise the AETR-doctrine would lose much of its importance if a "complete harmonisation" or the "existence of common rules largely covering an area" would be excluded any time that Community legislation does not refer to third country nationals.

The Court finally concluded by examining whether individual provisions of Community legislation in that field might be affected by the bilateral agreements. On this basis, it held that the Community had acquired exclusive competence to enter into international commitments only with regard to individual subject matters, namely the limitation on the freedom of non-Community carriers to set fares and rates, as well as obligations relating to computerised reservation systems (CRS) offered for use or used in its territory.

A final remark on this judgment leads back to the issue of concurrent implied competences. The Court confirmed in para 111 that *"any distortions in the flow of services in the internal market which might arise from bilateral 'open skies' agreements concluded by Member*

States with non-member countries do not in themselves affect the common rules adopted in that area and are thus not capable of establishing an external competence of the Community.” If one applies the concept of implied concurrent competences to this finding, it may be stated that the attainment of the Community objective, namely a common air transport policy, would be facilitated by the conclusion of an agreement governing the access of non-Community air carriers. When the Court generally excluded “*an external competence*” in this situation, this might be understood as a final say on implied concurrent competences. Again, however, the judgment focused on the question of to what extent the Member States had infringed on the Community’s exclusive competence. Possibly, the Court again chose to circumvent the issue, given that it decides upon the essential question, of whether the Community would have been entitled to conclude the Open Skies Agreement alone, on the basis of its exclusive and concurrent competence. The same would apply with regard to the WTO Agreement, which will be dealt with in more detail below in the context of the Common Commercial Policy. Last but not least, this arguable and still unresolved question renders the significance of the CT’s proposals on implied competences even more apparent.

IV.4. Rendering Implied Powers Explicit? The CT’s Proposals on Implied Competences

IV.4.1. Introduction

With a view to the complexity of the Court’s jurisprudence, the objective of the Working Group on ‘External Action’ with regard to implied external competences was astonishingly simple: The Treaty should indicate that the Union is competent to conclude agreements dealing with issues falling under its internal competences and the new provision in the Treaty should specify that the Council should deliberate on such agreements according to the same voting procedure which would apply to internal legislative deliberations on the same issues (normally QMV).²⁶ Two provisions in the CT now seek to capture the ECJ’s case law on implied external competences.

Firstly, Art I-13 para 2 CT determines in which cases the Union will have exclusive competence for the conclusion of an international agreement:

“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.”

Secondly, another foundation is provided in Article III-323 CT, in the chapter on the conclusion of international agreements of Title V CT:

²⁶ CONV 459/02, p.4.

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

Five observations can be made at the outset: First, both provisions to some extent seek to codify the Court's findings in AETR and Opinion 1/76 in the Constitution. Second, the two provisions only partly overlap and, in essential points, translate the principles on implied competences in different ways. Third, it is not entirely clear whether these deviances constitute an inadvertence in the drafting procedure. Art III-323 CT had, before its final approval in the IGC, been amended by the Working Party of IGC Legal Experts on 11 June 2004, but the fundamental orientation of this provision remained untouched. Fourth, whilst Art I-13 CT undoubtedly refers to exclusive external competences, Art III-323 CT remains silent as to the scope of Union competence that it confers. Fifth, Art III-323 CT confers wider powers, but the relation to Art I-13 CT is left open, particularly regarding those parts of the provisions which go beyond the scope of Art I-13. In any event, it is submitted that the CT's proposals would confer extensive external powers to the Union. Together with the Union's competences in the proposed version of the Common Commercial Policy that will be dealt with below, the Member States' competences to act in the field of international trade might be significantly curtailed.

Against this background, it seems appropriate to take the individual elements of Art I-13 CT as a basis, not the least as it leaves fewer doubts as to what powers it confers, and compare each of its elements to the respective corresponding (or deviating) provisions of Art III-323 CT.

IV.4.2. Implied exclusive powers in the CT...

a. ... when its conclusion is provided for in a legislative act of the Union

The first element corresponds to the Court's findings in Opinion 1/94 and 2/92, namely that the Union will acquire an exclusive external competence, where internal legislation includes provisions expressly conferring on its institutions powers to negotiate with non-member countries. Such powers will be limited to the spheres covered by those acts. What remains unclear, however, is under which conditions the European legislator may decide to confer such powers upon the Union institutions in its legislative acts. Up to now, this question has not been addressed in the Court's jurisprudence. As Stefan Griller has pointed out, however, with a view to the principle of conferral which ranks among the fundamental principles in the constitution (Art I-11 CT), it is hardly imaginable that the legislator may decide *ad libitum* to

procure external powers to the Union on the basis of any internal Treaty provision (Griller, 2004:41). To assume that the legislator would be entirely free to donate such powers in laws or framework laws, which may eventually be adopted by qualified majority voting, would provide it to some extent with the competence to confer competences which would contradict the fundamental principles of competence allocation as laid down in the first part of this contribution. On the other hand, it is similarly not conceivable that this possibility is only limited to such provisions of the Constitution that already contain a link to “*relationships arising from international law*” (Opinion 1/94, para 76), such as Art III-236 para 2b) relating to transport which explicitly refers to the operations of non-resident carriers in the Community market. As Stefan Griller suggests, it would seem appropriate to only admit the conferral of such competences through an act of secondary law, if the conclusion of an international agreement at least facilitates the attainment of an internal Union objective (Griller, 2004: 41). This would, in fact, correspond to the conditions established for concurrent implied competences, as set out above. Even pursuant to this understanding, however, it is submitted that this provision, if used in practice by the legislator, may considerably extend the Union’s external competences.

Turning to Art III-323 and the corresponding passage in this provision, it immediately stands out that the conditions differ in one remarkable aspect. External competence will arise where the conclusion of an agreement is provided for “*in a binding Union legal act*”. It needs to be emphasised that the original version of the CT referred to a “binding Union *legislative*” act, which was amended by the Working Party of IGC Legal Experts only a couple of days before the approval of the final text. The Legal Experts had thus apparently not intended to assimilate Art III-323 to Art I-13. This leads to the questions of why the difference was made, which acts may be addressed that are not already covered by Art I-13 CT and finally, which kind of external competence the CT thereby intends to confer. With a view to Art I-33 CT on the legal acts of the Union, it seems that the principal application might be the “European decisions” which will be non-legislative acts, binding in their entirety. One prominent field of application where legislative acts are excluded and where the principally applicable instrument would be the European decision is the CFSP. If the current wording of Art III-323 CT remains, it would signify that in the future (implied) external competences might arise in the CFSP where a European decision in this field so provides. This seems particularly interesting with a view to the extension of qualified majority voting in this area. What remains unclear, however, is the type of competence that Art III-323 CT in conjunction with the respective “binding Union legal act” should confer, as exclusive external competences are limited to the conferral of powers through legislative acts. With a view to the residual character of this category (Art I-14 para 1 CT), one might consider that it leads to a shared competence and the Constitutional Treaty thus finally resolves the questions of

(implied) shared competences. Admittedly, however, it remains doubtful, whether this indeed reflects the intention of the drafters.

b. ...or is necessary to enable the Union to exercise its internal competence

The second element of Art I-13 CT basically reflects Opinion 1/76. The “inextricable link” required between the conclusion of the international agreement and the adoption of internal measures for the attainment of a Community objective is formulated pointedly.²⁷

In contrast, it is again the analogical provision in Art III-323 CT that gives rise to bewilderment. It confers competences, “*where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives fixed by the Constitution*”. Again the reason remains nebulous as to why the terminology differs in such a manner from Art I-13 CT. There is also no explanation in any of the drafting documents relating to these provisions. Therefore, it is also difficult to determine which concept of necessity will be implied under this provision. If it were the concept of Opinion 1/76, why then was the terminology of Art I-13 CT not adopted? If one argues that Art III-323 CT will in effect only constitute a reflection and repetition of Art I-13 CT, as it occurs several times in Part I and Part III of the draft, its wording would “leave a lot to be desired”. Yet, if Art III-323 were to be interpreted in the light of the Court’s Opinion 1/76, its wording may be reconciled with Art I-13.

Again, the second alternative might be to imply the concept of necessity in the light of shared (concurrent) implied competences. The “necessity” (which in the German version is translated as “*erforderlich*”) in Art III-323 CT would then (merely) require that the international agreement, in the framework of internal policies, facilitates the achievement of a Union objective. In the light of the significantly expanded objectives, particularly in the field of external relations, this would again extend the potential scope for external powers to a considerable degree. Moreover, as Stefan Griller points out, in the light of the significantly extended “legal basis for implied competences” in the first option of Art I-13 CT and the extended powers under the Common Commercial Policy, the additional recognition of concurrent implied competences in Art III-323 CT seems almost excessive (Griller, 2004:41). On the one hand, he thereby refers to the fact that in several fields, explicit provisions of the CT confer shared external competences to the Union. This includes, for example, the environment (Art III-233 para 4 CT), research, technological development and space (Art III-248 CT), readmission agreements with third countries (Art III-267 para 3 CT), development cooperation (Art III-316 para 2 CT), economic, financial and technical cooperation with third countries (Art III-319 para 3 CT) and humanitarian aid (Art III-321 para 4 CT). On the other

²⁷ The fact that the Union has to exercise its competences in order to attain the objectives set out in the Constitution is anyway presumed by Art I-11 para 2 CT.

hand, as the ECJ has ruled for example in its judgment on the EU-US Energy Star Agreement²⁸, the scope of the Common Commercial Policy may also extend to other areas, such as the environment, agricultural policy or the internal market in general that normally require specific legal bases.

c. ...or insofar as its conclusion may affect common rules or alter their scope

Finally, in its last element, the CT also takes up the “original” AETR-doctrine, without, however, taking account of the Court’s rulings in the specific cases, where an area “*is already largely covered by such rules*” (Opinion 2/91, paras 25 and 26) or “*where the Community has achieved complete harmonisation in a given area*”. Moreover, as Cremona observes, also the phrase: “The Union shall have exclusive competence for the conclusion of an international agreement [...] when its conclusion affects an internal Union act” is misleading. She emphasises that it is not the conclusion of the agreement by the Community which might or might not affect an internal act but that the conclusion of a particular agreement by one or more Member States acting alone might affect those rules or alter their scope”.²⁹ However, it is argued that these points may be interpreted in the light of the *Community acquis*, particularly with regard to the Court’s finding that in the case of common rules largely covering an area, “*Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules*”.

It is also with regard to this last element that finally the provisions of Art I-13 and Art III-323 CT coincide to the largest extent. This, at least, may be interpreted as a strong indication that the two provisions were intended to produce the same legal effects, namely to confer exclusive external competence to the Union.

However, in an overall view an explicit statement seems hardly possible to make and, at least, in this regard the CT has accurately continued the line of the ECJ’s jurisprudence: it has avoided a clear statement on the existence of implied shared (concurrent) competences and left the question as a matter of dispute to academia. But even if it were assumed that this competence category would be abolished in the CT (to the extent that it presently exists), the external powers conferred upon the Union by Art I-13 CT and III-323 CT are already comprehensive. Particularly the conferral of powers through a legislative (or binding) Union act, might create considerable dynamics for the Union to act in the international sphere.

²⁸ C-281/01, *Commission vs Council (Energy Star-Agreement)*, ECR 2002/I-12049.

²⁹ Cremona 2003:1362 with reference to Opinion 2/91, para 9.

V. The Union's External Action: Individual Competence Provisions

V.1. Introduction

The following chapter contains an overview on the individual competence provisions governing the Union's external relations in Title V of the Constitutional Treaty. Title V is divided into eight chapters. Chapter I, which includes the general provisions, has already been dealt with in the previous Section. The implications of these provisions on the individual fields of the Union's external action will, however, be considered in the relevant context. Chapter II relates to the Common Foreign and Security Policy, including the Common Security and Defence Policy and Financial Provisions, Chapter III regulates the Common Commercial Policy, Chapter IV the Cooperation with Third Countries and Humanitarian Aid with separate Sections on (i) Development Cooperation, (ii) Economic, Financial and Technical Cooperation with Third Countries and (iii) Humanitarian Aid; Chapter V deals with Restrictive Measures, Chapter VI contains the provisions on International Agreements, relating to the scope and the procedure for the conclusion and negotiation of such agreements, Chapter VII determines the Union's Relations with International Organisations and Third Countries and Union Delegations and, finally, Chapter VIII regulates the Implementation of the Solidarity Clause.

V.2. The Common Foreign and Security Policy (Art III-294 – III-313)

V.2.1. General Observations

Despite the merging of the pillars, the introduction of a single legal personality and the integration of the CFSP and CSDP under the general umbrella of "Union external action", the CT highlights several times that the CFSP maintains its specific status. Ultimately, one may state that, despite the outwardly uniform structure, the pillar structure re-enters through the backdoor. The separate competence category for the CFSP in Part I CT (Art I-12 para 4 and I-16 CT) provides a first indication. It displays the reluctance to apply either of the legal consequences attached to the categories of shared competences or the area of supporting, coordinating or complementary action to the CFSP. The concept of shared competences contains the principle of pre-emption which the Member States refused to apply to the CFSP. Yet, obviously it did not seem to constitute an appropriate solution either to simply exclude pre-emption, similar to the example of development cooperation.³⁰ Categorizing the CFSP as area of supporting, coordinating or complementary action, as another alternative, might have been perceived as a poor signal on the way to developing a strong Union common foreign and security policy. Possibly, with a view to the persisting, significant differences regarding

³⁰ Compare Cremona, 2003:1353ff.

procedures, instruments and organs dominating the CFSP, one might even state that it was the most "honest" solution to provide for a separate competence category.

Art I-40 para 6 CT expressly excludes legislative acts in the field of the Common Foreign and Security Policy; simply put, this implies that the CFSP remains the business of the executive, with the European Parliament, in principle, being only a supporting actor in this field. It needs to be only consulted and regularly informed, but has no participation in decision-making. Moreover, the CFSP remains the only field where the EP does not have to be consulted by the Council for the conclusion of international agreements (Art III-325 para 6 CT). Also, the role of the Commission is still not as strong as it is, by comparison, in other fields of Community competences. The dominant actors remain the European Council, whose role has been significantly enhanced, and the Council of Ministers. In addition, the jurisdiction of the ECJ continues to be excluded (Article III-376 CT). A novelty in the CFSP is certainly the introduction of a single set of instruments to the CFSP: The current Common Strategies, Common Positions and Joint Actions give way to the European decision which will be the main instrument applicable in the CFSP. As Cremona observes, this bears a certain integrative element, as there will by definition be no distinction between European decisions under the CFSP and other Community competences, such as for example under Articles I-59, III-165 para 2 or III-172 para 6 CT (Cremona, 2003:1354). However, as indicated above, whilst the European decision even has similar characteristics as the legislative act, this may be misleading, as *the essential factor remains the procedure applied for the adoption of such acts which varies depending on the relevant legal base which is applicable*. Thus, it is in particular the procedural differences, the exclusion of the legislative procedure, the institutions involved and unanimity as the principal voting requirement which determine the continuing special character of the CFSP.³¹

An important expression of this specific character is constituted by Article III-308 CT which provides that *"the implementation of the CFSP shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Constitution for the exercise of the Union competences referred to in Articles I-13 to I-15 and I-17"* and vice-versa. Following the merger of the pillars and the introduction of a single legal personality, the non-interference between the CFSP and external competences currently based in the first pillar gains additional significance. With a view to the persisting differences regarding organs, instruments and applicable procedures in the CFSP, it remains at issue that the current supranational fields of external relations will, in the future, not also be dominated by the intergovernmental sphere. Presently, the primacy of Community law is explicitly regulated

³¹ Compare however CIG 38/03, according to which some delegations in the Intergovernmental Conference want qualified majority to be the general rule or at least extended in the field of CFSP.

in several provisions of the TEU, namely Art 1, 2, 3 and particularly 47 TEU.³² The Court has ruled upon the primacy of Community law in its decisions in *Leifer*, *Werner* and *Centro-Com*³³ with respect to acts adopted under the Common Commercial Policy. In *Leifer* and *Werner*, the Court stated that “*a measure whose effect is to prevent or restrict the export of certain products cannot be treated as falling outside the scope of the CCP on the ground that it has foreign and security objectives*” (*Werner*, para 10). In *Centro-Com*, it added that “*even where measures have been adopted in the exercise of national competence in matters of foreign and security policy, they must respect the Community rules adopted under the CCP*” (para 30). Also under the Constitutional Treaty, it will be for the European Court of Justice to monitor compliance with Article III-308 (Art III-376 CT). Yet, it is questionable whether, following the merger of the pillars and with no provision in the Constitution securing the primacy of the present supranational fields, the Court would continue this line of jurisprudence.³⁴ Taken together with the European Council’s powers under Art III-293 CT, there is the potential that the influence of intergovernmental mechanisms in the Constitution could increase.

Moreover, there are several areas in the Constitution, where delimitation between the CFSP and the other fields of external relations will imply significant consequences. First, Art III-325 CT on the conclusion of international agreements stipulates that the right of proposing the opening of negotiations, the voting modalities as well as the inclusion of the European Parliament differ, “*if an agreement exclusively or principally relates to the CFSP*”. Another open question concerns the effects of international agreements in the CFSP. The special procedures and characteristics of Union agreements under Article 24 TEU have been abolished. This particularly refers to the Member States’ possibility under this provision to subject the binding character of the agreement to compliance with the respective national, constitutional requirements. Yet, it is not clear whether agreements in the CFSP should have the same binding force as agreements falling under the current Community sphere or whether they will, similar to the whole field of the CFSP, maintain a specific character.³⁵ As the CFSP was taken out of the general competence categories, it is doubtful whether any of the respective categories, exclusive or shared, should apply for the conclusion of

³² Regarding the relationship between current first and second pillar and the precedence of Community powers on for specific forms of foreign policy over the CFSP refer to Eeckhout, 2004:151ff.

³³ C-70/94, *Werner*, ECR1995/I-3189, C-124/95, *The Queen, ex parte Centro-Com*, ECR 1997/I-81, C-83/94, *Criminal proceedings against Leifer and others* ECR 1995/I-3231.

³⁴ Also compare in this regard the Court’s jurisprudence in the *Airport Transit Visa* case, C-170/96, *Commission versus Council*, ECR I-2763 on the delimitation of competences between the first and the third pillar; for a detailed discussion compare Griller in de Witte, 2003: 136ff.

³⁵ Compare, however, the general provision in Art III-323 para 2 CT that stipulates without reservation that ‘agreements concluded by the Union are binding on the institutions of the Union and on its Member States’.

international agreements in this area. In addition, given the exclusion of the ECJ's jurisdiction in the CFSP, it is also questionable who will determine the effect of Union agreements in the CFSP sphere on Member State competence?³⁶ Other areas, where the delimitation between the CFSP and the current supranational fields of external action is of relevance are the European Council decisions on the basis of Art III-293 CT, as set out above, as well as the Union's cooperation policy and the implementation of restrictive measures, as will be further outlined in Chapters V.4. and V.5. below.

In summary, it may be stated that despite a partly stronger coherence in the field of external action, the artificial separation of the economic and political aspects of external relations still persists in the draft. Given the inextricable link between economic and political concerns, which is even more strongly knotted in the Constitution with the inclusion of foreign policy objectives in the area of the commercial policy, its delimitation becomes more and more impracticable in political reality.³⁷

V.2.2. The Proposed New Competence Provisions in the CFSP/CSDP

a. Introduction

Looking at the individual competence provisions in Title V, it seems that the Articles on CFSP do not contain any radical changes to the current Title V TEU. The emphasis is still on broadly worded objectives rather than a precise delimitation of subject matter or a definition of the kind of competences conferred upon the Union (Eeckhout, 2004:139). Following the abolition of specific CFSP objectives and their integration in commonly defined targets for the entire field of external relations, the definition of CFSP competences will certainly not become easier. In contrast, substantive amendments were made in the CSDP³⁸, where the Constitutional Treaty, above all, sought to increase the Member States' obligations to provide military and civil capacities and to procure mutual assistance in the case of crises. At the same time, the competence provisions in the CSDP involve an increased element of flexibility by focusing on a long-term or case by case cooperation of certain groups of Member States (Cremona, 2003:1360).

The general legal basis for CFSP and CSDP in Part I of the Constitution is provided in Art I-12 para 4 CT. "*The Union shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.*" According to Art I-16 CT, this competence covers all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence

³⁶ Compare Cremona, 2003:1352.

³⁷ Griller/Weidel in Griller/Weidel, 2002:6.

³⁸ The differentiation between CFSP and CSDP in this contribution shall not withstand the fact that the CSDP is an integral part of the CFSP (Art I-41 para 1).

policy, which might lead to a common defence. Member States are obliged to support the Union's common foreign and security policy and adhere to the acts adopted in this area (Art I-16 para 2). A first notable difference in the draft lies in the determination of the political statement contained in Art I-41 para 2 CT providing that the progressive framing of a defence policy *will*, and not only *might*, lead to a common defence, when the European Council acting unanimously, so decides (compare current Art 17 TEU). The European Council will by decision recommend to the Member States the adoption of a decision in accordance with their respective constitutional requirements (Article I-41 para 2). This statement is accompanied by the expansion of the Petersberg tasks referred to in current Art 17 para 2 TEU to which other missions have been added.³⁹ They will forthwith also include “joint disarmament operations, military advice and assistance tasks, conflict prevention and post-conflict stabilisation” (Art III-309 CT).⁴⁰ In the light of the most pertinent global security challenges, the Treaty explicitly emphasises that “*all these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories*” (Art III-309 CT). With a view to these extended objectives, the requirements to provide the Union with the necessary operational capacity for the implementation of the CSDP, increases simultaneously (Art I-41(3)). The Member States’ are obliged to procure such capacity, which draws on both civil *and* military assets, in order to contribute to the objectives defined by the Council in relation to the respective tasks (Art I-41(3) and III-309(2)). They will, however, continue to have a right of veto with a view to their commitments in the CSDP, as European decisions on defence policy must still be adopted unanimously (Art I-41 (4) CT).

The most relevant substantive innovations introduced in the CSDP are threefold: the application of several mechanisms of flexibility, including the possibility for structured cooperation, the introduction of a mutual defence clause and lastly the establishment of a European Defence Agency.

b. Areas of Flexibility in the CSDP

Forms of flexibility in the CSDP have many faces in the draft Constitution. On the one hand, “the Council may entrust the implementation of a task to a group of Member States which are willing and have the necessary capability for such a task” (Art III-310 CT). The participating Member States, in association with the Union minister for Foreign Affairs, will agree among

³⁹ As Duke provides, “one explanation for the relatively easy expansion of the Petersberg tasks may be that the question of competences, at least on paper, is becoming less relevant with the prospect of an EU Foreign Minister who, acting under the authority of the Council and in close and constant contact with the Political and Security Committee “shall ensure coordination of the civilian and military aspects” of the above tasks (Art III-309 CT) (Duke, 2004: 21).

⁴⁰ As set out in Art I-41 para 1 CT, the Union may use its operational capacity also for missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nation Charter.

themselves on the management of the task. The Council is kept regularly informed of the progress and consequences in the implementation.⁴¹ On the other hand, the draft Constitution foresees a permanent structured cooperation for “those Member States whose military capability fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions” (Article I-41 para 6 and Article III-312 CT). This is a remarkable novelty, given that enhanced cooperation in the field of security and defence was explicitly excluded in the TEU (Art 27b TEU). Member States that wish to participate and fulfil the criteria regarding the military capabilities set out in the respective Protocol in the Constitution will notify the Council.⁴² Within three months following such notification, the Council will adopt a European decision establishing permanent structured cooperation and determining the list of participating Member States (Art III-312 para 2 CT). It will be open to other Member States subject to a vote by the Council of Ministers with the participation of those Member States already taking part in the group (Article III-312 para 2 CT). The dividing lines between these two forms of flexibility in the CSDP are thus the qualitative requirements for military capability of the participating Member States, as well as the quality or respectively the challenges of the missions and the ad hoc character of Art III-310 CT. Yet, how these differences will apply in conceptual and practical terms seems not entirely clear (Duke, 2002:24).

c. The Mutual Defence Clause

The second major innovation in the CSDP is the mutual defence clause in Art I-41(7) CT. Whilst it was initially, under the Convention’s draft, also designed as a form of flexible cooperation, the final concept of the Union’s mutual defence clause now obliges all Member States to aid and assist “*by all the means in their power*” another Member States that is “*the victim of armed aggression on its territory*”, in accordance with Article 51 of the United Nations Charter. This comprehensive obligation constitutes a significant challenge particularly for the neutral and non-aligned countries, such as Austria, Finland, Ireland and Sweden, and also Denmark with a view to its specific position in the CSDP. It, however, takes account of potential political or even constitutional conflicts by stating that this clause “*shall not prejudice the specific character of the security and defence policy of certain Member States*”. At the same time, it avoids challenging the role of NATO by providing that the “*Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it,*

⁴¹ As Cremona observes, those Member States will then be committed to the task as defined in the relevant European decision, thus they will not have complete freedom of action and if it should prove necessary to amend those parameters, a further European decision by the whole Council of Ministers will be necessary. These provisions constitute the legal basis for such operations as in the former Yugoslav Republic of Macedonia and the Democratic Republic of Congo (Cremona, 2003:1360).

⁴² Refer to Protocol 23 in CIG 87/04, ADD1.

remains the foundation of their collective defence and the forum for its implementation.” Therefore, a clear line is established to Article 5 of the Brussels Treaty, which should take priority over any application of Art I-41(7) CT. Whether this concerns also the scope of the defence clause, in the sense that Art I-41(7) CT also excludes pre-emptive action on the basis of proven threats in compliance with the standard interpretation of Art 51 of the UN Charter, is unclear. It might be implied by the requirement in Art I-41(7) CT that commitments in this area will be consistent with the North Atlantic Treaty Organisation. Yet, with a view to the differences regarding the legality of military action in Kosovo and Iraq, it is not clear whether there exists a uniform position on these questions within the EU.

d. The Solidarity Clause

Another form of mutual assistance, which is not regulated within the section on CSDP, but in fact also concerns potential security threats against any of the Member States, is the Solidarity Clause (Article I-43 and Article III-329 CT). With a view to the current challenges of global politics, practical recourse to this provision seems even more imminent than situations under the mutual defence clause. Art I-43 CT establishes an obligation to assist a Member State that becomes a victim of a natural or man-made disaster or a terrorist attack, at the request of its political authorities. In this event, Union and Member States are called to act jointly, *in a spirit of solidarity*, subject to coordination in the Council of Ministers. The Union will mobilise all the instruments at its disposal, which notably includes also the military resources made available by the Member States, intelligence, police and judicial cooperation, civil protection, etc.⁴³ Similar to the provision on mutual defence, the scope of obligation under the solidarity clause is not entirely clear: Principally, the objectives of Art I-43 CT are the prevention of threats or the assistance in the event of a threat or other disaster in the territory of the Member States. The second indent of Art I-43(1)(a), however, also foresees the implementation of the solidarity clause, in order to “*protect democratic institutions and the civilian population from any terrorist attack*” without any specification as to where such measures will take place. Again, therefore, the scope of such competence may be questioned and, particularly, whether its formulation might permit pre-emptive action on the basis of proven threats, contrary to the obligations under public international law (Art 51 UN-Charter). Read in isolation of the Union’s international obligations, a preventive military action for example in Afghanistan, in the case of terrorist threats against any of the Member States by a fundamentalist group, cannot be excluded.

⁴³ Compare CONV 461/02 (Final Report of Working Group Defence), p.20; generally, the arrangements for the implementation by the Union of the solidarity clause referred to in Article I-43 shall be defined by a European decision adopted by the Council acting on a joint proposal by the Commission and the Union Minister for Foreign Affairs. The Council shall act in accordance with Article III-300(1) where this decision has defence implications. The European Parliament shall be informed.

e. **The European Defence Agency**

The last significant amendment in the CSDP that will be addressed is the legal basis for establishing a European Defence Agency in Art I-41(3) and Art III-311 CT. It is regulated in the context with the Member States' obligation in Art I-41(3) CT "*to make civilian and military capabilities available to the Union for the implementation of the CSDP [...]*". In consequence of this obligation, "*Member States shall undertake progressively to improve their military capabilities*".⁴⁴ To this end, the Constitution authorises the establishment of an agency in the field of defence capabilities development, research, acquisitions and armaments. Its tasks include promoting the harmonisation of operational needs, initiating or coordinating multinational projects or programmes with regard to the objectives in terms of military capabilities and fostering research activities and the industrial and technological base in the defence sector (Art III-311(1) CT). Remarkably, the Agency will also contribute to defining the Member States' military capabilities objectives and evaluate the observance of the capability commitments given by the Member States (Art III-311(1)(a) CT), although it is not even obligatory that all Member States take part in the endeavour. That is to say that also the European Defence Agency constitutes a sort of flexible cooperation, as it "*shall be open to all Member States who wish to be part of it*". Moreover, "*specific groups shall be set up within the Agency bringing together Member States engaged in joint projects*". Similar to other fields of the CFSP/CSDP, the Agency will bring about an interesting constellation regarding the institutions involved. The Agency's statute, seat and operational rules will be defined by the Council, acting by qualified majority (Art III-311(2) CT)⁴⁵. The Agency itself will act subject to the authority of the Council (Art III-311(1)), which presumably refers to the Foreign Affairs Council and hence the Union Foreign Minister, and at the same time will carry out its task in liaison with the Commission where necessary (Art III-311(2) CT). Remarkably, even before the formal signing of the Constitution, the Council has already adopted a Joint Action establishing the European Defence Agency with the mission to *support the Council and the Member States in their effort to improve the EU's defence capabilities in the field of crisis management and to sustain the ESDP*⁴⁶.

In summary, the Constitution includes important amendments to the CSDP, particularly by broadening the Union's competences through the extension of the Petersberg tasks and including several new legal bases allowing for a flexible integration and, thus, the possibility

⁴⁴ Compare in this regard the Final Report of the Convention's Working Group on Defence which clearly stated in the context of the European Defence Agency that "the development of capabilities is linked to development of armaments" (CONV 461/02, 24).

⁴⁵ Presumably, all Member States and not only the participating states shall take part in the decision-making, as the following sentence explicitly requests that "that decision should take account of the level of effective participation in the Agency's activities.

⁴⁶ Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ L245/17 of 12 July 2004; for a more detailed outline on the European Defence Agency refer to Blanck, 2005:27-30.

for a stronger progression of “coalitions of the willing” in the defence sector.⁴⁷ Taken together with the comprehensive obligations of mutual defence and solidarity assistance, it may be undoubtedly concluded that one “achievement” of the Constitution was to strengthen at least the legal basis for a Common Defence Policy to a considerable degree.

V.3. The Common Commercial Policy: (Art III-314 and III-315 CT)

Chapter III of Title V on the Common Commercial Policy contains two provisions: Art III-314 CT on the establishment of a customs union between the Member States and Art III-315 CT which constitutes the considerably amended version of current Art 133 TEC. In the external sphere, the customs union as well as the common commercial policy is (explicit) exclusive competence as specified by Art I-13(1)(e) CT. Cremona interprets the common commercial policy as an expression of the principle that an exclusive competence of the Union arises, where the Community’s internal market objectives are dependent on the conclusion of international agreements. The attainment of its objectives excludes the maintenance of an autonomous external trade policy by the Member States.⁴⁸

Article III-314 CT basically reflects Article 131 TEC with the significant complement, however, that it will henceforth also contribute to the progressive abolition of restrictions on *foreign direct investment* and to the lowering of customs *and other* barriers. As Herrmann provides, the inclusion of non-tariff barriers and foreign direct investment (hereinafter: FDI) in the scope of the Common Commercial Policy constitutes another indication for the ambitious and comprehensive global commercial policy aspired by the CT. It corresponds to the extension of the Union’s objectives in the field of external action through Art III-292 CT which in his view constitutes an expression of the Union’s aspiration at international level to find and defend its own consensus on the equilibrium between economic and non-economic trade aspects towards the outside world.⁴⁹ With a view to these objectives, agreements concluded under the CCP might, in the future, also be reviewed with regard to their capacity of furthering sustainable development. It is also questionable, how trade agreements with countries that do not respect human rights should be legally evaluated in the light of the human rights-objective under Art III-292 CT.

⁴⁷ Another indication for a more efficient operation of the CSDP is the provision on financing in the Constitution (Art III-313 CT). Principally the Constitution maintains the approach of charging expenditure arising from operations having military or defence implications to the Member States in accordance with their respective gross national product scale. Yet, for the urgent financing of initiatives in the framework of the CFSP, and particularly preparatory activities for the Petersberg tasks, the Constitution foresees the establishment of specific procedures guaranteeing rapid access to appropriations in the Union budget (Art III-313(3)). In addition, in order to finance preparatory activities for Petersberg tasks, a start-up fund made up of Member States’ contributions shall be established.

⁴⁸ Cremona, 2003:1362f.

⁴⁹ Herrmann, 2004:23, Cremona, 2003:1349.

Also, the amendments to the scope of the CCP, as currently regulated in Art 133 TEC, would bring about a significant development in the sphere of the international economic law. The proposal in the CT aspires to resolve the compromise adopted in the Nice-version, between those who felt that the Union's external powers were unnecessarily limited through the Court's ruling in the WTO-Opinion and those who dreaded a further extension of the Union's competences. It seems that the Convention, after the drawback of Opinion 1/94, now tends to take up the extensive interpretation of exclusivity first adopted by the ECJ in Opinion 1/78. Last but not least, the proposal would entail one significant gain, namely the simplification of the current "legal monstrosity"⁵⁰ created under the Nice Treaty.

Currently, the Union's competences under the Common Commercial Policy include the adoption of tariff rates, quantitative restrictions, antidumping measures, anti-subsidy measures against unfair trade practices, export policy and the conclusion of tariff and trade agreements. With regard to the WTO-Agreement, the ECJ clarified in Opinion 1/94 that besides the Agreement on trade in goods, only selected fields of trade in services and intellectual property are covered by (now) Art 133 TEC. Of the "four modes of the supply of services" identified by the Court, only the cross-frontier supply of services was held to fall under the scope of the Common Commercial Policy. With regard to the TRIPS Agreement, only IP protection regarding the release into free circulation of counterfeit goods was under the Court's ruling covered by Art 133. In addition, the conclusion of the Agreement on Technical Barriers and on Agriculture falls under exclusive Community competence under the CCP. As a consequence, the Union's external powers appeared somewhat fragmented in relation to the substantive agenda of the WTO.

Following the Nice-Treaty, the trade aspects of services and IP rights were included in the Common Commercial Policy, yet with several restrictions. First, following the predominant interpretation of Art 133 paras 5 and 6, the TEC only established concurrent competences in these areas.⁵¹ Second, Art 133 para 5 TEC only covers the conclusion of international agreements regarding services and IP, and does not include autonomous EC-measures, which emphasises the foreign trade aspect of Art 133 TEC. Third, the emphasis on *trade aspects* of services and intellectual property also clarifies that intra-Community aspects are not covered by Art 133 TEC and fall under the domain of internal competences. Fourth, pursuant to the prevailing understanding, the notion of services under the EC-Treaty does not cover the establishment of a commercial presence in another Member State, thus the setting up of a branch or a subsidiary.⁵² A different understanding might only seem

⁵⁰ Herrmann, 2004: 2 (loose translation).

⁵¹ Griller in Hummer, 2002:131.

⁵² A national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State, comes under the provisions of the [...] right of establishment,

admissible if one applies the notion of services under the GATS Agreement to Art 133 TEC.⁵³ The reasons for defending this interpretation might be appealing if examined on the basis of its practical implications: With a view to the liberalisation of the financial markets, for example, the Union may achieve harmonisation in the field of financial services on the basis of its internal competences, and might exercise its (exclusive and/or concurrent) competence for concluding international agreements on cross-border financial transactions or the supply of financial services by credit institutions located in third countries. The broad understanding of services under the GATS Agreement would also permit the conclusion of international agreements regulating the conditions for the first establishment of subsidiaries or branches of such credit institutions within the Community. In turn, the limited scope of the Community's definition of services would exclude such external competence relating to the establishment of subsidiaries or branches. Thus, throughout the Community different rules regulating the market access and the national treatment of such institutions may result in considerable distortions of competition, including forum shopping with a view to the Member States offering the most beneficial conditions. The drawback of the strict Community interpretation is evident in the light of this example. However, as Gamharter and Griller have convincingly argued, the negotiating history of Art 133 TEC preceding the Nice Treaty, the ensemble of Art 133 TEC with its inherent exceptions, which provides no adequate basis to align the Community competences with the WTO agenda, as well as a systemic interpretation of this provision in the framework of the EC-Treaty strongly speak in favour for applying the EC-notion of services under the Common Commercial Policy.⁵⁴ Thus, whilst the active and passive freedom of services is covered by the CCP, the third mode of supply in the terminology of GATS remains outside the scope of the Union's competence under Art 133 TEC.

Against this background, it may be observed that the CT's proposal in Art III-315 CT would significantly broaden the scope of the Common Commercial Policy. The relevant passages of this provision include the following:

and not those...relating to services" (Case C-55/94 Gebhard [1995] ECR I-4165). In turn, freedom to provide services includes investment insofar as it concerns the establishment of infrastructure such as an office, chambers or consulting rooms, as long as the "temporary nature of the activities in question" is not lost.

⁵³ Compare Vedder, 2001:31, as well as Eeckhout, 2004:215.

⁵⁴ Griller/Gamharter, 2002:91f.

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. European laws shall establish the measures defining the framework for implementing the common commercial policy.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Section 7 of Chapter III of Title III and to Article III-325.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States insofar as the Constitution excludes such harmonisation.

The first observation evidently relates to the scope of competences in the proposal, which extends exclusive Union competence under the CCP to the conclusion of tariff and trade agreements relating to services and the commercial aspects of intellectual property rights, as well as foreign direct investment. Unchanged remains the reference to *trade aspects* of services and IP rights. The principal but undoubtedly significant change is the limitation of the Member States' competences, as they would be entirely excluded from concluding international agreements in these areas. Under the current regime, on the basis of the concept of pre-emption in the sphere of concurrent competences, the Member States retain external competence to the extent that the Community has not acted. Pursuant to the CT, the Member States would be *ab initio* precluded from setting any external action. It would be exclusively upon the European Union to negotiate and conclude agreements in the respective areas. Indirectly, it would compel the Member States to reach agreement within the Council, if they wish to participate in the development of a certain subject matter at international level.

An important extension of the Union's room for manoeuvre would also be effected by the inclusion of foreign direct investment in Art III-315 CT. Whilst it is submitted that "trade in services" would, also in the future, have to be interpreted in accordance with the EC- notion of services, the inclusion of foreign direct investment in Art III-315 CT would (finally) also bring the establishment of a "commercial presence" under the scope of the CCP.⁵⁵ Therefore, FDI would, as well as its focus on questions concerning the capital market, also imply an exclusive Union competence regarding international agreements on the establishment of third country residents and undertakings. If, therefore, the proposal was adopted in its current version, including trade in goods, services and IP, as well as foreign investment supplemented by the Union's exclusive competences pursuant to Art I-13 CT, namely in particular the field of competition, the Union's external powers in international trade would be impressive. Herrmann even suggests that the Union would practically "govern" all aspects on the WTO-agenda and would be solely entitled to sign a final agreement at the current Doha development round.⁵⁶ With a view to the parallel WTO-membership of the European Community and the Member States, he even raises the question on the consequences for a revision of the Agreement pursuant to Art X WTO-Agreement, if the Member States were not entitled anymore to translate amendments to the Agreements.⁵⁷ Indeed, the Member States' margin of manoeuvre to conclude international commercial agreements, and more generally to adopt rules on services, IP and foreign direct investment that relate to third country nationals, would be reduced to a considerable degree. Moreover, it may be expected that the conclusion of an international agreement in a certain field also provides an incentive for an internal regulation, for example on the basis of the Union's concurrent competences. Cremona regards the new wording of the CCP as another attempt to extend the Union's competence in this field beyond its traditional application; an attempt, which has in her view already been shown in the course of the debate within the European Convention on whether the four freedoms should become an exclusive Community competence (Cremona. 2003:1361f). Notwithstanding this proposal, which has eventually been dropped in the course of negotiations, it remains at issue to what extent the CCP would lead to a 'tacit expansion of exclusive EU competences' in its fields of application.⁵⁸ That is to say that also in the CT's proposal, it is submitted that only conventional measures, meaning the conclusion of tariff and trade agreements, and not autonomous measures are covered

⁵⁵ This may be based on the argument that the maintenance of a permanent commercial presence in a country inevitably includes an investment decision (Griller/Gamharter in Griller/Weidel, 2002:93f)

⁵⁶ Herrmann, 2004: 26.

⁵⁷ Herrmann, 2004: 26f.

⁵⁸ Griller, 2003:138, on the proposal to bring the entire Common Commercial Policy under exclusive competence: 'The point of such concerns is that as a result of expanding the CCP in this manner, Member States would no longer be competent to regulate services and intellectual property rights with regard to nationals of third countries.'

⁵⁸ CONV 528/03, Comments to Article 11 and CONV 797/1/03, Article I-12 para 1.

with regard to trade in services and IP as well as FDI. Thus, either a third country or an international organisation must participate in a Union measure.⁵⁹ This seems to be the more convincing interpretation, even though one might state that the scope of application in Art III-315 para 1 CT is not conclusive and the reference in para 2 to European laws as measures for the implementation of the CCP serves to establish Union competence also for autonomous measures.⁶⁰ Yet, it would seem that the wording of para 1 is unequivocal and, what's more, the provision in para 6, which stipulates that the exercise of competences under the CCP will not affect the delimitation of competences between the Union and the Member States, would otherwise lose its meaning. This provision intends to delimit the external from the internal sphere and seeks to prevent the exclusive character of the powers under the CCP encroaching upon the internal delimitation of competences. In turn, the primacy of Union law and the Member States' commitment under Art I-5 para 2 CT to ensure the fulfilment of the obligations flowing from the Constitution or from the Union institutions' acts, prevents a conflict between the international agreements concluded by the Union and the exercise of internal competences by the Member States.

The second phrase of Art III-315 para 6 CT also sets limits to the Union's external competence, in that the exercise of the competences under the CCP will not lead to harmonisation where this is excluded in the internal sphere. Notably, this concerns the entire area of supporting, coordinating or complementary action (Art I-17 CT), where the Union may in fact not enter into any international commitment that would imply the establishment of common rules at Union level. In addition, several other competence provisions, such as employment (Art III-207 CT), or, in the field of shared competences, Social Policy (Art III-210 CT), as well as research and development, or development cooperation and humanitarian aid (Art I-14 para 3 and 4 CT) to some extent prevent harmonisation. Pursuant to Art III-315 para 4 CT, the internal requirements for unanimity also translate to the negotiation and conclusion of agreements in the fields of trade in services and IP, as well as FDI. In this regard, the proposal contains another amendment compared to the Nice version as regards agreements in the field of trade in cultural and audiovisual services. The rather incoherent attribution of such services as mixed competence established under the Nice version in Art 133 para 5 which mainly resulted from the Member States', and particularly the French concern to protect domestic cultural services was dropped. Instead, the general CCP competence allocation principally also applies to trade in cultural and audiovisual services. The Member States' sovereignty concerns are addressed by the requirement of unanimity where the conclusion of agreements in these fields risks prejudicing the Union's cultural and linguistic diversity. Moreover, the exclusion of any harmonisation of the Member States' laws

⁵⁹ Compare Griller/Gamharter in Griller/Weidel, 2002, 90f.

⁶⁰ Compare also Herrmann, 2004: 24; differently Eeckhout, 2004.

and regulations in the field of culture pursuant to Art III-280 para 5 CT needs to be considered. As set out above, it excludes the establishment of common rules at the external level. This applies equally to the fields of trade in social, education and health services, where the conclusion of agreements will also be subject to a unanimity requirement, where such agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

Finally, para 5 sets out that the negotiation and conclusion of international agreements in the field of transport will be subject to the specific provisions of Section 7 on Transport in Title III. Thus, the field of transport services remains outside the exclusive CCP competence and, following the most recent judgment of the ECJ on the Open Skies Agreements, the largest part of this sector gives rise to (only) shared external competence of the Union and the Member States. Thus, irrespective of whether FDI will or will not form part of the CCP, the area of transport will constitute a gap in the Union's near-complete powers in international trade. A last, brief remark relates to the procedural aspects of the CCP which would bring about an increased role of the European Parliament. In accordance with Article III-325 para 6(b) CT, the European Parliament will for the first time be given the right to be consulted, where an agreement under the CCP is concluded.

V.4. Cooperation with Third Countries and Humanitarian Aid (Art III-316 to III-321 CT)

V.4.1 Introduction

Chapter IV of Title V on the Union's cooperation policies covers one of the main pillars of EU external action. Measures adopted on the basis of these provisions extend to practically all countries in the world and cover all essential areas of cooperation with third countries, including economic, social and political aspects. The Union's cooperation policy is thus another field which displays the strong link between trade or economic relations and foreign policy aspects.⁶¹ Articles III-316 to III-321 CT essentially reflect the provisions on development cooperation in the current Art 177 TEC, as well as economic, financial and technical cooperation with third countries in Art 181a TEC. Art III-321 CT moreover introduces a new competence provision on humanitarian aid, for cases of ad hoc assistance, relief and protection for people in third countries and victims of natural or man-made disasters.

⁶¹ Compare the statement of the Commission and the Council, available at http://www.europa.eu.int/comm/development/index_en.htm, according to which it is the task of the Community to ensure that development policies and trade and investment policies are complementary and mutually beneficial (p.6).

These provisions have been the result of a gradual development of the Community's cooperation policy. In its original version and until Maastricht, the TEC did not contain any specific legal basis for development cooperation or cooperation with third countries. The development of policies in these areas was largely based on (current) Art 310 TEC (Association Agreements)⁶² or Art 133 TEC (Common Commercial Policy).⁶³ Yet evidently, it conflicts with the very purpose of Art 310 TEC to conclude association agreements with all developing countries. Also the CCP is not the appropriate legal basis to cover all aspects of development policy. Maastricht finally introduced the current Art 177 TEC and established development cooperation formally as an area of Community policy.⁶⁴ Its objectives included amongst others the sustainable economic and social development of the developing countries, the campaign against poverty and the gradual integration of these countries into the world economy. It thus offers a broad margin to define the actual content of cooperation with third countries. The Court, in turn, has interpreted the scope of the nature of the Community's competence in this field more narrowly by providing that cooperation agreements must not impose on the Community "*such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of development cooperation*".⁶⁵ This particularly implies that the Community could not, through cooperation measures, affect internal legislation in fields other than development cooperation (Martenczuk, 2002:393). On the other hand, as is emphasised in Art 177(2) TEC, the objectives of development cooperation will be taken into account in all Community policies which are likely to affect developing countries. Above all, this refers to the delimitation between development cooperation and the Common Commercial Policy, or the close co-existence between trade, economic or technical cooperation and other forms of cooperation intended to strengthen democratic and human rights values in third countries.

⁶² Compare for example the earlier Lomé Conventions which have been now replaced by the so-called Cotonou-Agreement with the ACP-countries (Council Decision 2003/159/EC of 19 December 2002 concerning the conclusion of the Partnership Agreement between the African Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000) which is also based on Art 310 TEC; Compare hereto Schmalenbach in Callies/Ruffert, ad Art 177, para 3.

⁶³ Compare, for example the Council regulation on the cooperation agreement with the Asian and Latin American countries which are based on Art 133 in conjunction with Art 181 (Council Regulation (EEC) No 1440/80 of 30 May 1980 concerning the conclusion of the Cooperation Agreement between the European Economic Community and Indonesia, Malaysia, the Philippines, Singapore and Thailand - member countries of the Association of the South-East Asian Nations, OJ L 144/1; also the regulation on the Generalised System of Preferences (Regulation 2501/01, OJ L 346/1) is based on Art 133 TEC, although it pursues development policy objectives; compare moreover the Court's broad approach on CCP in Opinion 1/78, where it took Art 113 TEC to cover commodities agreements or in the GSP-case where the Court decided that unilateral trade preferences for developing countries also came within the scope of the Common Commercial Policy.

⁶⁴ For an historical background on the development cooperation, refer to Martenczuk in Griller/Weidel (2002).

⁶⁵ Case C-268/94, Portugal versus Council, [1996] ECR I-6177, para 39.

The Nice Treaty inserted another title in the field of cooperation policy, governing economic, financial and technical cooperation with third countries (Art 181a TEC). It codified a long standing Community practice of concluding cooperation agreements or including cooperation provisions in general agreements with non-developing countries, which until then had to be based on current Art 308 TEC.⁶⁶ In terms identical to Art 177(2) TEC, Art 181a TEC is also designed to contribute to the general objective of developing and consolidating democracy and the rule of law, and to further the respect for human rights and fundamental freedoms. Yet, in contrast to Art 177 TEC, it specifically addresses the cooperation with countries or regions other than developing countries, including industrialised countries. The subject matter of such cooperation in the Treaty is defined in broad terms and, as Eeckhout sets out, removes the need for recourse to different Treaty provisions depending on the subject of cooperation (Eeckhout, 2004:117).⁶⁷ Nevertheless, to the extent that such measures fall under the scope of other Community policies, in particular to the common commercial policy, the more specific legal basis will prevail (Martenczuk, 2002:407). An exclusive Union competence under the CCP would, for example, continue to exist to the extent that Community measures pursuing development objectives have as an essential goal to determine commercial or agricultural policy.⁶⁸

Through the introduction of a common set of objectives, the emphasis to extend the Union's cooperation, and particularly development policy objectives to all fields of external action has become even stronger (Art III-292(2) CT). This applies particularly to the respect for human rights, democracy or the rule of law which frequently is a condition for financial or economic assistance in development or trade agreements with third countries. Yet, also the fostering of "*sustainable economic, social and environmental development of developing countries*" (lit d) explicitly ranks among the general objectives of the Union's external action. These commitments for the future implementation of the Union's external action, as well as the further extension of competences in cooperation policy appear to aim at an enhanced Union engagement in this field.⁶⁹

⁶⁶ Compare, for example, Council Regulation (EC) No 2698/2000, OJ L 311/1 amending Regulation (EC) No 1488/96 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership, as well as Council Regulation 443/92, OJ L52/1 governing financial and technical assistance and economic cooperation with the developing countries of Latin America and Asia (ALA).

⁶⁷ An agreement providing for technical cooperation in matters of transport, environmental protection and agriculture, for example, does not need to be based on the express or implied external powers in those areas (Eeckhout, 2004: 117).

⁶⁸ Schmalenbach in Callies/Ruffert, ad Art 180 para 1 and Art 179 para 3; C-268/94, Portugal versus Council, ECR 1996/I-6177, ad para 39.

⁶⁹ Compare Working Document 29 of Working Group "Complementary Competences"; similar Schmalenbach in Callies/Ruffert, Art 180, para 1; compare also Zimmermann/Martenczuk in Schwarze, Art 177, para 14.

V.4.2. The New Provisions of the Constitution on the Cooperation with Third Countries and Humanitarian Aid

Both Art 177ff TEC and Art 181 TEC stipulate that the Community policy in the sphere of cooperation policy shall be “*complementary to the policies pursued by the Member States*”. Yet, despite this clear wording in the Treaty, Community measures in the field of development cooperation in practice go beyond a mere coordination of Member States’ policies. As the Convention’s Working Group on “Complementary Competences” observed, the preferred legal instrument for Community action in development cooperation is regulations, which would under the definition chosen imply shared competence. The Group, however, also stated that *development cooperation has special features because Union activities in this field would never pre-empt the competence of the Member States to maintain their own national development policy*. It is thus presupposed that Member States will continue to have their own development policies.⁷⁰

The Constitutional Treaty takes account of this specific nature of the Union’s development policy. Art I-13 CT categorises development cooperation and humanitarian aid as shared competences. At the same time, it provides that the exercise of Union competence in this field *to take action and conduct a common policy* may not result in Member States being prevented from exercising theirs (Art I-13 para 4 CT). The principle of pre-emption, normally inherent in the context of shared competences, does not apply in these areas. Consequently, Art III-316 in Part III of the Constitution stipulates that the Union’s development cooperation policy and that of the Member States will complement and reinforce each other and that the Union’s external powers in the field do not prejudice the Member States competences to negotiate in international bodies and to conclude agreements (Art III-316 and III-317(2) CT). The same applies to economic, financial and technical cooperation with third countries (Art III-319 CT)⁷¹ and humanitarian aid (III-321 CT).

⁷⁰ CONV 375/1/02, REV 1, p.9, compare also Working Document 29 of Working Group “Complementary Competences”, where it is proposed that development policy, as a sub-category of shared competence could be parallel competence; compare also Schmalenbach in Callies/Ruffert ad Art 180, para 1; see also Zimmermann/Martenczuk in Schwarze, ad Art 177, para 14.

⁷¹ Interestingly, the field of economic, financial and technical cooperation with third countries (Art III-221) is not specifically attributed to a competence category in Part I CT, unless one assumes that the reference in Art I-14(4) CT relates to the entire chapter on cooperation with third countries and humanitarian aid. Yet, also Art III-319(3) CT foresees that in the sphere of external relations, the Member States’ competence to negotiate in international bodies and to conclude international agreements shall not be prejudiced by the exercise of Union competences in this field. On the basis of this provision, the systemic integration of Art III-319 CT in Chapter IV of Title V and the residual character of shared competences, it may be concluded that also Art III-319 CT confers shared competence by excluding pre-emption.

V.4.3. Development Cooperation (Art III-316 to III-318 CT)

A substantial novelty in the provision on development cooperation is the emphasis on the primary objective of reducing and, in the long term, eradicating poverty (Art III-316 para 1 CT). Despite the general obligation in Art III-292 CT, Art III-316 para 1 CT once more underlines the Union's commitment "*to take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries*". Both Union and Member States are moreover held to "*comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations*" (Art III-316 para 2 CT). Internally, development cooperation policy will be implemented through European laws or framework laws, as well as multi-annual cooperation programmes. Art III-317 CT contains the legal basis for the conclusion of agreements with third countries and competent international organisations to achieve the objectives referred to in Articles III-292 and III-316 CT. Also, the European Investment Bank is held to contribute, under the terms laid down in its statute, to the implementation of development cooperation policy (Art III-317 para 3 CT). Art III-318 CT furthermore includes a mutual obligation for coordination and consultation between Union and Member States, "*in order to promote the complementarity and efficiency of their action*".

V.4.4. Economic, Financial and Technical Cooperation with Third Countries (Art III-319 and III-320)

Art III-319 CT essentially reproduces current Art 181a TEC. It empowers the Union to carry out economic, financial and technical cooperation measures, including assistance and, in particular financial assistance, with third countries other than developing countries. A progress in comparison to Art 181a TEC is certainly the introduction of the legislative procedure for decision-making. The requirement for unanimity regarding agreements under Art III-319 CT with countries that are candidates for accession remains unchanged.

An additional legal base is awarded in Art III-320 CT for adopting the necessary European decisions, when the situation in a third country requires urgent financial assistance. It allows the Council to adopt such measures by qualified majority, instead of unanimity, as is presently the case under Art 308 TEC.⁷²

V.4.5. Humanitarian Aid (Art III-321)

The provision on humanitarian aid may be regarded as another necessary extension of the Community competences in the field, following the current practice of Community action. It

⁷² Art III-320 would provide the appropriate legal basis for the regulation on the rapid reaction mechanisms covering the reaction to crises both in developing and non-developing countries, which was adopted on the basis of Art 308 TEC.

entitles the Union to implement operations for ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these situations (Art III-321 para 1 CT). Such operations will be concluded in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination (Art III-321 para 2 CT). As became evident in the *Bangladesh case*⁷³ decisions on emergency aid, and particularly the financial assistance linked to such decisions, brought about some difficulties regarding the legal basis in the Treaty for a Community humanitarian aid policy. (Eeckhout, 2004:108)⁷⁴. In this judgment, the Court allowed Member States to collectively finance emergency aid and taking decisions when meeting in the Council, yet acting outside the framework of the Treaty and of the budget. The current provision in the Constitution brings matters of humanitarian aid within Union competence. This might also entail implications with regard to budgetary matters, given that the main issue of dispute underlying the Bangladesh case was the Parliament's claim that the Member States' decisions on emergency aid infringed its budgetary prerogatives. With a view to the "complementary" character of this policy and notwithstanding the coordination with Union actions, Member States may still continue to pursue independent operations.

V.5. Restrictive Measures (Art III-322 CT)

The provisions on economic and financial sanctions against third countries have all along rendered the inextricable link between CFSP and external relations under the current first pillar apparent, both in procedural as well as in substantive terms. Generally, embargo sanctions are *imposed by an authority against another subject of international law in pursuance of a foreign policy objective, namely to alter the conduct of the target State*.⁷⁵ Art III-322 incorporates current Articles 301 TEC on economic and Art 60 TEC on financial sanctions and, in terms of procedure, maintains the two-stage approach provided for in Art 310 TEC for the adoption of sanctions.⁷⁶ This is particularly noteworthy with a view to the merger of the pillars. In fact, it provides another confirmation that, also in a "unified" Constitution, the Member States' concerns to hand over sensitive foreign policy instruments are successfully addressed through the persisting procedural safeguards in the CFSP. For the interruption or reduction of economic or financial relations pursuant to Art III-322 CT the

⁷³ Joined Cases C-181/91 and C-248/91, Parliament vs. Council and Commission, [1993] ECR I-3685.

⁷⁴ Compare also Regulation 1257/96, OJ L 163/1, 2 July 1996 which constitutes the basis for the Commission's humanitarian activities world-wide and has been adopted as a thematic instrument on the basis of Art 179(1) TEC.

⁷⁵ Compare Lukaschek in Grillier/Weidel (2002) 324 referring to Schneider (1997) 27f.

⁷⁶ The structure of this provision introduced through the Treaty on European Union has been preceded by a long standing practice of a combined approach, namely the adoption of sanctions on the basis of a consensus decision with in the EPC followed by a Community measure based on former Art 113 TEC; for a detailed account on the European Union's legal framework on economic sanctions, compare Lukaschek in Grillier/Weidel (2002): 322-354.

Council thus needs to adopt a (principally) unanimous European decision in the framework of the CFSP. On the basis of such a decision, the Council, acting by qualified majority, will adopt the necessary European regulations or decisions.

Evidently, a unanimous Council decision as necessary precondition for the adoption of sanctions, though most probably unavoidable from a political point of view, is a rather challenging requirement in a Union of 25 Member States. It substantially weakens an otherwise powerful trade and policy instrument in the hands of the Union. Moreover, the unanimity requirement comprises another important facet with a view to the competence allocation for the adoption of sanctions. Notably, Art III-322 CT is not assigned to a specific competence category. On the basis of the general rule in Art I-14(1) CT, one might therefore argue that it figures as a shared competence. This conclusion somewhat contradicts the current perception of Art 301 TEC which is that of an exclusive competence⁷⁷ or, alternatively, suggests that the scope of the Union's competence depends on the repartition of powers in the field of the respective embargo measures⁷⁸. Following the latter approach, for example, the "classical" trade sanctions covered by the Common Commercial Policy-competence are exclusive. In contrast, on the assumption that the competence to adopt economic or financial sanctions was shared in the Constitution, the Member States would be principally free to adopt autonomous sanctions, as long as the Union had not acted in a given case. This would become problematic in each case where the adoption of a measure in the Council was blocked for the lack of unanimity.

With a view to the quest for a more coherent and consistent approach in the field of external relations, this solution seems entirely inappropriate: Particularly with a view to the Union's comprehensive exclusive powers in the field of the Common Commercial Policy, it should be out of question that the Member States adopted autonomous trade sanctions. The more plausible approach would therefore be to not interpret Art III-322 CT as a genuine empowering provision, which for this reason already does not fit in the general system of competence categories. On this basis, the division of competences would depend on the individual case. As long as the Union did not adopt sanctions against a third country, an individual or non-State entity, the Member States would be free to take such embargo measures that are not in conflict with any of the Union's exclusive competences. This might include flight embargos in the field of transport, visa restrictions, or eventually the freezing of

⁷⁷ Compare for example Cremer in Callies/Ruffert, ad Art 301 para 14 and fn.63.

⁷⁸ Compare for example Lukaschek in Griller/Weidel (2002): 345f; this would, for example imply that a measure on the basis of Art 301 TEC, which also encompassed services, would on the basis of Opinion 1/94 only confer concurrent competence. This view would, however, contradict a systematic interpretation of the Treaty, as Art 60 TEC extends the competence for adopting measures under Art 301 TEC to the field of capital and payment and explicitly foresees in its para 2 in exceptional cases, a (concurring) competence of the Member States for serious political reasons and on grounds of urgency.

accounts in the field of capital and payment. In contrast, it would prevent the Member States from adopting any trade sanctions with a view to the Union's exclusive competence under Art III-315 CT. Art III-322 CT would thus be understood as a horizontal competence provision, conferring power on the Union only in those fields, where the Union's legislator is internally entitled to act. This approach would also seem in line with the Member States' interest to retain control on the implementation of this important foreign policy instrument. For reasons of efficiency and coherence at the international stage, however, it would have seemed preferable to institute a general exclusive embargo competence for the Union and to ease the requirements for decision-making. In any event, it should be added that the issue is put into perspective in practice, as a great proportion of the Union's embargo measures are adopted to implement the decisions of the UN-Security Council that are mandatory for all Member States. Nonetheless, it speaks for itself that the Constitution, similar as for the CFSP, avoids clarifying the competence for this hybrid legal basis.

In substantive terms, Art III-322 CT reacts to the current practice and global security challenges by extending the scope of "addressees" in the provision. Economic and financial sanctions may forthwith be applied not only against States, but also against natural or legal persons and non-State groups or bodies (Art III-322 para 2 CT). Currently, this would, in principle, only be possible on the basis of Art 308 TEC and thus subject to unanimity.

Finally, it should be added that the provisions on restrictive measures, though clearly involving foreign security aspects, are not part of the chapter on CFSP and, therefore, fall within the jurisdiction of the European Court of Justice. This also includes a review under the current Art 230 TEC regarding the legality of restrictive measures adopted by the Council. The Court's jurisdiction in this field might gain importance with a view to the future relationship between the CFSP and current supranational fields of external action, and the associated institutional and procedural prerogatives in the Constitution. It may become pertinent with a view to the delimitation to Art III-325 (9) CT, which constitutes the second provision in the Constitution for "sanctioning" third countries by suspending the application of an existing agreement. Whilst the adoption of a sanction pursuant to Art III-322 CT requires "a CFSP measure", thus unanimity within the Council, followed by a Council regulation, the suspension of an economic agreement comes under the CCP and can in principle be done upon proposal by the Commission and qualified majority within the Council. Thus, if unanimity in the Council cannot be achieved and the Commission, nevertheless, considers the adoption of sanctions necessary, it might seek to tempt a qualified majority within the Council by proposing to suspend an agreement with the country in question. If this were among the tasks of the Union Foreign Minister in his function as External Relations-Commissioner, yet simultaneously head of the Foreign Affairs Council, he/she might indeed face a difficult decision concerning whether or not to push for the adoption of such proposal

within the Commission. A lack of unanimity in the Council expresses that the adoption of sanctions is not considered an appropriate foreign policy instrument in a given case. Yet, without considerably affecting the scope of application of Art III-325(9) CT, this should not prevent a “sanction”, namely the decision to suspend an agreement, if the necessary quality majority is reached, although it contradicts the foreign policy interests of certain Member States.

It all comes down to the extent of the institutions’ commitments pursuant to Art III-292 para 3 CT to “*ensure consistency between the different areas of its external action*”. Practice will show in which fora (the External Action Service?) and under whose aegis (the Foreign Minister) these commitments will be implemented and to what extent the obligation for consistency may be enforced or even challenged in a Court’s action.

V.6. International Agreements (Art III-323 to III-325)

V.6.1. The legal basis for the conclusion of international agreements (Art III-323 CT)

The questions relating to the Union’s substantive powers for concluding international agreements in the Constitution have been discussed above in relation to the Union’s implied powers under Art III-323 para 2 CT⁷⁹. In the context of this provision, it should suffice to summarise that Art III-323 CT empowers the Union to conclude an international agreement with one or more third countries or international organisations where the Constitution (explicitly) so provides or, respectively, on the basis of its implied powers. It is therefore not a genuine competence provision, but entitles the Union to conclude international agreements where there is an appropriate legal basis in the Constitution⁸⁰ or where an external competence arises implicitly through provisions of the Treaty or secondary law. With regard to the effect of these agreements Art III-323 para 2 CT provides that they “*are binding on the institutions of the Union and on its Member States*”.

V.6.2. Association Agreements (Art III-324 CT)

Art III-324 CT literally reproduces current Art 310 TEC entitling the Union to “*conclude an association agreement with one or more third countries or international organisations in order to establish an association involving reciprocal rights and obligations, common actions and special procedures*”. The concept of “association” remains undefined in the Constitution, yet

⁷⁹ Refer to Chapter IV.4.

⁸⁰ This, for example, includes the Union’s competences to include international agreements in the field of the environment (Art. III-233(4)), research, technological development and space (Art. III-248), readmission agreements with third countries (Art. III-267 (3)), development cooperation (Art. III-316(2)), economic, financial and technical cooperation with third countries (Art. III-319(3)) and humanitarian aid (Art. III-321(4)).

probably gathers a more narrow scope of application with the newly introduced provision on neighbourliness agreements (Art I-57 CT) and the Union's extended competences in the field of cooperation policy (Art III-316 to III-321 CT). Following the pertinent judgment of the ECJ in *Demirel*⁸¹, the key elements of an "association" should be the creation of special, privileged links with the country in question and its participation, at least to some extent, in the Community system. For this reason, namely to extend the system of the Treaty for the relevant policy areas to the associated country, the Court established an extremely broad external Union competence.⁸² As Eeckhout points out, however, even where the judgment was *among the most expansive in Community competence, it did not much change the practice of concluding association agreements in mixed form*, particularly because of the necessary underlying political dialogue (Eeckhout, 2004:106). According to Art III-325 para 8 CT, moreover, unanimity as well as the consent of the European Parliament is required for the adoption of association agreements. Agreements aiming to establish closer (economic, social or political) links with third countries without the inherent "promise" of accession might equally be based on Art I-57 CT or, for example Art III-319 CT. For these agreements, the Council may normally act by qualified majority⁸³; the European Parliament would have to give its consent in the case of agreements subject to Art III-319 CT (Art III-325(6)(a)(v)CT) or after having been consulted in the case of neighbourliness agreements.⁸⁴

V.6.3. The Union and its Neighbours (Art I-57 CT)

A specific legal basis for the future of the Union's relationship with its neighbouring countries is enshrined in Part I of the Constitution, directly ahead of the Title governing Union Membership (Title IX). In conjunction with Art III-225 CT, it empowers the Union to conclude agreements with neighbouring countries, in order to "*develop a special relationship [...] 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.*" Similarly as for association agreements, the neighbourliness agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly (Art I-57 para 2 CT). In substance, however, the objective target of Art I-57 CT is different. It pictures a product of the European Neighbourhood Policy (ENP), initiated by the Commission and essentially designed to "*prevent the emergence of new dividing lines between the enlarged EU and its neighbours and to offer them the chance to participate in various EU activities, through*

⁸¹ Case 12/68, *Demirel versus Stadt Schwäbisch Gmünd* [1987] ECR 3719.

⁸² In the case of *Demirel*, this included for example also aspects of immigration and employment of third country nationals.

⁸³ Notably with the exception of agreements subject to Art III-319 with accession candidates.

⁸⁴ The Parliament's consent for the conclusion of neighbourliness agreements might only be required, if such agreements established specific institutional framework (Art III-325(6)(a)(iii) CT).

greater political, security, economic and cultural co-operation".⁸⁵ In its outline on the neighbourhood policy, the Commission emphasises that the ENP is distinct from the issue of potential membership, yet offers a privileged relationship with the Union's neighbours. Together with partner countries, it aims to define a set of priorities, whose fulfilment will bring them closer to the European Union. The countries currently covered by the European Neighbourhood Policy are Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Syria, Tunisia, Ukraine, as well as the Palestinian authority.

V.6.4. The Procedure for the Conclusion and Negotiation of International Agreements (Art III-325 CT)

Article III-325 CT regulates the procedural aspects of international agreements. Its major achievement is to apply a single provision to the negotiation and conclusion of practically all EU agreements, including also the CFSP and PJCCM (police and judicial cooperation in criminal matters) agreements that are currently regulated in Art 24 TEU⁸⁶. Specific provisions are only foreseen for the common commercial policy (Art III-315 CT) and for international agreements in the field of monetary matters (Art III-326 CT). Without entering the details on the procedure, the main innovations are outline briefly below.

As Art III-325 CT covers agreements both in the fields of the CFSP and current Community matters, several features preserving the more intergovernmental approach in the CFSP are apparent in the procedure. Either the Commission or, where the agreement relates exclusively or principally to the CFSP, the Union Minister for Foreign Affairs may recommend the opening of negotiations (para 3). The Council nominates the Union negotiator, presumably following the current practice, either the Commission or the Union Minister for Foreign Affairs, or where an agreement covers both CFSP and Community matters. As has been set out above, the European Parliament unfortunately remains entirely excluded with regard to CFSP agreements. In contrast, its role has been enhanced in other areas. The Parliament's consent is required for agreements in all fields, where the legislative procedure applies (para 6)⁸⁷. Most notably, this is the case for all PJCCM matters, where the Parliament's role has thus proceeded from no involvement to consent. On the same basis, the Parliament's consent will also be required for agreements under the CCP, where it currently has no formal role. Also in the framework of the Constitution, the role of the Parliament remains, however, limited to the conclusion of agreements. The negotiating

⁸⁵ Further information on the objectives and methods of the ENP are available at http://www.europa.eu.int/comm/world/enp/policy_en.htm.

⁸⁶ For PJCCM matters, Art 24 TEU applied by reference in Art 38 TEU, entitling the EU to conclude international agreements in third pillar matters.

⁸⁷ Under Art 300 (3) TEC, the Parliament's power of assent was in this regard limited to agreements requiring an adopted act to be amended under the co-decision procedure.

phase, which is essential for the shape and substance of the agreement, will continue to be determined by the Council and Commission and the Union Foreign Minister. Regarding the voting modalities, qualified majority continues to be the principle, except for association agreements, agreements referred to in Art III-319 (economic, financial and technical cooperation) with the States which are candidates for accession, as well as those fields for which unanimity is required internally for the adoption of a Union act (para 8). Important also is the power of the European Court of Justice to render opinions as to whether an agreement envisaged is compatible with the Constitution (para 11). In the context of a cross-pillar mixity thus agreements covering both CFSP matters as well as Community aspects of external relations, the Court's jurisdiction might constitute another potential playing field for defining the future relationship between the former pillars.⁸⁸

Finally, the provision on suspension of agreements (Art III-325 para 9 CT), which has been mentioned above in the context of Art III-322 CT on restrictive measures is noteworthy. In contrast to the two stage procedure that applies to economic and financial sanctions, the suspension of an agreement is conducted by a European decision of the Council, acting on a proposal from the Commission or the Union Minister for Foreign Affairs. Nevertheless, as has been discussed above, the suspension of agreements mostly constitutes a highly sensitive, political act. It is thus striking that the Constitution remains silent on the European Parliament's participation in these decisions. This might either imply that the Parliament has no say in such decisions or, analogous to Art III-325(6)(b) CT, would at least need to be consulted.

V.7. The Union's Relations with International Organisations and Third Countries and Union Delegations (Art III-327 to III-328 CT)

In a sort of catchall-provision at the end of Title V, the Constitution entitles the Union to “*establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development*”, and “*as are appropriate with other international organisations*” (Art III-327 CT). The provision furthermore contains a rather curious directive on its implementation as “*the Union Minister for Foreign Affairs and the Commission*”, presumably by the Council “*shall be instructed to implement this Article*” (Art III-327(2) CT).

As mentioned above in Chapter III.3.1, Art III-328 CT finally empowers the Union delegations to represent the Union in third countries and at international organisations. They are placed

⁸⁸ Regarding the conclusion of such agreements in the case of a cross-pillar mixity, compare the contrasting positions of Griller in de Witte (2003), 151 and Eeckhout (2004), 184; for a discussion on the hierarchy of international agreements compare Lechner, 2004: 23.

under the authority of the Union Minister for Foreign Affairs and will act in close cooperation with Member States' diplomatic and consular missions.

VI. Summary

The attempt to analyse the future of the Union's external relations is necessarily limited by two factors: On the one hand, as has been stated earlier, this relates to the uncertainty as to whether the Constitutional Treaty will actually enter into force, which will, at the earliest be determined by the end of 2006.⁸⁹ The second factor, presuming a successful ratification procedure, concerns the extent to which the potential that is undoubtedly yielded in the Constitutional Treaty will be implemented in practice. This potential may, notably, shift the Union into several directions, including a stronger intergovernmental orientation in the Union's external relations, or indeed, a more coherent role of the Union in the world, based on its extended economic competences and a successful implementation of the institutional amendments. Eventually, the CT might also hold up the artificial separation of economic and political aspects of external relations which currently persists.

The (merely preliminary) findings on the Union's future role in the field of external relations may, therefore, be summarized as follows.

- (i) Regarding the definition of competence-categories and the attribution of competences, the CT provides for stronger clarity and transparency by essentially codifying the present competence regime. With a view to the Union's external competences, however, there are controversial developments: On the one hand, the CT significantly expands the Union's exclusive competences, particularly in the field of the Common Commercial Policy, which implies a move towards integration and centralisation, even putting at risk the flexibility and dynamics of the system. On the other hand, the draft implies the inherent danger of a stronger intergovernmental orientation of the entire field of external relations through the predominant role given to the European Council.
- (ii) In spite of the factual perpetuation of the pillar structure with regard to the proposed design of the CFSP, the competences of the Union in the field of external relations have been strengthened as a whole. This applies particularly to the field of economic external powers. The extension of the scope of the CCP together with the CT's proposal on implied competences in Art I-13 and III-323 CT might in the future even empower the Union to conclude international agreements, such as the Open Skies-Agreement, as well as to sign a final agreement at the current Doha development round alone, on the basis of its exclusive as well as concurrent competences.

⁸⁹ Regarding the state of play on the ratification procedure, refer to http://europa.eu.int/futurum/referendum_en.htm.

- (iii) The introduction of generalized objectives governing the entire field of external action (Art III-292 CT) implies the obligation for a broader orientation of the Union, also in the area of economic external relations. This might particularly bring about a stronger consideration of non-economic trade aspects in the implementation of the Common Commercial Policy.
- (iv) By looking at the individual competence provisions in Title V, the ever-closer link between foreign policy and economic aspects of external relations becomes visible, particularly in the area of restrictive measures or the Union's cooperation policies. Through the persisting differences in the institutional and procedural provisions between CFSP and the current supranational fields of external action, moreover, the delimitation between the two "pillars" remains at issue. The commitment to ensure consistency between the different areas of external action will thus become a core challenge for the Union's institutions, and particularly the Union Foreign Minister.

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