THE CONSTITUTIONAL LAW OF EXTERNAL RELATIONS

Bruno de Witte [1]

1. Introduction: The Emergence of the Foreign Affairs Dimension in the Constitutional Reform Debate

In the initial stages of the current constitutional reform process, external relations were not a central concern. Of the four subjects identified by the Nice Declaration of December 2000 as requiring a 'broader debate' (simplification of the treaties, status of the Charter of Rights, delimitation of competences and role of national parliaments), none primarily involved the external dimension of EU policies. However, one year later the Laeken Declaration considerably broadened the constitutional reform agenda and, under the impression of the recent terrorist attack on the United States, the foreign relations of the European Union figured prominently in that document of the European Council. The Laeken Declaration contained the oft-cited, and somewhat, trendy, phrase that the EU should "shoulder its responsibilities in the governance of globalisation". There was a clearly shared view that the EU should play a more active role on the international scene. That this ambition required further institutional reforms (after the ones made in all previous Treaty revisions) may not be altogether obvious, but it quickly became the prevailing wisdom among the members of the Convention on the Future of the Union. A Working Group on external relations was established, which produced a voluminous final report replete with reform proposals that found their way both in Parts I and III of the Draft Constitutional Treaty. A more specialized Working Group on Defence was also created which paved the way for many of the the Draft Treaty's provisions on a 'Common Security and Defence Policy' as a semi-autonomous subsystem within CFSP.

The Iraq crisis, that happened in the middle of the Convention's work, brought in sharp relief the traditional gap between rhetoric and reality in EU foreign relations, but after a short phase of perplexity the Convention soldiered on and produced a vast number of both broad and detailed reform proposals in the field of external relations. The main objective of those proposals was to improve the decision-making capacity of the EU institutions in foreign policy. In this sense, the Convention's final document fits in the tradition of the Treaties of Maastricht, Amsterdam and Nice. In Marise Cremona's words, "we have yet another attempt to create an institutional structure in the hope that unity wil emerge and foreign policy 'weight' in the world increase."[2] The proposed institutional reforms affect what is, today, the 'first pillar' (for instance, through the proposed extension of the exclusive trade competence of the EU and through the codification of an EU competence for humanitarian aid[3]). They also, and more conspicuously, affect what is today the 'second pillar', namely the Common Foreign and Security Policy, the face of which would be more profoundly transformed than

1 The author has benefited from comments by Marise Cremona on an earlier draft.

2 M. Cremona, 'The Draft Constitutional Treaty – External Relations and External Action', *Common Market Law Review* (forthcoming).

3 Article 13(4) and Article III-223.

any other EU policy area if the Convention's proposals were to enter into force. The proposed CFSP reforms include: a new extension of the security tasks of the EU, the creation of new organs and agencies (foremost of which the Union Minister of Foreign Affairs), a limited extension of qualified majority voting in the Council, the enactment of a solidarity clause, and the allowance for various forms of flexible cooperation between groups of Member States. The total amount of words spent on external relations is staggering, and entirely unprecedented for a 'Constitution'; but then, here more than in other area, the Draft Constitution is essentially a reorganisation of the existing Treaty texts.

However, in this short contribution, I will not deal with this policy reform dimension of the Convention's work,[4] but only with the specifically constitutional dimension of the Convention's work on external relations. I will address this dimension under two different headings: the first heading is the *formal constitutionalisation* of EU external relations as represented by the merger and reorganisation of the Treaties and by the attempt at partial codification of the unwritten constitutional acquis; the second heading is a *substantive constitutional* evaluation of the Convention's work on external relations, from the perspective of central constitutional values such as the institutional balance, democratic accountability and the rule of law.

2. The Constitutional Reorganisation Perspective: Merger of the Treaties, Half-Way Depillarisation and Limited Codification

a. Single Legal Personality and Merger of the Treaties

An early achievement of the Convention, that occurred already in the autumn of 2002, was the agreement on the need to provide the European Union with a single legal personality. This consensus was reached first in Working Group III, that had specifically been set up to look into this question, and was then very quickly carried over to the Convention as a whole. This reform proposal is now laid down in Article 6 of Part I of the Draft Constitution: "The Union shall have legal personality". This is a very short, but not a very clear provision. The implications of this legal personality are drawn in Part III and particularly in the provisions dealing with international agreements and the Union's representation abroad. From the perspective of explaining the operation of the EU to the interested citizen, it would have been much preferable to express these practical consequences directly in the text of Article 6; indeed, only legally trained persons can grasp the concrete significance of the statement that the European Union is given legal personality.

Article 6, if adopted and ratified, will bring an end to the long-drawn battle on whether the European Union (as opposed to the European Community) *should* have legal personality and on whether in fact it had already *implicitly been given* legal personality by the Treaties of Maas-

---

[4] I refer to other studies that examine the concrete policy implications in the field of external relations: M. Cremona, n. 2 above; D. Thym, 'Reforming Europe's Common Foreign and Security Policy', *European Law Journal* 10 (2004) 5; S. Duke, *The Convention, the draft Constitution and External Relations: Effects and Implications for the EU and its International Role*, European Institute of Public Administration – Working Paper No.2003/W/2. For a critical commentary on the Convention's approach written while it was still in operation, see S. Griller, 'External Relations', in B. de Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe* (2003) 133. For a useful panorama of the reform agenda as it stood when the Convention started its deliberations, see I. Pernice and D. Thym, 'A New Institutional Balance for European Foreign Policy', in *European Foreign Affairs Review* (2002) 369.

tricht and Amsterdam.[5] Putting an end to this discussion and to the unclear status of the European Union in relation to third states is, in itself, a very positive result of the Convention's deliberations. However, the significance of the discussion on this point, in the early autumn of 2002, was much broader. Indeed, one of the intriguing aspects of the Convention saga is that this innocuously-sounding consensus on the establishment of a single legal personality brought much broader implications for the work of the Convention. It led almost imperceptibly to a consensus, first in Working Group III but soon after in the Convention body as a whole, on the need to *merge* the EC and EU Treaties (which was not a straightforward implication of the creation of a single legal personality). This merger, in turn, paved the way for a *reorganisation* of the entire primary law in a single Constitution divided in four Parts.[6]

The merger of the Treaties obviously has major consequences in the field of external relations. At the overall level of treaty structure, the traditional pillar distinction between the external relations of the EC on the one hand, and Common Foreign and Security Policy on the other, ceases to exist. However, the underlying political need to distinguish between these two modes of EU foreign relations has far from disappeared, and many traces of the pillar division are still visible in the text of the Draft Constitutional Treaty. To put it in Convention jargon, the merger of the *structure* was not accompanied by a merger of the *method*.[7] If the Constitutional Treaty enters into force in the form proposed by the Convention's Draft, it will have accomplished a merger of the Treaties but only a half-way 'depillarisation'. In this respect, it is curious to see that the old pillars remain very visible (indeed, much too visible in my opinion) in Part I of the Constitution, whereas they will be more submerged in Part III, which offers more coherence between the different subsystems of foreign policy. I will now examine the degree to which the external relations have been streamlined and homogenized by looking in turn at both these Parts of the Draft Constitution, after which I will turn to the attempts by the Convention to codify the unwritten constitutional law of external relations.

b. The Looming Presence of the Pillars in Part I

The first negative comment that one is bound to make of Part I is that it fails to provide a concise comprehensive view of the European Union's external relations. There is no separate Title devoted to external relations. Instead, provisions on external relations are spread all over the text of Part I. Moreover, Part I fails to mention some essential features, whereas it in-

---

5 In this discussion, I side with those authors who have argued that the EU already has legal personality since the Treaty of Maastricht or, at least, since the Treaty of Amsterdam, despite the lack of a consensus in the subsequent IGCs of Maastricht, Amsterdam and Nice to state this in so many words in the text of the EU Treaty. See R. Wessel, 'The International Legal Status of the EU', *European Foreign Affairs Review* (1997) 109; R. Wessel, 'Revisiting the International Legal Status of the EU', *European Foreign Affairs Review* (2000) 507; A. Dashwood, 'External Relations Provisions of the Amsterdam Treaty', *Common Market Law Review* (1998) 1019, at 1040; A. Tizzano, 'La personalità internazionale dell'Unione europea', *Il Diritto dell'Unione Europea* (1998) 377.

6 For a pre-Convention analysis of the emergence of the project to merge and reorganise the founding Treaties, see B. de Witte, 'Simplification and Reorganization of the European Treaties', *Common Market Law Review* (2002) 1255.

7 In this turn of phrase, the word 'method' is used in a loose sense and refers not only to the decision-making procedure (which is more or less supranational or intergovernmental) but also to the nature of the competences, the types of legal instruments and their legal effect and judicial enforceability. In other words: all the characteristics that have distinguished the second from the first pillar ever since Maastricht.

cludes many rather detailed matters that could safely (and better) have been included in Part III instead.

The dispersion of external relations provisions is evidenced by the fact that relevant rules can be found in most of the Titles of Part I:

- Title I lists the specific objectives of foreign policy (Article 3, paragraph 4) and mentions, in Article 6, that the Union shall have legal personality, though nothing is added to make clear to the reader that this is in essence an external relations provision.
- Title II provides for the accession to the European Convention of Human Rights, which is an external relations act.
- Title III makes specific reference to external competences within the categories of Article 12 (exclusive competences) and Article 13(4) (parallel shared competences), whereas Common Foreign and Security Policy is listed separately as a special competence *hors catégorie* in Article 15.
- Title IV contains special institutional provisions dealing with the Foreign Affairs Council (Article 23) and the Union Minister for Foreign Affairs (Article 27).
- Title V, which is about procedures and instruments, contains specific articles that organise a completely different set of procedures and instruments for CFSP (Article 39) and CSDP (Article 40).
- Title VIII is devoted to one specific type of external relations, namely the relations with the European Union's 'immediate environment'. It is not evident why this type of external relations deserves to be singled out, rather than other, closer and long-standing, foreign links of the EU with countries that have concluded association agreements with it.

Most of the provisions in Part I that deal with external relations can be explained, in one way or another, by the former existence of the pillars. This obsession with the pillars has a number of negative consequences from the point of view of constitutional clarity and overall balance of the Draft Constitution (leaving aside, for now, their content).

First, the attempts to simplify the Treaty text, and to facilitate its comprehension, are undermined. The effort to categorize Union competences in Title III is hindered by the fact that common foreign and security policy does not fit in any of the three general categories (exclusive, shared and complementary) and is therefore put in a category all of its own. One could argue that CFSP is, in fact, a special type of shared competence,[8] but for the Convention to list it among the shared competences would probably have been too controversial. Similarly, the Articles 39 and 40 destroy the unity of Title V on 'Exercise of Union competence'. Of all the legal acts of the Union that are carefully listed and described in Article 32, only the *decision* is allowed to be used in CFSP – to be adopted either by the European Council or by the Council of Ministers, depending on the case. The definition given in Article 32 of the decision as a binding, non-legislative instrument offers only limited guidance as to its nature and effects, and decisions will in fact serve a variety of functional purposes across the EU policy domains. Within the CFSP field, the decision will become the *passe-partout* legal instrument, as is confirmed by the detailed provisions of Part III, particularly in its Article III-195, paragraph 3. That paragraph shows that, while common strategies, common positions and joint actions

8 S. Griller, n. 4 above, at 136.

will disappear as separate types of legal acts (which they are now[9]), they will survive as distinct kinds of one type of act, namely the decision. So, the simplification of the legal instruments is more superficial than one would think at first.[10]

Secondly, the CFSP provisions rupture the style of Part I. Whereas most of the provisions of Part I are relatively concise, and couched in accessible language, Articles 39 and 40 are very detailed and contain much technical language. These are, in fact, the longest articles of Part I. Much of their content could easily have been transferred to Part III. This is particularly so with Article 40 ('Common Security and Defence Policy'), which is the only provision of Part I that describes in detail the *content* of an EU policy – a matter which is dealt with, for all the other policy fields, in Part III. Moreover, the fact that Article 39 and 40 contain so much detail inevitably means that they overlap, and risk contradiction, with the CFSP provisions of Part III.

Thirdly, the Convention text does not eliminate the existing ambiguity as to whether security and defence is a full part of CFSP or rather a 'second-and-a-half' pillar of its own. In some provisions of the Draft Constitution, such as Article 15, 'CFSP' is used as a comprehensive concept encompassing defence. In other places (such as the Articles 39 and 40) 'CFSP' and 'CSDP' are treated as two separate policies. This is not consistent. Moreover, it is rather odd that the 'S' of 'security' forms part of both 'CFSP' and 'CSDP' which means that one is left wondering where in Part I one needs to look for the relevant instruments and mechanisms of security policy: is it in Article 39 or in Article 40, or in both interchangeably?

Fourthly, and more seriously, the 'pillar mania' leads, in return, to neglect for other external relations questions that, despite their potential Part I-relevance, have simply been forgotten. Although Title V of Part I purports to give a comprehensive list of EU instruments, it forgets to mention the *international agreement* which, after all, is a prominent legal instrument of the EU's external relations. This instrument is arguably as important as the laws, framework laws and various types of regulations and decisions that are mentioned in Title V of Part I, and yet one needs to turn to Part III of the Draft Treaty to find express confirmation of the fact that the EU can conclude international agreements with third states and international organizations (namely, in Article III-225).

c. An Excessively De-Pillarized Part III?

Whereas, as argued above, the treatment of external relations in Part I is fragmentary and disrupts the style and structure of the Constitution's fundamental part, the treatment of external relations in Part III is much more unitary. Almost all relevant provisions are grouped together in a separate Title V entitled "The Union's External Action" (Articles III-193 to III-231), which is a considerable improvement over the current state of things. External relations have, in fact, been the object of special treatment by the Convention: whereas most of Part

---

9 On the current use of these various CFSP instruments, see R. Wessel, *The European Union's Foreign and Security Policy* (1999), chapter 5; E. Denza, *The Intergovernmental Pillars of the European Union* (2002), at 134-154; E. Decaux, 'Le processus de décision de la PESC: Vers une politique étrangère européenne?', in E. Cannizzaro (ed), *The European Union as an Actor in International Relations* (2002), 17, at 33-47.

10 I concur with the following comment by Cremona, n. 2 above: "Thus, although there is only one type of legal act available, in practice there are several different versions of that act, adopted by different institutions and with different legal consequences. On a superficial level, this may appear simpler, but a precise indication of the action taken will require the use of cumbersome portmanteau phrases instead of the relatively simple descriptive labels we currently use."

III was only cursorily glanced at by the Convention at a very late stage of its work, the draft Articles of Title V were proposed by the Praesidium and discussed by the Convention earlier on.[11] Within this Title V, there is a separate chapter for CFSP (and a separate section within that chapter for ESDP), but this is unavoidable and there are, in fact, also separate chapters for other parts of external relations, namely common commercial policy, cooperation with third countries and humanitarian aid, and "restrictive measures". The separate treatment of these external relations sectors is, however, accompanied by a large number of *common provisions* that will operate across all areas of external relations. Thus, one finds chapters dealing with the conclusion of international agreements and the representation of the Union abroad, which apply both to CFSP and to the external relations currently covered by the EC Treaty. On a closer look, though, the 'cracks' denoting the former pillars are visible here as well, for instance in the fact that the conclusion of CFSP-related international agreements will be tightly controlled by the Council, whereas the Commission and the Parliament are given a more prominent role for the other, non-CFSP, agreements.

However, the most spectacular expression of unity in external relations is the inclusion of a first chapter (consisting of the Articles III-193 and III-194) which is modestly called "Provisions Having General Application". Article III-193 seeks to reinforce the *unity of purpose* of external relations, by listing a long list of objectives and underlying principles that elaborates upon the foreign relations objectives listed in Article 3(4) of Part I. So far, only Common Foreign and Security Policy has a set of objectives that are spelled out in the Treaty (in Article 11 EU), whereas the external policies of the EC do not have such a common frame of objectives. The formulation of a common framework of objectives applying across all areas of external relations is a positive development, although it is difficult to predict how the enactment of this broad set of policy values will affect the conduct of, say, the EU's trade relations.

The next article, Article III-194 seeks to introduce *unity of policy design* in achieving these purposes, by enabling the European Council to adopt decisions identifying the strategic interests and objectives of the Union in relation to particular foreign policy themes or to particular areas of the world. These decisions are then to be implemented by the other EU institutions in accordance with the various procedures outlines elsewhere in Part III. This institutional mechanism formalizes and entrenches the leading role of the European Council, the intergovernmenal institution *par excellence*, for the whole range of external relations. This involves a shift in the overall institutional balance, to which I will return below.

d. Codification of Unwritten Constitutional Law

Article III-225 usefully codifies the ECJ's case law on the existence of *implied treaty-making powers* of the European Union, by stating that the Union may conclude agreements not only when other articles of the Constitution explicitly provide for it, but also "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, where there is provision for it in a binding Union legislative act or where it affects one of the Union's internal acts." The only thing to be said against this provision is the fact that it was placed in Part III rather than in Part I, whereas it is a provision of great constitutional importance that illuminates the system

[11] CONV 685/03 of 23 April 2003.

of division of competences between the European Union and its Member States. Instead, what we find in Part I is another, but this time rather misguided, attempt to codify the case law of the ECJ. Article 12(2) states the following: "The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable it to exercise its internal competence, or affects an internal Union act."

This sounds very similar to the text of Article III-225 indeed! In fact, the authors of the Draft Constitution seem to have mixed up, when writing this clause, the ECJ's general statements about *implied external competence* (which are correctly rendered in Article III-225) and its statements about the more specific question when such implied competence is, or becomes, *exclusive*. It is true that the Court's case-law on the latter question is not crystal clear, but even so it should be fairly evident that the proposed text of Article 12(2) is not a mere codification of the present state of Community law, but would rather lead to a considerable extension of the *exclusive* as opposed to the *shared* implied powers of the European Union. Moreover, the last part of the phrase is confusing: it probably intended to reflect the rule, formulated by the ECJ, that Member States are not allowed to conclude an international agreement with third countries if the content of that agreement would affect the content of an internal EC measure; but the fact that *Member States*' treaty making competence is *restrained* is not equivalent to saying that the internal measure vests an exclusive treaty-making *competence* in the *European Union*, as the Draft states.[12] One of the weaknesses of the Convention method was revealed on this occasion. No Convention member proposed an amendment of this draft article when it was first proposed by the Praesidium, probably because everyone took at face value the accompanying statement of the Praesidium that this was merely the codification of ECJ case-law. Given the confused state of the ECJ's case law on this matter, which was not remedied by its recent *Open Skies* judgments,[13] it would probably have been better for the Convention to refrain from this particular attempt at codification.

Another important element of the unwritten constitutional law of external relations was not codified at all, namely *mixed agreements*. These are an important phenomenon of EC external relations that is currently not recognised in the text of the EC Treaty (apart from an incidental reference inscribed by the Treaty of Nice in Article 133, paragraph 6). Many important international agreements are concluded, from the European side, by both the European Community and all its Member States separately. This raises a number of complex issues, including the need for ratification by the national parliaments of the 15 (soon 25) Member States before the agreement can be concluded by the EC and enter into force, and it creates uncertainty as to the share of obligations (and international responsibility) undertaken, for each mixed agreement, by the EC and by its Member States, and as to the limits of the ECJ's

---

12 For further elaboration of this distinction, see J. Klabbers, 'Restraints on Treaty-Making Powers of Member States Deriving from EU Law: Towards a Framework for Analysis', in E. Cannizzaro (ed), n. 9 above, 151.

13 Eight judgments of 5 November 2002 in Case C-466/98, *Commission v United Kingdom* et al. The point that the Court failed once again, in these judgments, to distinguish clearly between the *existence* of an implied EC competence and its (exclusive or shared) *nature* is made by R. Holdgaard, 'The European Community's Implied External Competence after the Open Skies Cases', *European Foreign Affairs Review* (2003) 365, at 388 ff.

competence in interpreting and enforcing such mixed agreements.[14] A good case could be made for the express recognition of the mixed agreement in the text of the Constitutional Treaty, and for an effort at spelling out the principal elements of its idiosyncratic legal regime, but the Convention did not attempt do so. The elaborate provisions in Article III-227 about the decision-making procedure for the conclusion of EU agreements convey the mistaken impression that only the EU institutions are to be involved, whereas many agreements will continue – because of their mixed nature – to involve the constitutional organs of the Member States.

3. The Constitutional Quality Perspective: Institutional Balance, Democratic Accountability and Judicial Control

a. Institutional Balance (I): The Invention of the Double-Hatted Minister as a Recipe for Institutional Conflict?

One of the most widely trumpeted achievements of the Convention is the creation of the double-hatted figure of the Union Minister for Foreign Affairs – which aims at putting an end to the embarrassingly overlapping roles of the Commissioner in charge of coordinating external relations ('Patten'), the High Representative for the CFSP ('Solana') and the rotating Council Presidency, by concentrating these three existing roles in one single person.[15] The Minister will be both the Chair of the Foreign Affairs Council (replacing the rotating Presidency in this area of EU policy) and a Vice-President of the Commission. This spectacular reform was recommended by Working Group VII in its final report[16] and was eagerly accepted by the plenary of the Convention. It became the central 'post-merger' institutional innovation proposed by the Convention, and can be seen as an attempt to bridge the remaining differences between the supranational and the intergovernmental dimensions of external relations in the unified Treaty structure. The members of the Convention seem particularly proud of this institutional innovation and, in fact, both the Commission and the European Parliament, in their recent opinions for the IGC, have listed this among the positive achievements of the Convention and are confident that this could boost the effectiveness of the EU's foreign policy and its visibility at home and in the wider world. However, there are also much more critical views about this institutional innovation.

Officials of the Commission and the Council are reported to say *sottovoce* that this arrangement cannot work properly, and also in academic writing there have been criticisms pointing

---

14 Among the scholarly contributions in which those grey zones of EC law are explored, see A. Rosas, 'The European Union and Mixed Agreements', in A. Dashwood and C. Hillion (eds), *The General Law of E.C. External Relations* (2000) 200; M. Björklund, 'Responsibility in the EC for Mixed Agreements – Should Non-member Parties Care?', *Nordic Journal of International Law* (2001) 375; E. Neframi, 'International Responsibility of the European Community and of the Member States under Mixed Agreements', in E. Cannizzaro (ed), n. 9 above, 193; J. Heliskoski, 'The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements', *Nordic Journal of International Law* (2000) 395.

15 For a useful discussion, prior to the Convention, of the various reform options allowing for the emergence of a 'single voice' in external relations, see Pernice and Thym, n. 4 above, at 391-399.

16 Working Group VII 'External Action', Final report of 16 December 2002, CONV 459/02, p.5. The Working Group had discussed various alternative options; see the reflection of that discussion on pp.19-23 of its report. A "large trend" (p.23) emerged in favour of the double-hatted figure, for which the Working Group proposed the name "European External Representative" (later modified in the Praesidium's draft articles into "Union Minister for Foreign Affairs").

at its questionable constitutional implications. Stefan Griller, for instance, argues that the Minister will occasionally be torn apart between his/her role as member of the Commission (subject, among other things, to collegial decision-making) and his/her complex role as both the chairperson of the Council and the executive arm of decisions of the Council and European Council. Depending on the way the Minister will deal with these constraints and diverging accountability lines, there may be a creeping expansion of the Commission's role in CFSP, or on the contrary a greater overall control of the (European) Council and the Member States on the external relations falling within the current scope of the first pillar. Such gradual shifts have occurred ever since the Treaty of Maastricht erected the pillars,[17] but the creation of the pivotal Minister for Foreign Affairs might blur the lines of the horizontal division of powers between the EU institutions to a much greater extent than before. Even assuming that such shifts will not occur and that the Minister will indeed manage to juggle both roles and walk the bi-institutional tightrope as a perfect 'Mr Check and Balance', there will nevertheless be an unprecedented concentration in the hands of one person of a variety of policy determination and policy execution functions.[18] This concentration of power sits uneasily with the traditional institutional balance system of the EC, whereby the institutions control and counterbalance each other's actions. The hypothesis that the Foreign Affairs Minister could develop into an autonomous power centre, escaping from any effective control by the institutions, is made plausible by the fact that the Minister will, according to the Convention's design, have the support of a newly created European External Action Service, grouping officials of the Commission and the Council, as well as staff seconded from the national diplomatic services.[19]

b. Institutional Balance (II): The Reinforcement of the European Council's Role

As was noted above, Article III-194 allows the European Council to take binding decisions setting out the "strategic interests and objectives" of the Union's external relations across all areas, and not only for CFSP matters as it is today. Therefore, the statement in Article 20 (Part I) that the European Council "does not exercise legislative functions" should be read with some caution: it is true that the European Council will not adopt formal legislation, that is, laws and framework laws, but the power given to it in Article III-194 is rather similar in substance in that it involves defining the broad lines of the EU's approach in one very important policy area namely foreign relations. This increase of its decision-making role will be boosted by a corresponding increase of its capacity to control the follow-up of its decisions

---

[17] On the patient affirmation of the Commission's role in CFSP before and after Maastricht, see S. Nuttall, 'The Commission – The Struggle for Legitimacy', in C. Hill (ed), *The Actors in Europe's Foreign Policy* (1996) 130; for more recent developments, see G. Müller-Brandeck-Bocquet, 'The New CFSP and ESDP Decision-Making System of the European Union', *European Foreign Affairs Review* (2002) 257, at 274-277. On the opposite tendency, for the second pillar actors to encroach upon external EC competence, see C.W.A. Timmermans, 'The Uneasy Relationship Between the Communities and the Second Union Pillar: Back to the Plan Fouchet?', *Legal Issues of European Integration* (1996) no. 1, 62. For recent overall accounts of the institutional tensions caused by the pillar structure, see R. Baratta, 'Overlaps between European Community Competence and European Union Foreign Policy Activity', in E. Cannizzaro (ed), n. 9 above, 51; and B. Weidel, 'Regulation or Common Position? The Impact of the Pillar Construction on the European Union's External Policy', in S. Griller and B. Weidel (eds), *External Economic Relations and Foreign Policy in the European Union* (2002) 23.

[18] S. Griller, n. 4 above, at 146-7.

[19] The Convention's final text is extremely vague on the organisation of the External Action Service, which raises a number of institutional and practical issues (on which, see for example the study of S. Duke, n. 2 above, at 8-12).

through the creation of the post of a long-term President of the European Council (Article 21) who will, quite naturally, seek to maximise the effective implementation of the European Council's policy indications. This implementation shall occur (as Article III-194 specifies) "in accordance with the procedures provided for by the Constitution." In other words, the role played by each institution will differ depending on whether the implementation requires, say, trade measures or diplomatic steps. So, when trade measures are to be taken, the Commission will preserve its formal right of initiative, but it will have to exercise that right in accordance with the substantive directions given by the European Council.

This increase of the European Council's power is not accompanied by a correction of the traditional constitutional defects of the institution, namely the fact that it does not have any rules of procedure, the fact that it meets behind closed doors and normally decides by unanimity, the fact that it is not subject to European parliamentary control and is subject only to token national parliamentary control, and the fact that the legality of its decisions cannot be directly challenged before the ECJ.

c. Democratic Accountability: A Partial Reinforcement of the Role of the European Parliament

The pillar structure is still very visible in the case of the European Parliament. There is a sharp contrast between its role in respect of CFSP, which will remain as negligible as it is now, and its role in respect of other areas of external relations, which will be considerably strengthened. In CFSP matters, it "shall be regularly consulted" and it "shall be kept informed" (Article 39). The Parliament will not even have to be consulted before the conclusion of international agreements in the field of CFSP (Article III-227 (7)), nor *a fortiori* will it be called to give its approval of such agreements. This is a flagrant gap in parliamentary control which contrasts with the arrangements for parliamentary approval of international treaties that exist in the constitutional law of almost all Member States.[20] The EP's power to influence the content of Common Foreign and Security Policy will therefore remain as limited as it is today. That power essentially takes two forms: the capacity to provide a forum for public discussion on EU foreign relations, which may lead to the adoption of resolutions that derive their authority from the EP's representative character rather than their formal legal effect; and the capacity to control part of the expenses related to the operation of CFSP.[21] This leaves a considerable democratic deficit at the EU level,[22] which contrasts with the tendency at the national level to extend the control powers of parliaments over foreign policy, and also with

---

[20] This point is made, for instance, in a Convention document submitted by Elena Paciotti (MEP), CONV 793/03 of June 2003, p.2. See also the proposals made, at an earlier stage of the Convention, by Joachim Wuermeling (MEP), *International Agreements of the EU – Proposals to Reinforce Parliamentary Control*, CONV 362/02.

[21] See R. Bieber, 'Democratic Control of International Relations of the European Union', in E. Cannizzaro (ed), n. 9 above, 105, at 110-112. Specifically on the budgetary dimension of the EP's influence, see J. Monar, 'The Finances of the Union's Intergovernmental Pillars: Tortuous Experiments with the Community Budget', *Journal of Common Market Studies* (1997) 57; and E. Dardenne, 'Le Parlement européen et le financement de la PESC', in M. Dony (dir.), *L'Union européenne et le monde après Amsterdam* (1999) 291.

[22] See for example M. Koenig-Archibugi, 'The Democratic Deficit of EU Foreign and Security Policy', *The International Spectator* (2002) no. 4, 1.

the European Union's active policy to promote democratic institutions and practices in other parts of the world.[23]

However, in the non-CFSP areas of external relations the EP clearly benefits from the overall levelling-up of its powers under the Draft Constitution. *Autonomous legislative measures* in the field of trade and in other non-CFSP fields will be subject to the 'ordinary legislative procedure', namely reformed codecision. This major extension of the EP's influence over unilateral EU acts is accompanied by a corresponding extension of its assent power for *international agreements*, since such assent will be required for "agreements covering fields to which the legislative procedure applies." (Article III-227(7) sub e). This will lead to a quite remarkable change for trade agreements since these, today, are not subject to the European Parliament's approval (Article 300(3) EC).

d. Judicial Control: A Continuing Exception to the Rule of Law

The question of judicial control of the EU's foreign relations (particularly the CFSP part of it) was not central to the Convention's work and the result of its work is somewhat ambiguous on this point. The report of the Working Group VII 'External Action' did not deal with this question, which was left for consideration by the Discussion Circle on the Court of Justice. The members of that Circle could not find agreement on extending the powers of the ECJ to CFSP acts,[24] and the Draft Treaty continues, as before, to keep CFSP outside the Court's jurisdiction. This exclusion is not apparent from Part I. Indeed, Article 28 proudly states that the Court of Justice "shall ensure respect for the law in the interpretation and application of the Constitution". However, there is no indication in Article 28, nor elsewhere in Part I, that this rule fails to apply to some parts of the constitutional edifice. It is only when reading the Part III-provisions on the Court of Justice that the reader stumbles upon Article III-282 stating that the ECJ has "no jurisdiction with respect to Articles I-39 and I-40 and the provisions of Chapter II of Title V of Part III."

This old-fashioned clause, replete with opaque cross-references in traditional IGC-style, aims at excluding the Court from the CFSP domain, though in fact it does not entirely exclude it. The article itself makes an exception with regard to one category of CFSP measures whose immediate legal impact is most obvious, namely sanctions against natural or legal persons. Their legality can be assessed by the Court of Justice through the action for annulment. Furthermore, because of the specific language in which the exclusion clause is formulated, it implicitly leaves to the Court a power of interpretation with regard to certain aspects of CFSP that are not covered by it, namely the general definition of the role of the Foreign Minister (Article 27 of Part I), the definition of the objectives of foreign policy (which include CFSP) in both Part I and Part III, the competence clause of Article 15 of Part I and, perhaps most importantly, the strategic decisions of the European Council taken in accordance with Article

---

[23] For the general argument that the European Union has been actively expecting democracy out of others but has not consistently lived up to democratic principles in its own activities: R. Burchill, 'International Law of Democracy and the Constitutional Future of the EU: Contributions and Expectations', *Queen's Papers on Europeanisation* No 3/2003 (available on internet).

[24] See the special report of the Discussion Circle on this question, CONV 689/1/03 REV 1 of 16 April 2003 in which some members are said to have argued "that if the Court of Justice were given powers to review the legality of acts adopted in the CFSP field, this would not only threaten the policy's effectiveness and development but would also entail a significant shift in the existing institutional balance."

III-194: indeed, Article III-194 is not part of Chapter II of Title V, and is therefore not excluded from the Court's jurisdiction. It is true that acts of the European Council cannot be the subject of a direct *action for annulment*, as results from the fact that Article III-270 does not list the European Council among the institutions whose acts can be challenged before the Court. However, the acts of the European Council based on Article III-194 could arguably form the object of another procedure before the Court, namely *preliminary references* from national courts seeking the Court's views on the interpretation of a European Council decision, or even on its validity in the light of the fundamental rights, values and objectives listed in the Constitution.

Another possible extension of the Court's role occurs in Article III-227, paragraph 12: the existing mechanism of *a priori* review of the constitutionality of planned international agreements of the EC is made applicable to all EU agreements, without excluding the agreements in the field of CFSP, that today are not subject to such constitutional review. Indeed, the interpretation of these CFSP agreements could also be the object of preliminary rulings – at least, that possibility is not clearly excluded by the Draft Constitution. So, despite the blunt and distinctly unconstitutional attempt to keep the Court out of the CFSP field, the language of the Constitutional Treaty does create some new openings allowing for the strengthening of the rule of law in foreign affairs. The exclusion clause of Article III-282 remains, nevertheless, very regrettable. It is true that, in national law, courts tend to exercise their control powers more cautiously in the field of foreign relations than in purely domestic affairs, but this is not a sufficient reason for excluding at root the possibility for the Court of Justice to control the legality of the EU's foreign and security policy. Nor can national courts replace the Court of Justice in this control function. Binding CFSP acts will prevail over national law (as results from the primacy clause of Article I-10), so that national courts will have to abide by them.