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Of 'mixity' and 'double-hatting'

EU external relations law explained

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UNIVERSITY OF AMSTERDAM

Pieter Jan Kuijper

A black and white close-up portrait of Pieter Jan Kuijper, a middle-aged man with light-colored hair, looking directly at the camera with a slight smile. The background is dark.

Of 'Mixity' and 'Double-hatting'

EU External Relations Law Explained

Faculty of Law

Of ‘Mixity’ and ‘Double-hatting’

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Of ‘Mixity’ and ‘Double-hatting’

EU External Relations Law Explained

Inaugural Lecture

delivered on the appointment to the chair of
the Law of International (Economic) Organizations
at the Faculty of Law
at the University of Amsterdam
on Friday 23 May 2008

by

Pieter Jan Kuijper

VOSSIUSPERS UvA

*Mevrouw de Rector Magnificus,
Mijnheer de Decaan,
Waarde Collega's en
Allen die door uw aanwezigheid van uw belangstelling zo heugelijk blijk geeft,*

Introduction

'Zwei Seelen wohnen, ach, in meiner Brust.'¹ One of them is the soul of the academic who was of some use to the European Commission because of his academic knowledge of international law, when he arrived there almost thirty years ago. The other is the soul of the practitioner, who may still be of some use to the University now because of his practical experience over all those years. Whether I have become like Faust in this way and concluded a pact with the devil will be for you to judge. However, for this afternoon it is useful to have these two souls. It helps you to understand the present state of EC/EU external relations law on the eve of the probable entry into force of the Lisbon Treaty, since the EC/EU itself has two souls, two legal personalities even. After an impression of the legal highlights of EC/EU external relations, we shall have a brief look at the Lisbon Treaty's provisions in the matter – one of the major areas that that Treaty sought to improve.² Finally, we will try to look forward to the future of Union external relations under the Lisbon Treaty and give some advice and sound some warnings.

Four characteristics suffice to give you an impression of the present state of EC/EU external relations. In presenting them, I will rely from time to time on personal experiences and impressions. Both the academic and the practitioner will speak. These four characteristics are:

1. The two souls of the EC/EU
2. Implied external relations power
3. The central place of the common commercial policy
4. Mixed agreements.

The Two Souls of the EC/EU

Most of you probably know that ever since the Treaty of Maastricht, but more still since the Treaty of Amsterdam, it has become ‘good form’ to use the term ‘European Union’, at the expense of the term ‘European Community’. Most of you will also remember that at Maastricht, the Treaty on European Union was created next to the Treaty establishing the European (Economic) Community.³

That Union Treaty brought about a codification of the European Political Co-operation into the Common Foreign and Security Policy (CFSP or Second Pillar) and created the co-operation in the field of justice and home affairs (or Third Pillar) that we will leave to one side today. It created an old-fashioned intergovernmental co-operation for the CFSP,⁴ but the Community method which had always been characterized as supra-national remained as well. That is all more or less common knowledge.

If one reads the first articles of the present Treaty on European Union, it is obvious that the European Union was intended on the one hand to become the intergovernmental vehicle for the CFSP and on the other was supposed to be based on the European Community. The Union and the Community together were also to be called the European Union.⁵ The practitioner knows how all this has developed differently, especially after the entry into force of Amsterdam (1999). Then the political, but also the new military co-operation took off under the influence of the creation of the new office of the High Representative for the CFSP (Xavier Solana). Although the European Union had not been granted international personality in the Treaty, it had been given treaty-making power.⁶ Very quickly it had concluded so many international agreements – in particular in relation to its mushrooming police and military operations – that a *de facto* international personality could be said to exist.⁷

Therefore, no all-embracing European Union, as intended in Maastricht and Amsterdam, but two actors appeared on the international scene: the European Union in the narrow sense and the good old European Community. This creates considerable confusion for our partners on the international scene. The proverbial single telephone number that Henry Kissinger craved is still not there. The remedy is easy: let us create a single European Union as actor on the international scene. And that is indeed what the Lisbon Treaty now aims to do. Fine, the solu-

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tion is perhaps within reach, but we should still ask ourselves the question where this urge to create a political superstructure for the EC came from.

The answer is: from the Fouchet Plan of 45 years ago (1961-1962).⁸ But wasn't that defeated, you will ask, in no small measure due to the heroic resistance of our very own Joseph Luns, the only minister tall enough to come eyeball to eyeball with De Gaulle? However, the French, nothing if not consistent in their approach to the 'longue durée' of the European project, continued to come back to it and later other Member States joined. The original idea was to control the 'supranational Community' by superimposing on it an intergovernmental structure, consisting of the Council of Heads of State and Government that would take care of the broad political impulsions for European Cooperation.⁹ The right of initiative was too important to be left to the Commission that could too easily escape from Member State control from time to time. This inter-governmental approach should in particular be safeguarded in the field of foreign policy and defense.¹⁰ Such was the French view.

First the return of Fouchet was left entirely outside the EC Treaty, and was hidden away in an Annex to the Single Act of 1986. Then it was put in the Treaty on European Union, at Maastricht, allowed to use the Community institutions and perfected in the successive treaties of Amsterdam and Nice. Those who resisted this movement tried to stop it by refusing to give an official confirmation to its international personality, with the limited result I mentioned. In addition they have tried to protect the Community method against intergovernmental Union encroachment by including an article to that effect in the TEU: Article 47. Nevertheless we have seen a slow but sure ascendancy of the European Council over the European Commission as the institution setting the agenda for the European Union. The Community side of matters seems to be increasingly pushed into subservience to the Common Foreign and Security Policy on the basis of an innocuous looking provision on coherence between the CFSP and Community external policies in the TEU,¹¹ and more than once over the past years the Council in CFSP mode has gone further than that and ridden roughshod over EC competences.¹² One such instance has led the Commission finally to bring a case against the Council in which the Court gave judgment very recently.¹³ Given that the Court's ruling was strongly favorable to the Commission, both in respect of the principles underpinning the interpretation of Article 47 and of the interpretation of the con-

tested CFSP decision, it may set some limits to the CFSP's *de facto* directing of Community external relations, while maintaining proper coherence between the two.

A reason why the Member States wanted to place a political superstructure again on EC external relations after the failure of the Fouchet plan can be found in the early jurisprudential developments in this domain which I will discuss under the following two headings.

Implied External Relations Powers

In the early eighties I was sitting as a young practitioner in a working group meeting in the Council discussing a Commission proposal on the application of the competition rules to the air transport sector in the Community. Suddenly the representative of a Member State asked: 'What is the Commission's view of the ERTA effect of its proposal?'

What did this mean, ERTA-effect? ERTA stands for the European Road Transport Agreement and it is also the name of a Court case of 1971.¹⁴ It contained rules on periods of work and rest for lorry drivers on which there was also Community legislation. First of all, it is necessary to understand that the original EEC Treaty of 1958 contained very few explicit provisions on the external powers of the Community. There was one provision on the legal personality of the Community and one procedural provision on how to conclude international agreements. Only two provisions indicated areas of substantive treaty-making power, one on the commercial policy and one on so called association agreements.

The crucial question before the Court was whether the provisions on personality of the EC and on the procedures for the making of international agreements related only to the provisions in the EC Treaty that explicitly laid down a treaty-making power (i.e. for trade policy and association agreements) or related to *all* provisions granting substantial powers to the Community, even if only on the internal plane. The Court opted for the second, the implied powers interpretation. Moreover, the Court considered the hypothetical question of what would happen if the Member States concluded the ERTA rules on rest and driving times on their own. If they did so, they would undermine the internal Community legislation on rest and driving times that they had already agreed. That was imper-

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missible and hence treaty-making power in the field of rest and driving times should henceforth be considered as exclusive to the Community.

As a result of the ERTA judgment the Community had implied (potential) treaty-making power all across the spectrum of its Treaty. In addition it had implied exclusive treaty-making powers in those areas where internal legislation had been enacted. As can be gauged from my story of the man who raised the 'ERTA effect', the Member States have always been leery about this case law and elsewhere I have analyzed in greater detail their reaction.¹⁵ One of the things they did was introducing more explicit treaty-making powers in the Treaty on the occasion of the successive Intergovernmental Conferences, such as for development, the environment and research and development.¹⁶ This by itself already reduced the scope for the application of the ERTA doctrine. Moreover, the Court in the thirty-five years since the ERTA judgment has had to spend an inordinate amount of time and ingenuity on cases reducing and then expanding the doctrine again. As a result of this series of cases, the ERTA doctrine has become so complicated as to be almost useless to the political institutions of the Community as guidance for their actions.¹⁷ If the science of law is the ability to predict what courts will decide in future cases, that science has become very feeble in this particular corner of EC external relations law indeed.

The Central Importance of the Common Commercial Policy

Running into the venerable Mr. Wellenstein, the former Dutch Director-General for external trade at the Commission, one day in the corridors of the old Berlaymont (about 1980), I had the misfortune of referring blithely to the 'mandate for negotiation' that the Commission had received from the Council on a particular trade matter. 'It is not a "mandate"', he said. 'The Treaty says "directives" and that is something different. Somebody who has received a "mandate" cannot deviate from it. We receive "directives for negotiations", which means we have received a certain margin for manoeuvre from the Council. Don't you forget.' Of course I never did; I even repeated the lesson '*ad nauseam*' to my colleagues in the Commission.

This little anecdote illustrates the great importance that the Commission has always attached to the common commercial policy and to the niceties of its nego-

tiation, and with reason. The common commercial policy is the flip side of the common market, the hard core of the Community. In Opinion 1/75 – and this is the second jurisprudential development that I announced – the Court saw very sharply that the common commercial policy had to be an exclusive power of the Community. It stressed that any solution that would give the Member States a concurrent power in this area would lead to disparities in the conditions of competition between enterprises on the common market or on export markets, which was incompatible with the idea of a common commercial policy as such.¹⁸

The debate very soon shifted to the difficult terrain of the scope of the common commercial policy. The term as such was originally used in the Treaty without any definition. So the question arose whether it encompassed the external side of all of the common market, including trade in services, establishment and foreign investment, or only of the customs union, i.e. only trade in goods. Initially the Court took the view in Opinion 1/78 that the common commercial policy should be allowed to evolve organically over time and that the Member States by developing new instruments for it could not escape the Community discipline of the common commercial policy.¹⁹

This was a line it did not care to hold, when during the period of the discussions about ratification and entry into force of the Maastricht Treaty, it was confronted with the question whether the Community could approve the new WTO Agreements alone or had to be joined by the Member States in doing so. It took the view that the new domains included in the Uruguay Round negotiations leading up to the WTO Agreements, trade in services and trade-related aspects of intellectual property, did not form part of the common commercial policy. The WTO, therefore, had to be concluded as a mixed agreement.²⁰

Nevertheless, the Court may have been too kind to the Member States, even in their own view. Ever since Opinion 1/94 there have been attempts at Inter-governmental Conferences to make the scope of commercial policy according to the Community Treaties equal again to what its scope was understood to be in the WTO. At Amsterdam it remained a symbolic gesture.²¹ At Nice the intentions may have been good, but a misguided attempt on the one hand to codify Opinion 1/94, but on the other hand to restrict this to sensitive service sectors only, was a dismal failure.²² The dynamic of the Convention process, however, secured a clear

formulation of the common commercial policy powers in the Constitution which was conserved in the Treaty of Lisbon.²³

With this sketch of the two jurisprudential developments that inspired caution in the Member States, I come to the fourth point that at least in part results from them.

Mixed Agreements

From the very beginning of its existence, the European Economic Community has concluded what came to be called 'mixed agreements'. Especially the first 'association agreements' foreseen by the EC Treaty were concluded as mixed agreements, that is to say agreements to which not only the Community, but also the Member States are parties. The 'pre-accession associations' with Greece and Turkey of the early sixties are examples of such mixed agreements.²⁴ Allegedly such agreements had to be mixed, because they covered ground that was not fully covered by Community competence. That the truth was more political than that was demonstrated by two other 'pre-accession associations' of the early Community days, namely those with Malta and Cyprus.²⁵ These were concluded by the Community alone. So the size and importance of the partner also had something to do with the need for 'mixity'. This has always remained the case, but it is undeniable that the Court's ERTA case law in respect of implied exclusive competences in external relations and its own later restrictions to this doctrine, as well as its restraint in respect of the scope of the common commercial policy have considerably contributed to the phenomenon.

There are presently about 250 mixed agreements in force.²⁶ Most of these agreements are cases of 'voluntary mixity' (voluntary on the side of the Member States, because they want it). There are very few cases of 'necessary mixity', because a part of the agreement falls under the exclusive competence of the Member States so that they *have* to be in. The potential treaty-making of the Community is seldom resorted to in order to conclude a pure Community agreement. Mixed agreements clearly respond to a deeply felt need of the Member States.

It is obvious that mixed agreements cause great problems because of the necessary ratification procedures in the Member States. With now 27 Member States of whom nearly all (the UK being one known exception) require parliamentary ap-

proval for ratification, the delays are bound to be considerable, usually three years and longer. Provisional application of the parts of the agreement that fall under exclusive Community competence is not a good solution.²⁷ Provisional application can be terminated by either party without further notice and without giving reasons: an exceedingly weak position to remain in for so many years.²⁸

In addition there are serious drawbacks in our relations with our partners, who often understand very little of the intricacies of the Community and have no interest to devote much time to this strange deviation from the unitary actor that is the norm in the Westfalian state system. New theories about multi-layered systems, non-unitary actors and non-State actors in international law provide us with valuable insights, but 'the facts that live in the office', at least in Washington – I suspect also in Beijing, Brasilia and Delhi – still conform to the classical State system. Mixed agreements are at best reassuring to our partners because the Member States are there, although the legal problems resulting from the latter's presence are highly vexing to them.

'For us this is a multilateral treaty', the American lawyer explained to me, when discussing the mixed agreement on the Galileo satellite system with the US. 'The obligations rest equally on all the parties, the Community and the Member States.' The explanation that the Community and the Member States together formed one party in our vision, each complementing the other in their different powers so that together they had the power to conclude the agreement with the US, met with an uncomprehending stare. 'If that were the case', he said, 'whom could the US hold responsible, if anything went wrong?' He was told that that would depend on the evolution of the division of external relations powers, according to the ERTA doctrine, at the point in time the question would be raised. We could make an educated guess on the basis of the present situation, but it would not be helpful to put that on paper, since it would be subject to change, depending on the evolution in internal legislation. 'You are exporting your internal problems to us', he complained, a statement I was in the habit of making to him on the basis of US post 9/11 legislation about *their* requirement to check sea-containers *before* they left Rotterdam for Norfolk (Virginia). No doubt, our partners have some real problems here.

Some intermediate conclusions

Let us summarize the four points mentioned above. First of all, EU/EC external relations are carried on by way of two parallel organizations, the European Union and the European Community. The first concentrates on 'high foreign policy and defense matters' and is conceived and carried out largely by the High Representative, the successive Member States holding the Presidency and the Council Secretariat, with an occasional input from the Commission. The second is occupied with 'low external relations', trade policy, development policy, accession and the external aspects of all other Community policies, and is carried out by the Commission. The decision-making mechanisms and the parliamentary legitimization are totally different in the two organizations, but they both use the Community institutions.

The Member States do everything to remain internationally in the picture by insisting on so-called mixed agreements, even when that is not legally necessary. This reflects the reality that, when power is leaking away from the Member States to the EU/EC, this is much more visible and may have more immediate consequences, when it happens on the international stage than when it is restricted to the internal domain. At the international level, a State that does no longer sign and ratify many of the treaties by which it is bound, a State that becomes little by little a second rank Member of international organizations, since the EU/EC speaks for it most of the time (as in the WTO), a State that acts largely through combined EU diplomatic missions, such a State is very quickly confronted with the question whether it is still a State in all its fullness. Hence the continued popularity of mixed agreements.

The common commercial policy remains central to the Community. It is one of the best and most efficiently conducted external policies of the Union, even though formally mixity presently prevails also in that domain. One may suspect that it works so well, since the Member States over time have lost the capacity to carry out a credible trade policy of their own. If a few Member States continue systematically to detract from the success of this policy, it is probably for that reason as well.

All this results from two forces and their interaction. On the one hand there was the case law of the Court which played an enormous role, especially in the decade of the 'seventies. It created a certain conception of the external relations of

the EU/EC based on implied external relations powers which could develop into exclusive powers at the same rhythm that internal legislation was adopted in the Community. On the other hand there was the reaction of the Member States to that, expressed at the political level and in litigation before the Court, and in the last instance in the Inter-governmental Conferences where the founding treaties were amended. The Member States have never gone so far as to reverse openly a judgment of the Court in external relations through Treaty amendment, but they have created more explicit external relations powers and laid down that these were *ipso facto* shared competences and they have constantly increased the inter-governmental pressure on Community 'low external relations' by their CFSP under the Union Treaty. Let us see now, what the last round of IGC's has yielded in this respect.

The Lisbon Treaty

It is impossible to do justice to all the amendments that Lisbon brings to the sector of foreign affairs and external relations, but let me try to give you an impression of the most important developments in this field.

Institutional: There will be a single Union with a single legal personality, based on a two-treaty structure and that will succeed to the Community.²⁹ There will thus be an end to the difficult-to-explain situation that within the overarching Union there are two organizations, each with their own legal personality. However, it will still need explaining why two treaties now no longer give rise to two personalities. Curiously, one of the declarations (No. 24) to the Treaty of Lisbon states that the fact that 'the European Union has legal personality will not in any way authorize the Union to legislate or act beyond the competences conferred upon it by the Member States in the Treaties'. Was there some 'apprenti sorcier' in one of the Member States that wanted to deny the Court of Justice the possibility to repeat the ERTA judgment?

Will the new High Representative for the CFSP (formerly the Union's Minister of Foreign Affairs), who will also be Vice-President of the Commission, provide a single leader for the single Union in external relations, supported by a single foreign service, the horribly named European External Action Service?³⁰ Article

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18 of the Treaty of Lisbon shows that the HR in the Council would be in charge of the CFSP and ESDP, make proposals in this domain to the Council, and chair the meetings of the Council of Ministers of Foreign Affairs. This is the H.R.'s first hat. At the same time, as Vice-President of the Commission, he or she would have co-ordinating powers over the old Community aspects of external relations, such as trade, development, external transport and external environmental policy. This is the High Representative's second hat. Thus 'double-hatted', his or her loyalty as between the Council and the Commission may be sorely tested. Article 18(4) TEU would seem to indicate that the primary loyalty for the HR ought to be with the Council.³¹ Clearly this person should be very well placed to become a kind of super-Minister of Strategic and Foreign Relations, including the co-ordination of external relations of technical departments of government, of a kind never seen in any of the Member States before. Is this good? In theory, yes. Is it realistic? Probably not.

In addition this High Representative will necessarily have to co-operate with a 'new' President of the European Council, who according to Article 15(6) TEU, will 'at his or her level and in that capacity' ensure the external representation of the Union on issues concerning the CFSP, but – of course – 'without prejudice to the powers of the High Representative'. This comes straight from the French Fifth Republic, where the President of the Republic has a similar foreign relations power at his or her level, which from time to time has led to rather awkward relations with his Prime Minister and Minister of Foreign Affairs, especially in relation to foreign policy in Africa. Not necessarily a model to emulate.

Moreover, the High Representative obviously needs to have very good working relations with the President of the Commission, who has seen his/her powers over other commissioners already increased and also would wish to co-ordinate *all* of the Commissioners, including those on trade, development etc.³² Hence there must be total agreement between the President of the Commission and his Vice-President, the High Representative, on the necessary co-ordination between the Commissioners active wholly or partially in technical external relations matters, not only among themselves but also with the High Representative and his CFSP and ESDP. Is that possible? Yes. Is that likely? Probably not.

In sum, the three people discussed here, the High Representative, the President of the European Council and the President of the European Commission must be able to work extra-ordinarily well together in order to make the new system of

external relations of the European Union work. Obviously there is another explanation for this construction, namely that the drafters wanted to create an external relations system of the Union with countervailing powers built into it. In that system, moreover, the European Parliament will also have vastly increased powers.³³ All these factors would ensure that nothing rash could happen that would affect the position of the Member States as sovereign participants in international society. One must just hope that, if that has been the intention, it does not lead to a system in which not merely nothing rash would happen, but perhaps nothing much at all would happen.

Substantive: The Lisbon Treaty features clearer and more precise objectives in the field of external relations generally as well as the CFSP, both in the Article on the general objectives of the Union (Article 3(5) TEU) and in the first article (Art. 21) of the Title on the CFSP. Especially Article 21 TEU, which comes straight from the Constitution, is very interesting, because it gives a very complete and well-done overview of the objectives of EU external policy, integrating CFSP and former European Community aspects.

On the basis of these integrated objectives the European Council of Heads of State and Governments shall identify strategic interests and objectives of the Union. These may cover both CFSP and other areas of external action of the Union.

The Lisbon Treaty also spells a great improvement in the definition of the scope of the trade policy powers of the Union. The total uncertainty governing the formulation of this policy in the Nice Treaty has been overcome and the Union will dispose of a trade policy covering trade in services and trade related intellectual property without needing to have recourse to mixed agreements. Article 207 TFEU together with Article 3, which explicitly lays down the exclusive character of trade policy, makes this perfectly clear. Unanimity in the Council may be necessary only for sensitive service sectors (health, education, audio-visual), but normally qualified majority will prevail.³⁴

Unfortunately the drafters of the Constitution and of Lisbon have seriously erred by trying to codify the case law of the Court of Justice with respect to the treaty-making power of the Union. In the first line of Article 216 TFEU they have forgotten that one of the two main points of the ERTA case is that the potential treaty-making power of the Union ought to cover the whole breadth of the Treaty.³⁵ However they have restricted it to the explicit mention of treaty-making

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powers in the Treaty. It is true that in the Lisbon Treaty there are more of those than in the original Treaty of Rome, but there is a risk that gaps would open up in the future. In my view the drafters should have stopped there. However, Article 216 TFEU goes on to define the general treaty-making power by reference of the definition by the Court of *exclusive* treaty-making power. You will find other elements there from ERTA and some other cases that I have chosen not to discuss.³⁶ This makes no sense, all the less so as Article 3 TFEU – which more generally distinguishes exclusive from shared competence – already contains a paragraph 2 which defines the exclusive treaty-making power of the Union in slightly different terms from Article 216. So we are stuck with a provision which does not properly define the general, potential treaty-making capacity of the Union and which also creates confusion about the exclusive treaty-making power by using near-identical but different terms compared to the Article that is supposed to cover this matter.

Article 218 TFEU shows a continuing tendency to regulate the details of treaty-negotiation and -conclusion. This is understandable, as the negotiation of agreements on the CFSP should be carried out by the High Representative and his staff, while the negotiation of agreements in other areas of external relations ought to remain reserved to the Commission. This requires subtle rules for determining where the accent of an agreement might lie, when CFSP and other matters will be mingled in one agreement, in order to decide who will be head of the Union negotiating team. A lot of good will is needed between the institutions to decide these matters realistically and properly. There are also specific rules on the powers of the European Parliament that now will have to give its consent to most treaties to be concluded in the old Community domain of external relations, including – o, horror for some old trade hands – in the field of the common commercial policy. It has always seemed to me that, if Parliament is to handle the considerable amount of smaller international agreements in a speedy and proper manner, it could take a leaf from the Dutch rules in this respect, according to which treaties are placed before Parliament and are tacitly approved by it, unless a specific minority of its members requests that the Parliament debates the treaty in question, or the government has offered the treaty for explicit approval in the first place.³⁷

It is rather unfortunate, but the tendency to allow Member States to conclude treaties parallel to Union treaties in the same domain continues. Barely suppressed in the trade policy field, it raises its ugly head in the field of Justice, Liberty and Security (Declaration 36). This is an area in which the ERTA doctrine should apply

normally and it is not an area where, as in development aid, EU and Member State treaties can easily exist in parallel striving for the same result. To the contrary a Member State agreement on re-admission of illegal immigrants can totally undermine Union efforts to conclude an agreement on re-admission with the third State in question.³⁸ Therefore, this declaration is totally misguided.

Finally, a word about the jurisdiction of the Court of Justice in the field of foreign affairs. The Court, while retaining its task as watchdog of the frontier between CFSP and the rest, regrettably has been excluded from the substance of the CFSP and ESDP. Article 275 TFEU says so explicitly. The disappointment caused by this restrictive approach is slightly placated by the fact that to the extent that the Council in the framework of the CFSP was to take sanctions against individual persons (e.g. terrorists or financiers of terrorism), the Court may review the legality of such decisions. In my view, it would have been better to leave the Court of Justice the chance to find its own equilibrium in respect of foreign affairs cases, as most of the supreme courts of the Member States and the US have done. Like them, it could refuse jurisdiction in cases that would disturb the balance between the institutions or that would not be considered amenable to any judicially manageable criteria.³⁹ It could take jurisdiction in cases that pose no such problems about the proper role of the Courts in the Union's institutional system.

By Way of Conclusion: What is Ahead?

Back now to the questions I posed at the beginning. Are certain of the trends that I sketched when summarizing the historical development of the Union's foreign relations continuing? Is the European Union well equipped to meet the challenges likely to arise in world politics?

I think that there can be little doubt that certain trends that I have sketched earlier are clearly continuing under the Treaty of Lisbon. The grasp of the inter-governmental CFSP over the Community, supra-national, side of the other external relations is clearly growing further. The strengthening of the power of the European Council to devise strategies for CFSP and the other areas of external relations clearly goes in that direction. The integration of the person of the High Representative into the Commission, the last bastion of the '*methode communautaire*', and giving him an important co-ordinating power over other commissioners

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is an even more telling example.⁴⁰ And, as we have seen, his or her main loyalty remains to the Council, according to the Treaty. The recent case decided by the Court of Justice that I mentioned early on, may help to re-establish an equilibrium of sorts.⁴¹

Some grievous errors have been made in the definition of the treaty-making capacity and thus of the external relations powers generally of the Union, outside the area of the CFSP. However, this need not be fatal. The Court has been given sufficient jurisdiction over foreign affairs (in spite of the disappointment with respect to the lack of jurisdiction in CFSP) to be able to take the awkward implicit references to its past case law as an authorization to continue in that direction and simply sweep aside the misguided definition of the potential treaty-making power of the Union. However, my criticism of that case law as basically incapable of being applied with any certainty by the other institutions of the Union, except perhaps the Court itself, still stands. It will not cease to be a severe handicap in the preparation of treaties.

It is likely that the tendency to conclude mixed agreements will continue in some form. It may be that the need for them diminishes if one resorts to concluding combined agreements covering CFSP and other aspects of Union external relations: so-called trans-pillar agreements. Such agreements should then be approved by two separate decisions, one taken under the CFSP by unanimity and the other taken under the TFEU by qualified majority in most cases. However, this would require superhumanly proper behaviour on the part of the Member States: if they threaten to be outvoted on the Community part of the agreement, they should not use their veto on the CFSP part of it. Whether they indeed abide by these rules would be unverifiable, if the game of blocking is played well by the Member State in question. Neither should the European Parliament use its consent on the Community part, if that is required, to block the CFSP part. In such cases, such agreements might be exposed to a litigation risk under Article 40 TEU, that states that neither the CFSP nor the external powers laid down in the TFEU shall be affected by the other. All in all trans-pillar agreements are not very likely to succeed.

However, if mixed agreements respond to a dire need of the Member States, they can survive only if something is done about the time taken for ratification. So far it has been thought impossible to impose a duty of ratification within a specific period on the Member States, since it concerned the part of the agreement that fell under their own powers. However, the Court has rendered lately a number of

judgments relating to the duty of cooperation in the field of external relations⁴² which have convinced me that it would be legally possible, by invoking this duty, to set a deadline for the Member States within which they have to have completed (positively or negatively) their procedures for ratification

Mixed agreements also have the unfortunate tendency to externalize the internal problems of the Union on the division of powers between the Union and Member States and to unload them on our treaty partners, especially in respect of questions of responsibility. It might be a good idea to make it clear to treaty partners, when concluding a mixed agreement with them that we do so as a single group and that the group is solidarily, but not jointly and severally, responsible for the performance of the mixed agreement. This would require that the Council, in its decision on the approval of the agreement, lays down internal guidelines on how Member States are to act in the case of responsibility arising from the agreement, for instance on the burden sharing of any reparation. The Commission each time should make proposals to this effect. This would considerably reduce the risks of external meddling in the division of powers between Union and Member States. It would reduce the need for declarations of competence. It would not expose the Union and the Member States to the risk of being responsible jointly and severally, which often – given that it has a precedent in Annex IX to the Law of the Sea Convention – is the position of last resort in such situations. Since this means, for example, that China can gang up against Malta for the whole of the damages caused by unlawful behaviour of the Union or even of just one of its other Member States, this is not a desirable model.

These are a few warnings that one may sound or counsel that one may give and I hope they will be heard. If the right people manage to work together well and succeed to achieve only about sixty percent of the perfection of coherence and consistency that the Treaty of Lisbon seems to demand, the European Union nevertheless has a good chance to run a better, more consistent and more decisive foreign and external relations policy, backed up by a serious military posture of a strategic nature, while still continuing the emergency operations that have characterized its beginnings.

Valediction

According to the tradition in this country, I would like to end by saying a few words of thanks to those who have contributed to the fact that I stand here before you today.

First of all, my thanks goes to the College van Bestuur that had enough confidence in my continued academic prowess after exactly twenty years absence from this University to support my nomination to this chair of the Law of international organizations. I stand in the tradition of Hein Schermers and Richard Lauwaars, two of my predecessors in this chair. Hein was one of my Ph.D. supervisors and I remember him in gratitude. Richard became a colleague with whom I supervised three successful PhDs during my earlier period here in Amsterdam. I am very happy he is here today. It is not possible to go on without thanking two others of my early *maîtres à penser*: Peter Baehr, my other Ph.D. supervisor, and Jos Kapteijn with whom I have been able to continue the collaboration off and on for more than thirty years now.

Dear colleagues of the Law Faculty: as a newcomer from the unloved European Commission I may have been a bit bashful and withdrawn in my first nine months, but you have been uniformly kind and open to me and I hope to move more actively around the Faculty in the limited years that are left to me.

Dear colleagues of the Legal Service of the European Commission: over the more than twenty years that I have been able to work in your midst, individually each of you and collectively, because of the spirit of openness and curiosity that reigns in your service, you have been of enormous sustenance to me professionally, but also privately. The combination of a true academic spirit with high standards of legal professionalism that you collectively maintain is unique in the world of government legal advice. Thus I could proudly say of my team of lawyers – and not even in jest – that it would make an equally good law firm as a university department. It was for instance generally seen by some Members of the Appellate Body to contain the best group of WTO lawyers to appear before them. Without Eric White that would not have been possible.

Dear Students, I love teaching, but perhaps my expectations of you are too high. However, without high expectations on my part and willingness on your part to speak out we won't get anywhere.

PIETER JAN KUIJPER

Beste Vader, de formulering die ik aan het begin heb gebruikt, zul je herkend hebben als degene die jijzelf nu bijna 57 jaar geleden gebruikt hebt bij je promotie in de aula van de Oude Manhuispoort. Dit deed ik als een speciaal eerbetoon aan jou die met zoveel succes een wetenschappelijke benadering, technische kennis van biochemische processen en ondernemerschap gecombineerd hebt in de farmacie en de phyto-farmacie.

Beste Pien, het is heel simpel: zonder jou stond ik hier niet. Het doet me goed je hier te zien vandaag.

Jan Willem en Marc, jullie hebben mij gekend als een jonge professor in het midden van de jaren tachtig en nu ben ik een oude professor. Maar door jullie grote geduld met en genegenheid tot je vader hebben jullie me altijd steun geboden en kunnen we nog altijd samen ballen, al is dat dan verschoven van voetbal, hockey, tennis en cricket naar golf.

Chère Laurence, avant tout tu m'as donné le goût de l'aventure, intellectuelle et autre. De cette manière tu m'as stimulé de prendre de nouveau le chemin de l'Université et du droit international classique. Te voir travailler avec une énergie énorme sur une multiplicité de problèmes très importants dans ce domaine – tout en réservant du temps pour ta famille et tes amis partout dans le monde – inspire du respect et donne envie d'en faire autant.

Ik heb gezegd.

Notes

1. J.W. von Goethe, *Faust I*, Verse 1112.
2. The Irish referendum, obviously makes the future of the Lisbon Treaty somewhat uncertain (understatements are always necessary in European Community law), but it is reasonable to expect that there will still be some discussion on the Lisbon Treaty, and more particularly its provisions on external relations, in the months to come. Hence I have resisted the temptation to revise the text thoroughly and deviate substantially from the spoken version of three weeks before the referendum.
3. At Maastricht the word 'economic' was removed from the title of the Treaty.
4. There are those who claim that the European Union has already gone beyond inter-governmental co-operation since Maastricht. See Ricardo Gosalbo Bono, 'Some Reflections on the CFSP Legal Order', 43 CML Rev. 2006, p. 337-394. However, it seems to the present writer that the Treaty of Lisbon has firmly anchored the inter-governmental nature of the CFSP. In particular the brief provision in Article 24 TEU (Lisbon) that states that the 'adoption of legislative acts shall be excluded' seems to spell the end of the hopes of those who believed that some kind of CFSP 'legal order' is already developing and would continue to do so under the Lisbon Treaty.
5. See Articles 1-3 TEU. The inaugural lecture was accompanied by a power point presentation of the main articles of the different treaties mentioned in the text. If the reader wants to consult or download these articles, they can be found at (www.jur.uva.nl).
6. Article 24 TEU.
7. According to some recent indications, the European Union has concluded around 97 international agreements, see http://www.consilium.europa.eu/cms3_Applications/applications/Accords/searchp.asp?cmsid=297&party=UE&pname=European%20Union&lang=EN&doclang=EN. Only a few of those, namely the agreements with the US on extradition and mutual assistance and on Passenger Name Records and the agreements with Norway and Iceland and Switzerland concerning Schengen do not concern military or police missions in the form of Status of Forces Agreements or co-operation agreements with Third States relating to these missions.
8. For the Fouchet Plan, see the web-site of European Navigator, www.ena.lux. See also R. Boes, *Le 'Plan Fouchet' et le probleme de l'Europe politique*, (Bruges, College d'Europe 1970).
9. See Article 5 and 6 of Fouchet II (18 January 1962).
10. See Article 7 of Fouchet II.
11. See Article 3, 2nd alinea TEU. A standard article is based on this provision which appears in many CFSP Joint actions and reads usually as follows: 'The Council notes the intention of the Commission to direct its action towards achieving the objectives of

- the Joint Action, where appropriate, by relevant Community instruments'. See for instance Article 11 of Joint Action 2004/523, *Eujust Themis – Georgia*, O.J. 2004 L 228, 21-24.
12. An example is Operation *Eujust Themis* referred to in note 11 above, an operation which could have been based on the powers of title IV of the EC Treaty on Freedom, Security and Justice and Title XX on Development Cooperation (or Title XXI, Economic, Financial and Technical Cooperation with Third Countries).
  13. Case C-91/05, *Commission v. Council (Ecowas)*, Judgment of 20 May 2008, not yet reported.
  14. Case 22/70, *Commission v. Council (ERTA)*, 1971 ECR 263.
  15. See Pieter Jan Kuijper, 'Fifty Years of EC/EU Foreign Relations, Some Reflections on Historical Continuity and the Dialogue between Judges and Member States', 31 *Fordham International Law Journal* 2008 [forthcoming].
  16. The present Articles 181 (development), 174(4) and 175 (environment), and 170 (research and development) EC Treaty.
  17. See on these themes: Pieter Jan Kuijper, 'The Opinion on the Lugano Convention and the Implied External Relations Powers of the European Community', in: Bernd Martenczuk & Servaas Van Thiel (eds), 'Justice, Liberty, Security: New Challenges for the External Relations of the European Union, VUB Press, Brussels 2008, p. 187-210.
  18. Opinion 1/75, 1975 ECR 1355.
  19. Opinion 1/78, 1979 ECR 2871.
  20. Opinion 1/94, 1994 ECR I-5267.
  21. See Article 133(5) of the Treaty of Amsterdam which contained merely the possibility to decide by unanimity to bring trade in services and trade-related intellectual property rights (TRIPS) under the common commercial policy – a clause which was never resorted to.
  22. Articles 133(5) and (6) of the Treaty of Nice are so badly drafted that on one of the first occasions of their application the result was a court case: Case C-14/07, *Commission v. Council (Vietnam accession to the WTO)*, pending.
  23. See Article 207 of the TFEU including trade in services and TRIPs clearly in the common commercial policy.
  24. Agreement creating an Association between the European Economic Community and Greece, O.J. 1963, L p. 293/63; Agreement creating an Association between the European Economic Community and Turkey, O.J. 1964, L 217.
  25. Agreement establishing an Association with Malta, O.J. 1971, L 61; Agreement establishing an Association with Cyprus, O.J. 1973, L 133.
  26. Joni Heliskoski, 'Adoption of Positions under Mixed Agreements', paper presented at the conference 'Mixed Agreements Revisited', Leiden 9-10 May 2008.
  27. Such provisional application is possible on the basis of Article 300(2), 1st subparagraph EC Treaty.

28. See Article 25(2) Vienna Convention on the Law Treaties 1969.
29. Article 1 TEU (Lisbon); Article 47 TEU (Lisbon).
30. Of course the single foreign service cannot be called that for the same reason that the Community could not have foreign relations, but only external relations. So it has to be called European External Action Service. Nothing can be called what it is in the European Union/Community, because otherwise it would become really clear that it takes over sovereign powers from the Member States and that the Member States emperors have not got all their clothes anymore.
31. See the words 'to the extent that this is consistent with paragraphs 2 and 3' in Article 18(4) TEU (Lisbon).
32. See Article 17(6) TEU (Lisbon). These powers are already largely present in Article 217 EC Treaty. The Commission has during the presidency of Mr. Barroso clearly moved in the direction of a 'presidential system'.
33. The European Parliament, according to Article 218(6) TFEU (Lisbon) will have the power of consent over all international agreements concluded in those domains for which it has co-legislative power. Since these powers have (again) increased in the Lisbon Treaty, also to include trade policy for instance, there are very few areas left where the European Parliament would not have a decisive say together with the Council in concluding treaties. Oddly enough, precisely with respect to political agreements in the CFSP area, where the Parliament's influence ought to be the largest, it would be limited to giving an opinion.
34. Article 207(5), 2nd and 3rd subpara, TFEU (Lisbon).
35. See above p. 8-9.
36. See Article 216(1) TFEU (Lisbon).
37. Rijkswet Goedkeuring en Bekendmaking van Verdragen 1993, entered into force August 1994. One fifth of the members of Parliament can request an explicit approval, if the government has not put the agreement in question up for explicit parliamentary approval. See L.F.M. Besselink, *De staatsrechtelijke regeling van aanvaarding en invoering van verdragen in Nederland*, Deventer 1996, p. 19 ff.
38. Situations comparable to those condemned by the Court of Justice for inland water transport in Case C-266/03, *Commission v. Luxemburg*, points 57-67, that is to say concluding or negotiating agreements on readmission by individual Member States, when authorization to negotiate with the same third country had already been given or was being proposed by the Commission have happened repeatedly in this area.
39. See P.J. Kuyper & K.C. Wellens, 'Deployment of Cruise Missiles in Europe: The Legal Battles in the Netherlands, the Federal Republic of Germany and Belgium', XVIII NYIL 1987, p. 145-228, with extensive analysis of the US political question doctrine and the way the Dutch, German and Belgian courts avoided wholly or partially applying it in its crudest form.

40. See J. Wouters, 'The Union Minister of Foreign Affairs: Europe's Single Voice or Trojan Horse?', in: J.W. de Zwaan, F.A. Nelissen and S. Blockmans (eds), *The European Union, An Ongoing Process of Integration – Liber Amicorum Alfred E. Kellermann* (The Hague, T.M.C. Asser Press 2004), p. 77-86.
41. See Case C-91/05, above note 13.
42. See Case C-266/03, *Commission v Luxemburg*, 2005 ECR I-4805; Case C-471/98, *Commission v Belgium (Open Skies)*, 2002 ECR I-9681; Opinion 1/03, *Lugano Convention*, 2006 ECR, I-1145.