

Rule of Law in the European Union's Foreign Policy

Limits to Judicial Review

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Abstract

In most constitutional systems, political institutions are left a large margin of discretion as regards substantial foreign policy decisions and courts tend to not get involved. Substantial foreign policy decisions are regarded as part of “*high politics*”, dealing with questions that are generally conceived as “*political questions*”, which are not within law’s province or within the court’s jurisdiction. This train of thought has given rise to the doctrine of political question, a legal doctrine established by the US Supreme Court that, in essence, labels some questions as non-justiciable and thus not possible for a court to decide on. This doctrine is far from uncontroversial as it might lead to a judicial abdication at the detriment of rule of law as, according to several constitutional theories, access to judicial review is one of the cornerstones in the principle of rule of law.

The possibility of access to an independent judiciary and of judicial review is an essential aspect of the rule of law. The principle of rule of law was introduced in the EU legal order with Article 6 (1) of the Amsterdam TEU and can now be found in Article 2 TEU. According to Article 21 TEU, the European Union shall in its action on the international scene be guided by the principles which have inspired its own creation, one of these principles being the rule of law as provided for in Article 2 TEU. Furthermore, one of the objectives of the European Union’s external action is to promote the values that founded the European Union, among them the respect for rule of law.

The aim of the thesis is to investigate the rule of law in the EU foreign policy by looking at the submission of EU public authorities to judicial review. To achieve this the author attempts to answer the research questions: Is the access to legal review in EU foreign policy more limited in the former second and third pillars than in the former first pillar?; and, is there a doctrine of political question present in the European court’s case law that constitutes judicial abdication at the detriment of rule of law?

The method used in the thesis is traditional legal methodology and the material analyzed is primary law and case law from the European Courts. In the thesis it is concluded that the limits to judicial review are indeed problematic from a rule of law perspective. It is also concluded that the extent of the problem is hard to estimate due to the fuzzy boundary between CFSP and non-CFSP decisions. Furthermore it is concluded that there exists no systematic doctrine of political question that further limits the access to legal review. Finally, the author argues that while the limits to judicial review are similar to those in most constitutional systems, it can also be argued that the EU should try to lead by example, especially as one of the aims of the EU foreign policy is to export the values that inspired its creation, among them the principle of rule of law.

Abbreviations

AFSJ - Area of Freedom, Security and Justice

CCP - Common Commercial Policy

CFI - Court of First Instance

CFSP - Common Foreign and Security Policy

CSDP - Common Security and Defence Policy

EAEC – European Atomic Energy Community

EC - European Community

ECHR - European Convention on Human Rights

ECJ - European Court of Justice

ECOWAS - Economic Community of West African States

ECSC – European Coal and Steel Community

ECtHR - European Court of Human Rights

EEC - European Economic Community

EP - European Parliament

EPC - European Political Cooperation

EU - European Union

FASP - Foreign Affairs and Security Policy

FRY - Federal Republic of Yugoslavia

FYROM - Former Yugoslav Republic of Macedonia

GATT - General Agreement on Tariffs and Trade

JHA - Justice and Home Affairs

NCRI - National Council of Resistance of Iran

OMPI - Organisation des Modjahedines du peuple d'Iran

SALW - Small Arms and Light Weapons

SEA - Single European Act

TEC - Treaty on the Economic Community

TEU - Treaty on European Union

TFEU - Treaty on the Functioning of the European Union

UK - United Kingdom

UN - United Nations

US - United States

1. Introduction

The European Union has come a long way since its foundation with the Treaty establishing the European Coal and Steel Community (ECSC), which entered into force on 23 July 1952. The ECSC-treaty was followed by the Rome-treaty establishing a European Economic Community (EEC) in 1957 and the treaty establishing the European Atomic Energy Community (EAEC) in 1958. The three treaties together formed the three communities of which the EEC was by far the most important.¹ The three communities evolved under the following decades and in the early 1990s with the signing of the Maastricht treaty together with the Single Act, a variety of new competences were conferred upon the Community that related to a wide range of matters such as social policy and employment, the environment, public health and development cooperation.² The Maastricht treaty also introduced the Common Foreign and Security Policy (CFSP) and the Justice and Home Affairs (JHA). The European Economic Community was renamed to the European Community in order to indicate that many non-economic matters were part of its architecture.³ With the growth of the EU, its external action has grown as well and the EU is now able to enter agreements with third countries that create obligations on the Member States and its citizens, and has established itself as an international actor.

In most constitutional systems, political institutions are left a large margin of discretion as regards substantial foreign policy decisions and courts tend to not get involved.⁴ This is due to the nature of foreign policy as an institution that needs to be able to react quickly and efficiently to international developments.⁵ Substantial foreign policy decisions are regarded as part of “*high politics*”, dealing with questions that are generally conceived as “*political questions*”, which are not within law’s province or within the court’s jurisdiction.⁶ This indicates that there is a conflict between law and politics as they are regarded as two separate spheres. This train of thought has given rise to the doctrine of political question, a legal doctrine established by the US Supreme Court that, in essence, labels some questions as non-justiciable and thus not possible for a court to decide on. This doctrine is far from uncontroversial as it might lead to a judicial abdication at the detriment of rule of law as, according to several constitutional theories, access to judicial review is one of the cornerstones in the principle of rule of law.

According to De Baere, “[t]he possibility of access to an independent judiciary and of judicial review is an essential aspect of the rule of law in most understandings of this ‘essentially contested concept’.”⁷ The principle of rule of law was introduced in the EU legal order with Article 6 (1) of the Amsterdam TEU and can now be found in Article 2 TEU. According to Article 21 TEU, the European Union shall in its action on the international scene be guided by the principles which have inspired its own creation, one of these principles

¹ Van Gerven, 2005, p. 7.

² Ibid., p. 8.

³ Ibid., p. 9.

⁴ De Baere, 2008, p. 197.

⁵ Ibid., p. 193.

⁶ Eeckhout, 2005, p. 3, Ibid., p. 108.

⁷ Ibid., p. 176.

being the rule of law as provided for in Article 2 TEU. Furthermore, one of the objectives of the European Union's external action is to promote the values that founded the European Union, among them the respect for rule of law.⁸ The European Union's action on the international scene encompasses the Union's common commercial policy; development cooperation, economic, financial and technical cooperation with third states and humanitarian aid, as well as some foreign policy matters under the AFSJ framework, for example immigration. Although the most prominent field that deals with the traditional foreign policy is the common foreign and security policy (CFSP).

The introduction of the principle of rule of law was, however, no guarantee for it to be respected in the EU foreign policy. According to Van Gerven,⁹ in the pre-Lisbon setting, while the rule of law was respected under the former first pillar due to an extensive access to legal review, the former second and third pillars failed to live up to the standards set by Article 6 (1) TEU-old due to limitations in the jurisdiction of the European Court of Justice (ECJ). This is a question that, according to Eeckhout, is only dealt with in passing by most commentators, if dealt with at all.¹⁰

The aim of this thesis is to investigate the rule of law in the EU foreign policy by looking at the submission of EU public authorities to judicial review. To achieve this I will try to answer the following research questions:

- Is the access to legal review in EU foreign policy more limited in the former second and third pillars than in the former first pillar?;
- Is there a doctrine of political question present in the European court's case law that constitutes judicial abdication at the detriment of rule of law?

⁸ Article 21 (1) TEU.

⁹ Van Gerven, 2005, p. 61.

¹⁰ Eeckhout, 2005, p. 3.

2. Method, material and disposition

2.1. Method and material

Traditional legal methodology will be used in this thesis. I will thus try to find the existing law by studying the legal sources in a hierarchical order. The hierarchical order in the framework of EU law is:

- Primary law (the EU treaties)
- General principles of law
- International agreements that the Union have entered with a third country or international organizations
- Binding and non-binding secondary law (adopted in accordance with the treaties)
- ECJ and CFI case law
- Preparatory acts
- Opinions by the Advocate General
- Academic works
- Economic theories¹¹

The primary law currently consists of the current EU treaties and protocols and appendixes that are referred to in the treaties. The declarations in the treaties are however not legally binding.¹² The status of primary law of the treaties are motivated by the fact that the European Union was created by the Member States through the primary law and it should thus be admitted a significant degree of political and democratic legitimacy.¹³ The validity of the primary law cannot be challenged by the EU institutions as it is the primary law that is the foundation for their existence.¹⁴ The ECJ has consequently acknowledged that it lacks the jurisdiction to decide whether provisions in the primary law are valid.¹⁵ The ECJ has, however, been very generous in its interpretation of the treaty provisions and even interpreted them in conflict with their wording.¹⁶

The secondary law consists of legal acts adopted in accordance with the treaties. The most prominent are regulations, directives and decisions. The EU institutions also have the ability to adopt non binding legal acts such as recommendations and opinions. International

¹¹ Eriksson, Hettne, 2005, p. 24.

¹² Ibid., p. 25.

¹³ Ibid., p. 26.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

agreements are usually considered part of the secondary law as well due to the fact that they can only be adopted in accordance with specific provisions in the treaties.¹⁷

The special character of the EU legal system is to a large extent the product of the ECJ's creative and law creating activities.¹⁸ It has put the aim of the provisions in the EU law at the forefront as the provisions are interpreted by looking at their *effet utile*, i.e. by choosing the interpretation that is most favorable for the evolution of EU law.¹⁹ The ECJ case-law is more than a complement to the written primary law as several of the written provisions are vague and aim-oriented and thus provide little guidance. The case-law thus provides a necessary tool when applying the provisions.²⁰

The material chosen for this thesis will thus be primary law and case-law. As I will try to investigate the access to legal review according to the EU treaties the case law will be a necessary tool to apply the treaty provisions in a correct manner. The selection of case-law is inspired by Eeckhouts lecture, *Does Europe's Constitution Stop at the Water's Edge*, in which he reviews some high profile decisions, dealing with issues related to the EU foreign policy.²¹ However, other cases, dealing with typical foreign policy issues such as trade agreements and sanctions against individuals and third countries will be examined as well.

2.2. Disposition

I will begin by investigating the central concepts of this thesis, i.e. the doctrine of political question and the rule of law, and explain their relevance in the analysis. I will then investigate how the access to legal review within the EU foreign policy is regulated in the primary law, i.e. the current TEU and TFEU. As discussed in the introduction, there can be other limits to access to legal review than those provided for in primary law. Access to legal review might be limited in case-law if constitutional courts adopt a doctrine of political question. In the second part of my analysis I will analyze the case-law of the European Courts to try to establish whether there exists a doctrine of political question, limiting the access to legal review in EU foreign policy. In the final chapter of this thesis I will make some concluding reflections.

3. Concepts

3.1. Rule of law

Article 21 TEU provides that the EU external action shall be guided by the principles of its own creation. In Article 2 TEU, it is provided that, “[t]he Union is founded on the values of [...] rule of law [...]”. It is thus clear that the measures within the EU foreign policy need to be taken in accordance with this principle. But what is then rule of law?

¹⁷ Ibid., p. 26.

¹⁸ Ibid., p. 30.

¹⁹ Ibid.

²⁰ Ibid.

²¹ P. Eeckhout, “Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations”, at: <https://www.law.kuleuven.be/ccle/pdf/wvg5.pdf>.

The concept of an accountable and politically responsible executive government and the concept of rule of law are essential elements of a democratic political system.²² According to Van Gerven, for a government to be democratic, it must not only be accountable to the people but also be made subject to the rule of law.²³ Submission to the rule of law entails submission of public authority to judicial review by an independent judge, respect for the rights and freedom of the citizens, equality before the law, a clear legal basis for the exercise of public authority and legal certainty in the application of the law.²⁴ Thus, the question arises whether the judicial review should extend to the legislative branch. This question illustrates a contradiction between the concept of rule of law and the concept of democratic legitimacy. The former concept is based on the protection of the individual and the latter on majority rule. From an analytical perspective, a majority is perfectly able to oppress individual citizens.²⁵ Thus, many legal systems take the position that the legislative branch must be submitted to judicial control, this is the position taken by the European Union.²⁶

Van Gerven suggests a link between the accountability of the government and the rule of law, the less accountable a government is, i.e. the less democratic legitimacy a political system possesses in its legislative branch, the larger role the rule of law has to play, i.e. the greater the judicial scrutiny the system should be subjected to.²⁷ Thus, a higher degree of rule of law may act as a substitute for a lesser degree of accountability. This was illustrated during the pillar structure of the European Union, especially in the first pillar, where the limited democratic legitimacy of the Council of Ministers, as a component of the legislature, was and still is compensated for by submission to extensive judicial review.²⁸ Under the second and third pillars, the democratic legitimacy was weak as well, a problem that remains with the Lisbon Treaty.²⁹ Rule of law must thus, according to Van Gerven, play an important role in the former second and third pillars to compensate for the lack of democratic accountability, and from an analytical point of view, it needs to be at least as extensive as under the former first pillar for the EU foreign policy to be considered as governed under the rule of law.

However, rule of law is an ill-defined concept and according to De Baere, an essentially contested concept.³⁰ This is made further complicated as the English concept of rule of law, the German concept of *Rechtsstaat* and the French concept of *État de droit* are used as

²² Van Gerven, 2005, p. 104.

²³ Ibid., p. 63.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid., p. 63, 104.

²⁸ Ibid., p. 63.

²⁹ See for example, Stie, Anne Elizabeth. (2010): Decision-making Void of Democratic Qualities? An Evaluation of the EU's Second Pillar Decision-making Procedure, In: Vanhoonaeker, Sophie, Hylke Dijkstra and Heidi Maurer (eds). Understanding the Role of Bureaucracy in the European Security and Defence Policy, *European Integration online Papers (EIoP)*, Special Issue 1, Vol. 14, <http://eiop.or.at/eiop/texte/2010-011a.htm>; De Baere, p. 191 pp, Eeckhout, External Relations of the European Union: Legal and Constitutional Foundations, 2004, p. 420; Van Gerven, p. 63, 118-119.

³⁰ De Baere, 2008, p. 176; Van Gerven, 2005, p. 104.

synonyms in the translation of Article 2 TEU, despite their different meanings and backgrounds.³¹

In the United Kingdom, the concept of rule of law is regarded as one of three overarching principles of British constitutionalism together with the doctrines of separation of powers and the legislative supremacy of the parliament, rather than being a concept linked to the idea of the state.³² According to the principle of legislative supremacy of the parliament, the parliament has the right to make or unmake any law whatsoever; thus, it has the ability to repeal its legislation without subjection to a higher law.³³

This proposition was not accepted on the other side of the Atlantic as the US Supreme Court which in *Marbury v. Madison* stated that, “*to what purpose are powers limited, and to what purpose is that limitation committed to writing, if those limits may, at any time, be passed by those intended to be restrained?*”.³⁴ Thus, the written constitution is superior to legislation as a means of anchoring the organization of government and protection of the rights of citizens. This made the US constitutional model different from the English as, in contrast to the English model, in the US model, a parliament cannot be sovereign or supreme because its legislation must be compatible with a “*higher*” law, the Constitution, and this compatibility will not be decided by the parliament but rather by a judicial body.³⁵ The essence of this constitutional system is thus the judicial review as it allows a court to come to the conclusion that a statute is unconstitutional and thus not apply it.³⁶

The American constitutional system was not adopted in Europe until the middle of the 20th century. The introduction of the constitutional system and judicial review was in particular due to the fact that the judicial review came to be viewed as an expression of the idea that protection of civil liberties might not be in safe hands when entrusted to political institutions, a notion that was strengthened due to the world wars and dictatorships in Europe that showed the risks of relying on even democratically elected political institutions.³⁷ That became the case in the United Kingdom as well. Even though the parliamentary system remains strong, the role of judicial review has grown, although not to the same extent as in the American constitutional system.³⁸

The German concept of *Rechtsstaat* refers to a system where all state authority is ruled by law.³⁹ The concept originates from the *Vernunftstheorie* which finds the legitimacy of the state in natural law. According to this theory, it is up to the state, seen as a liberal state submitted to individual rights and freedoms of the citizens, to support the citizens in the pursuit of self-development and personal liberty.⁴⁰ Later, as presently in the United Kingdom,

³¹ Van Gerven, 2005, p. 104.

³² *Ibid.*, p. 105.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*, p. 106.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*, p. 107.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

institutional and procedural aspects, guaranteeing that decision making is made in accordance with legal rules and judicial review by an independent judge, came to be emphasized.⁴¹ However, the concept of *Rechtsstaat* remains centered on the liberal state at the service of its citizens and thus places an emphasis on human rights.⁴²

With the Basic law of the Federal Republic of Germany, enacted in 1949, the full significance of the *Rechtsstaat* was recognized.⁴³ The principle of *Rechtsstaat*, as provided for in German law, encompasses a large number of rules and institutions that concern respect for basic rights, submission of all public authority to law, the requirement of a legal basis for administrative action, separation of powers, state liability, judicial protection, legal certainty, the principle of proportionality and basic principles of criminal law and procedure.⁴⁴

In France, the development of rule of law was different from that of Germany, basically because of the democratic input of the 1789 revolution.⁴⁵ The concept of separation of powers, introduced by the revolutionaries, was characterized by the fear of a *gouvernement des juges*.⁴⁶ Under the 3rd Republic, a positivistic view of the legal order, known as *état legal*, was adopted, where the rule of law was equated with the rule of the laws and the legislator.⁴⁷ Inspired by Rousseau, the emphasis was on the *volonté général* that would, according to Rousseau, be best served by parliament being the sole transformer of the *volonté général* into legislation.⁴⁸ Thus, all laws, adopted by the parliament, no matter the scope or content, were seen as an expression of the *volonté général* and, consequently, just.⁴⁹ Judicial review was not among the principles of the *État legal* as there remained a suspicion of judges amongst scholars and politicians, based on the links between the judges and the *Ancien Régime*.⁵⁰ The judges were thus excluded from exercising any influence over the legislative power.⁵¹

The 1789 revolution had made respect for fundamental rights and separation of powers an officially recognized condition for the legitimate exercise of public authority. However, rather than being reinforced by the courts, the fundamental rights and the separation of powers, expressed in the constitution, functioned as a guide for legislative procedures and were thus mainly declaratory instruments.⁵² The protection was thus rather of a political than of a legal nature.⁵³

As it became clear that while parliamentary sovereignty may well express the will of the people it does not protect the rights of the citizens, the concept of *État de droit* was introduced

⁴¹ Van Gerven, p. 107.

⁴² Ibid.

⁴³ Ibid., p. 108.

⁴⁴ Ibid., p. 109.

⁴⁵ Wennerström, 2007, p. 73.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid., p. 73-74.

⁵² Ibid., p. 74.

⁵³ Ibid.

in the 20th century.⁵⁴ The concept was outlined in the works of Carré de Malberg in the first half of the 20th century and integrated into the French constitutional system in the second.⁵⁵ According to de Malberg, the *État de droit*, unlike the concept of *Rechtstaat* and rule of law, does not claim to define different elements of the rule of law as conceptions of positive law, nor to be applicable to the whole body of law, but rather specifically targets the fundamental rights and confirms their status as law.⁵⁶ It is, according to de Malberg, the state that provides protection of the fundamental rights against the legality of legislative measures by parliamentary sovereignty, which in its turn is protected under the *État legal*.⁵⁷ De Malberg further argued that the *État de droit* could not be fully implemented until the constitutional review of laws, adopted by the parliament, was made possible, a possibility that was introduced in the French legal system in 1971, when the *Conseil Constitutionnel* declared a law of parliament as void as it infringed a fundamental human right.⁵⁸

The review powers of the *Conseil Constitutionnel* are limited to legislative measures taken by the parliament and, thus, the *Conseil Constitutionnel* has no powers to review acts of government or the President. Furthermore, the review powers are limited to review of the constitutionality of parliamentary statutes which have not yet been promulgated.⁵⁹ However, legal review is, in the French legal system, considered to be a fundamental aspect of the rule of law, or *État de droit*.

Thus, even though the definition of rule of law differs between constitutional systems, one important feature is shared; the access to judicial review as a cornerstone in the principle of rule of law. I would therefore argue that, even though access to legal review is not the only aspect, the access to legal review is a strong indication to the extent the EU foreign policy is compatible with Article 2 TEU.

3.2. The doctrine of political question

As we learned in the previous chapter, access to judicial review is a cornerstone in the concept rule of law. Yet, according to De Baere, “[a] survey of the world's constitutional traditions suggests that courts tend not to get involved in substantive foreign policy decisions and leave the political institutions (normally the executive) a large margin of discretion, although the desirability and extent of this margin is open to discussion.”⁶⁰ This is supposedly due to the nature of foreign policy as an institution that needs to be able to react quickly and efficiently to international developments.⁶¹ A judicial abdication of the courts, when dealing with foreign policy matters, thus seems to suggest that most constitutional traditions do not fulfill one of the key requirements for societies governed in accordance with the rule of law. Yet this is a question that, according to Eeckhout, is only dealt with in passing by most commentators, if

⁵⁴ Ibid., p. 75.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ De Baere, 2008, p.197.

⁶¹ Ibid., p. 193.

dealt with at all.⁶² This is due to the fact “*that the conduct of foreign policy is inherently in the hands of the executive, and that Western democracies and constitutional systems traditionally conceive of foreign-policy as “political questions” which are not within law’s province or the courts’ jurisdiction.*”⁶³

This train of thought was established by the US Supreme Court in the landmark case of *Marbury v. Madison* (1803)⁶⁴ where the foundation of the “*doctrine of political question*” was laid. Article III Section 2 of the US constitution provides that “*the judicial power shall extend to all cases, in law and equity*”, however, in *Baker v. Carr* (1962) the US Supreme Court defined six situations where judicial control shall not be applied:

*“Prominent on the surface of any case held to involve a political question is found (1) a textually constitutional commitment of the issue to a coordinate political department; (2) or a lack of judicially discoverable and manageable standards for resolving it; (3) or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) or the impossibility of a court’s undertaking independent resolution without expressing lack of respect due coordinate branches of government; (5) or an unusual need for unquestioning adherence to a political decision; (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”*⁶⁵

Two approaches can be found in *Baker v. Carr*, the constitutional approach that suggests that the doctrine of political question is a result of the separation of powers. Whenever an issue is, according to the constitution, to be determined by the political branches, the court shall refrain from applying a legal control (situation 1, 4, 5, 6).⁶⁶ The second approach is called the prudential approach and seeks to recognize practical limits on the court’s ability to decide on certain issues (situation 2, 3). According to this perspective, when judicial standards to resolve a policy issue are absent, or the court is unable to decide on such a question the court shall refrain from doing so. It should be noted that the doctrine of political question in its entirety encompasses both approaches; however, the use of both approaches simultaneously can sometimes create conflicting results.⁶⁷ Both approaches are highly controversial as they potentially lead to judicial abdication at the detriment of rule of law, something that according to Redish, outweigh the positive aspects of the doctrine of political question.⁶⁸

Furthermore, the reasoning behind the doctrine of political question assumes that it is possible to draw a line between political and non political questions. This is somehow controversial as

⁶² Eeckhout, 2005, p. 3.

⁶³ Ibid., p. 3.

⁶⁴ *Marbury v. Madison*, 5 US 137 (1803).

⁶⁵ *Baker v. Carr*, 369 US 186 (1962), 217. Numbers added by author.

⁶⁶ Situation 4 can be argued to fall under both the prudential approach as well as under the constitutional approach. Birkey, Gordon v. Texas and the Prudential Approach to Political Questions, *California Law Review*, Vol. 87, No. 5, October 1999. p. 1280.

⁶⁷ Birkey, 1999, p. 1266.

⁶⁸ Redish, 1984-1985, p. 1031-1061.

any act by a public authority is directly or indirectly the result of a political decision. Assuming it is possible to separate political from non-political questions, it is very difficult to draw a clear demarcation line. Unless there exists a definition of what exactly qualifies as a political question which is not justiciable, there will be a wide margin of discretion left for the judges.⁶⁹

Far from being an American invention, comparable legal doctrines also exist in many of the EU-member states. The French *Conseil d'Etat* recognized in CE 8 March, *Rizeries Indochinoises*,⁷⁰ that certain governmental decisions are outside their jurisdiction due to the political character of the decisions. Similarly, the Italian Cassation Court found that Italian courts have no jurisdiction to review cases that are political in nature.⁷¹ While the German *Bundesverfassungsgericht*, like its American counterpart the US Supreme Court, refuses to automatically abdicate its role as a constitutional arbiter whenever a question of foreign policy arises, and contrary to the US Supreme Court refuses to acknowledge a doctrine of political question and thus tends to accept jurisdiction on such issues, the case law suggests a judicial restraint regarding politically sensitive questions.⁷² UK courts do not accept the doctrine of political question but nevertheless display a significant deference to the executive branch in matters of foreign affairs.⁷³

3.3. Reflections on the concepts and their use in the thesis

Given the attitude towards foreign policy and the doctrine of political question, can it be argued that a lack of judicial review in foreign policy matters is a problem for the European Union's position as a *Rechtstaat*? According to Van Gerven, the lack of judicial review in EU foreign policy is a problem but it cannot be an argument in itself that deprives the European Union of *Rechtstaat* status.⁷⁴ This is due to the similar constitutional status foreign policy is given in many states due to the complex and sensitive nature of foreign policy matters.⁷⁵ However, De Baere argues that: “[w]hile van Gerven is undoubtedly right that substantive judicial review in foreign policy matters within any constitutional system is very uncommon indeed, if not virtually non-existent, this should not divert us from fundamental questions about the implications of this constitutional position of foreign policy for any entity—State, international organization, or otherwise—that presents itself as subject to the rule of law.”⁷⁶ Thus, according to De Baere, while the European Union does not differ from most other constitutional systems with regard to the absence of judicial review in foreign policy matters, this does not answer the question of the implications it has on the characterization of the European Union as a *Rechtstaat*, nor does it make any less of a problem than it is in other constitutional systems.⁷⁷

⁶⁹ Elsuwege, 2010, p. 5.

⁷⁰ CE 8 March, *Rizeries Indochinoises*, Rec. 167.

⁷¹ ECtHR, Application No 1398/03, decision of 14 December 2006, para. 114-115.

⁷² De Baere, 2008, p. 193.

⁷³ *Ibid.*

⁷⁴ Van Gerven, 2005, p. 120.

⁷⁵ *Ibid.*

⁷⁶ De Baere, 2008, p. 200.

⁷⁷ *Ibid.*

This thesis will not attempt to investigate the status of the EU as a *Rechtstaat* as that would, as argued by Van Gerven, require that other aspects of rule of law than the access to legal review are taken into account as well. However, the discussion about how the lack of judicial review affects the EU as an entity under the rule of law is nevertheless interesting as, if you take the perspective of De Baere, the EU foreign policy in the former second and third pillars before the Lisbon Treaty failed to live up to the standards set by Article 2 TEU due to the lack of access to legal review, while the foreign policy under the former first pillar did in fact live up to these standards. Consequently, given that the access to legal review in the former first pillar has not been reduced, if the access to legal review in the former second and third pillars is similar to that in the first pillar it can be concluded that as far as legal review is concerned, the EU foreign policy lives up to the standards set in Article 2 TEU.

In my analysis I will investigate how the European courts have dealt with political questions. As argued above, the separation, between political and non-political questions, is not easy. However, issues such as sanctions against individuals and third countries and trade agreements are regularly viewed as having a political character and I will therefore look at cases where these issues have been discussed. I will then analyze whether any of the situations, provided for in *Baker v. Carr*, exist and if the Court has refrained from applying judicial control due to this. If this is systematically done by the Court, it can be argued that a doctrine of political question exists. That would, as suggested above, demonstrate a judicial abdication at the detriment of rule of law.

4. Analysis

4.1. Constitutional limits to legal review in EU-foreign policy

In my analysis of the constitutional limits to legal review in EU foreign policy, I will look at the access to legal review in the former pillars. The Lisbon Treaty aims to enhance the coherence of EU's external action.⁷⁸ This is supposedly achieved by the formal abolition of the pillar structure, the attribution of EU as a single legal personality, the reshuffling of EU's external competences and new institutions, for example the High Representative of the Union for Foreign Affairs.⁷⁹ Furthermore, the abolition of the pillars creates the impression of a fully integrated EU external action, governed by the same rules and principles. However, as will be demonstrated in the analysis, this is not the case. It is thus, from an analytical point of view, helpful to keep the division between the former pillars and analyze them separately when examining the limits to legal review in EU foreign policy as they are not, in fact, governed by the same rules and principles.

The external action within the former first and third pillars is now mainly regulated in Part V of the TFEU while the external action within the former second pillar is mainly regulated in Part V of the TEU.

⁷⁸ Van Elsuwege, 2010, p. 3.

⁷⁹ Ibid.

4.1.1. Judicial review under the former first pillar

Under the former first pillar, all Union institutions, including the legislature and Member State institutions implementing Union law must act in conformity with the law. If they fail to do so, they can be brought before the Union courts or the national courts. This is provided for in Article 19 TEU which states that the European Courts, “*shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*”

According to Article 263 TFEU:

“The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.”

Legal and natural persons may, under some conditions, bring action to the Court as well according to Article 263 (4) TFEU, as the provision states that, “[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”

The Court has refused to give broad interpretation of the words “*of direct and individual concern*”, despite several opinions of the advocate generals and case law from the CFI favoring a broad interpretation.⁸⁰ The refusal is according to Van Gerven based on two considerations, firstly, the Court argues that relief can be sought through other procedural means, either on the basis of Article 340 TFEU, or before the national courts that are according to Article 267 TFEU required to ask the ECJ for a preliminary ruling. This, however, is not a good solution, as individual plaintiffs may be obligated to break national law, allegedly inconsistent with the Union act, in order to be able to plead the unlawfulness of the Union act before a national court that then will have to ask the ECJ for a preliminary ruling. This is of course not consistent with the concept of rule of law.⁸¹ The second is that it

⁸⁰ Van Gerven, 2005, p. 112.

⁸¹ Ibid., p. 112, note 32.

is up to the Member States to revise the text of Article 263 TFEU if they find it unsatisfactory.⁸²

According to Article 265 TFEU, the ECJ has the power to establish a failure to act, as the provision states that, “[s]hould the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established.”

The right of complaint includes natural or legal person as well as they may, under the conditions laid down in Article 263 TFEU, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

The situations in which action can be brought are of a wide range, firstly as an action can be initiated by an applicant against any binding act, or failure to take such act that is inconsistent with EU law and can be attributed to any of the above mentioned institutions, and secondly, because the term “*infringement of any rule of law*” has been held by the ECJ to include general principles that are part of EU law, including protection of human rights.⁸³

Article 340 TFEU gives further access to legal remedy as it provides that, “[i]n the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.”

The ECJ lacks competence to annul or set aside national legislation, inconsistent with Union law. However, Article 267 TFEU provides that the ECJ shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. According to Article 267 (3) TFEU, “[w]here any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.”

The national court is then obligated to apply the ECJ ruling, thus annul or set aside any conflicting legislation or action. This procedure has, according to Van Gerven, allowed the Union Courts to indirectly control national legislature inconsistent with Union law.⁸⁴ Furthermore, he argues, that it is an undisputable fact that the preliminary ruling procedure has turned the Union law into a system with a high degree of legal accountability providing private parties broad access to a court of law.⁸⁵ This is, according to Van Gerven, one of the great achievements of the case-law of the ECJ.⁸⁶

⁸² Ibid., p. 112.

⁸³ Ibid., p. 111.

⁸⁴ Ibid., p. 114.

⁸⁵ Ibid., p. 114-115.

⁸⁶ Ibid., p. 115.

According to Van Gerven, due to the ECJ case-law, all public authority is subject to the rule of law as embodied in the Union primary and secondary law as well as in general principles.⁸⁷ The submission to rule of law is further enhanced by the principle of Union and state liability for injury caused by public authority as a result of infringements of Union law.⁸⁸

Thus, as has been discussed above, the access to legal review under the former first pillar can be argued to meet the requirements laid down in Article 2 TEU. It is thus against the jurisdiction of the ECJ in the former first pillar that the jurisdiction of the ECJ in the former second and third pillars will be measured.

4.1.2. Judicial review under the former third pillar

Informal cooperation on justice and home affairs matters first took place in the 1960s with institutionalized cooperation not starting officially until the Maastricht treaty with the creation of the third pillar of the Union (justice and home affairs or JHA).⁸⁹ The third pillar was an area of intergovernmental cooperation within the supranational framework of the European Union and different from the first pillar.⁹⁰ With the Amsterdam treaty, new substantial aspects of the third pillar were introduced, such as asylum, immigration and civil law issues.⁹¹

The late introduction of institutionalized cooperation in the area of JHA can be attributed to the sensitive nature of the issues it addresses and the fact that they are close to the core of a state's sovereignty.⁹² However, cooperation in these areas is indispensable due to the nature of the threats as something that a state alone cannot expect to counter effectively by acting alone.⁹³

The former third pillar is now called the Area of freedom, security and justice (AFSJ) and is regulated under Title V TFEU. The former distinction between police and judicial matters on the one hand (former Title VI TEU-old) and the rest of the AFSJ matters on the other hand (former Title IV TEC) is removed as the two are now united under a common heading in the TFEU, Title V, Part Three. While mostly concerned with internal issues, some elements of foreign policy can be found in this area as well, for example Article 79 TFEU, regarding a common immigration policy, that provides that the Union, "*may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfill the conditions for entry, presence or residence in the territory of one of the Member States.*"

The Court's jurisdiction over former third pillar issues has been expanded first with the Amsterdam treaty and later with the Lisbon treaty. Under the pre-Lisbon setting, under Article 35 (1) TEU-old, the ECJ had jurisdiction, "*to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions*

⁸⁷ Ibid., p. 118.

⁸⁸ Ibid.

⁸⁹ Hinarejos, 2009, p. 14.

⁹⁰ Ibid., p. 15.

⁹¹ Ibid.

⁹² Ibid., p. 14.

⁹³ Ibid.

established under this title and on the validity and interpretation of the measures implementing them.”

According to Article 35 (2) TEU-old, this was subject to declaration by a Member State that it accepted this jurisdiction. Individuals could not bring action according to this provision and only certain decisions could be reviewed.⁹⁴

Like under the former first pillar, the Court can annul decisions in accordance with Article 263 TFEU. There is no limitation as to which decisions that may be reviewed in this manner nor any limitation as for who can apply for annulment except for the general rules in Article 263 (2-4) TFEU. This removes the former limitation in Article 35 TEU-old. It should be noted that the problems facing individuals and legal persons in achieving *locus standi* according to Article 263 (4) TFEU are the same as under the former first pillar.

The Court is able to give preliminary rulings in accordance with Article 267 TFEU on decisions within the AFSJ. This possibility was, according to Article 68 TEC and Article 35 TEU-old, limited in the pre-Lisbon Treaty setting. However, according to Article 276 TFEU, the Court, “*shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.*”

This limitation is according to Hinarejos unfortunate but, as the area is “*uncomfortably close to the core of national sovereignty*”, it is also unavoidable.⁹⁵ Nevertheless, Article 276 TFEU poses an important limitation of the jurisdiction of the Court. Furthermore, according to Article 10 of Protocol 36 to the Lisbon Treaty, during a transitional period, the powers of the ECJ shall remain the same as before the entry into force of the Lisbon Treaty.

Although there are limitations to the jurisdiction of the ECJ, they are relatively small. The most important limitation is of course Article 276 TFEU. The access to legal review within the AFSJ is thus slightly smaller than under the former first pillar. There seems to be a consensus in the academic community that the access to legal review under the former third pillar has, with the Lisbon Treaty, gone from rather poor to fairly good.⁹⁶ The access to legal review in the former third pillar can however, as it still falls short compared to that under the former first pillar, be considered to be problematic from a rule of law perspective.

4.1.3. Judicial review under the former second pillar

4.1.3.1. The evolution of the CFSP

Bono offers an overview of the legal evolution of the CFSP, defined and divided according to the characteristics of each legal stage.⁹⁷ The following presentation will be in accordance with his presentation.

⁹⁴ Ibid., p. 102.

⁹⁵ Ibid., p. 112.

⁹⁶ Ibid., p. 110; Van Gerven p. 118-121; Rijken p. 1484-1486.

⁹⁷ Bono, 2006, p. 338.

4.1.3.1.1. The period of intergovernmental soft law, 1969-1992

The CFSP originated as mere intergovernmental discussions between Member States regarding foreign policy issues of common interest. It was framed as such by the governments of the six founding member states, outside the framework of the EC-treaties in the Hague Summit of 1969, as well. Thus, the Member states decided to establish a system of cooperation in foreign affairs, the European Political Cooperation (EPC), which was developed on the basis of traditional diplomatic mechanisms through periodically held meetings between foreign ministers. The purpose of the EPC was to add, facilitate and strengthen the economic integration objectives of the EC treaties.⁹⁸

The EPC was governed by rules of international law. Thus, agreements founded in the EPC could only be taken with the consent of all the member states. In practice, formal and explicit commitments were avoided and progress was made by “*gentlemen’s agreements*”, between governments, that could easily be denounced or renegotiated according to the circumstances. The guiding principles were consultation, confidentiality and consensus. In 1976, a compilation of the informal and formal working methods of the EPC was undertaken. “*The Coutumier*”, as the compilation became entitled, became the EPC common law of the “European correspondents” of the Ministers of Foreign Affairs.⁹⁹

In practice, due to the lack of legally binding commitments and legal obligations as well as the absence of institutional links between the EPC and the Community policies under the EC Treaty, the EPC did not create any significant achievements in respect to its utility of EC policies. Two encouraging developments, however, took place.¹⁰⁰

The ECJ did, within the jurisdiction conferred on the Court on matters falling within the external powers of the Communities under the EC treaties, establish an indirect jurisdictional control over the EPC. This happened as the ECJ was called upon to rule on “*mixed agreements*”, i.e. agreements with third countries containing Community elements and elements falling within the competence of Member States, including EPC issues, or both.¹⁰¹

In 1974, an informal institutional link between Community policies and the EPC was established through the creation, outside the framework of the Treaties, of the European Council. Although originally conceived as a conference of governments, it soon ceased to be exclusively intergovernmental in character, as the President of the Commission was incorporated, and thus became the supreme political instance of the EC and the EPC.¹⁰²

With the Single European Act (SEA), the EPC and the Community structures were formally linked by the establishment, under its Title III “*Treaty provisions on European Cooperation in the sphere of foreign policy*”, of a series of provisions in Article 30 SEA. On these provisions, the force of international treaty law, as a result of the ratification by the member

⁹⁸ Ibid.

⁹⁹ Ibid., p. 339.

¹⁰⁰ Ibid.

¹⁰¹ Opinion 1/75, *Opinion given pursuant to Article 228 (1) of the EEC Treaty*, [1975] ECR 1355; Case 181/73, *R & V Haegeman v. Belgian State*, [1974] ECR 449.

¹⁰² Bono, 2006, p. 339.

states in accordance with their constitutional requirements, was conferred. Under the SEA, the EPC thus acquired the status of primary law. However, the EPC decisions continued to be mainly of political nature and governed by international law. Decisions were consensual and the foreign policy continued in the form of intergovernmental cooperation.¹⁰³

The SEA did not grant any legislative powers to any institution. The nature of the provisions was what Bono calls “*soft law*”, i.e. the terms used were “*should*” and “*contribute*”, which did not lead to legally binding results.¹⁰⁴ Article 30 (2) SEA did, for example, only bind the Member States to take each other’s interests into consideration before coming to a decision in a matter of foreign policy.

However, the SEA created important institutional innovations. Under the SEA provisions, the EPC was to operate under its own institutional structures rather than on an intergovernmental basis. Among others, Article 2 SEA stated that the European Council, already an important part of the EPC, was to be formally included in the institutional system of the treaties. By Article 30 (10) SEA, a presidency of the EPC was instituted, with a right to coordinate national positions and to initiate action. The Court was, according to Article 31 SEA, not given direct jurisdiction over foreign policy issues, however, Article 32 SEA paved the way for a future role by the Court in the delimitation between EPC powers and Community powers, as it prohibited EPC from affecting Community law.

According to Bono, the legal innovations of the SEA improved the results of political cooperation. The common diplomatic declarations by the Member States were multiplied and important measures, such as trade sanctions against South Africa and Yugoslavia, were adopted. The SEA also contributed to the familiarization of the various administrations of the Member States in their cooperation on foreign policy matters. As a result of the incorporation of EPC into SEA the agreed policies became part of the *acquis* with which new Member States and candidates would need to comply. Alas, the crises in Kuwait and the Balkans revealed the weaknesses in the EPC structures established by the SEA, most prominently the absence of institutions endowed with legislative powers.¹⁰⁵

4.1.3.1.2. A CFSP system of Treaty law including institutions with law-making powers (1993-1998)

The weaknesses in the EPC structures were addressed on the 1992 Intergovernmental Conference on Political Union, resulting in the Maastricht Treaty on European Union (Maastricht TEU). The EPC provisions of the SEA were repealed and the process of political integration under a legal system established by treaty law was brought forward.

With the Maastricht TEU, in accordance with Article A, the European Union, founded on a three pillar structure, was established. The pillar structure separated the newly established intergovernmental competences of the EU in the second and third pillars, the second pillar

¹⁰³ Ibid.

¹⁰⁴ Ibid., p. 340.

¹⁰⁵ Ibid.

being CFSP and the third pillar being the Justice and Home Affairs (JHA), from the original supranational EC competences in the first pillar.¹⁰⁶

The purpose of the pillar structure was to avoid that supranational characteristics, i.e. direct effect, legal review and supremacy of EU-law, established by the Court in the first pillar, would affect the second and third pillar.¹⁰⁷ Thus, the jurisdiction of the ECJ was excluded from the second pillar and limited in regard to the third pillar. This separation worked as intended and only one case, the Transit visa case,¹⁰⁸ was decided by the Court. There was thus no need for a doctrine of political question to be developed. The Member States sought to avoid the jurisdiction of the ECJ as they wanted to be able to act within the second and third pillar without intervention from the ECJ, the Commission and the European Parliament.¹⁰⁹

According to Article J.1 Maastricht TEU, a common foreign and security policy was to be defined and implemented by the Member States. Interesting about this provision is that a “*common*” and not a “*single*” foreign policy is to be defined and implemented, reflecting a regard for national sovereignty as it provides that the Member States remain competent to maintain their own foreign policy, although with a higher order of obligations compared to the former notion of the political cooperation or consultation under the EPC.¹¹⁰ Furthermore, the definition of the European Union’s CFSP remained optional as the term “*a common foreign and security policy*” implied a choice for the Member States as to whether they would establish a Union common foreign policy or maintain their own foreign policy exclusively.¹¹¹ However, once a CFSP is established by the Member States, it is, according to Article J.1 Maastricht TEU, to be defined by the Union and its Member States, thus indicating the mixture of integrationism and intergovernmentalism visible in the Maastricht TEU.¹¹²

The Maastricht TEU, unlike the SEA, laid down a list of CFSP objectives, the purpose being to clarify the goals of the foreign policy. The CFSP could thus be conceived as a legal instrument to create and achieve a European identity similar to the early American Republic which in its infancy created the American CFSP, expressing the common identity of the Union of the American States.¹¹³

An innovation in the Maastricht TEU was the introduction of several CFSP provisions laying down legal obligations of a binding nature.¹¹⁴ In contrast to the old SEA and its “*soft law*”, the provisions in the Maastricht TEU used the terms “*shall impose*”, “*shall endure*” etc. which imposed binding legal duties on the Member States and the institutions.

¹⁰⁶ Lavranos, 2008, p. 311; Garbagnati Ketvel, 2006, p. 80.

¹⁰⁷ Ibid.

¹⁰⁸ C-170/96 *Commission v. Council*, ECJ [1998] ECR I-2763.

¹⁰⁹ Lavranos, p. 312.

¹¹⁰ Bono, 2006, p. 341.

¹¹¹ Ibid.

¹¹² Ibid., p. 314.

¹¹³ Ibid., p. 342.

¹¹⁴ See for example Article J, J1, J2, J3, and J4 Maastricht TEU.

In the EPC, the definition of CFSP principles and guidelines was a matter for the Member States. With the Maastricht TEU, this became a task for the European Council, Article D Maastricht TEU, and should be done on a consensual basis, Article J8 Maastricht TEU.

While not given direct jurisdiction over CFSP matters, the ECJ was for the first time given powers to uphold the delimitation between EC and the CFSP, provided for in Article M Maastricht TEU, which, like Article 32 SEA, prohibited CFSP activities from affecting the Community treaties. Other legal disputes relating to the CFSP were to be resolved by the EU political organs as well as by the national authorities according to Article J3 (7) Maastricht TEU. Furthermore, the Maastricht TEU reinforced and maintained some of the organs and functions established by the SEA, regarding the EPC, for example, according to Article J8 (5) Maastricht TEU, the Political Committee was to “*monitor*” the international situation and “*contribute*” to the definition of policies.

According to Article J3 (1) the European Council was to adopt general CFSP guidelines and according to Article J2, the Council, the CFSP legislature, was given the possibility to “*define common positions*” that the Member States should ensure that their national policies conformed to. Thus, the Maastricht TEU created several legal instruments specific to the CFSP, not put at the disposal of the Member States but rather put at the disposal of the Union’s organs and institutions.

The common positions were, in practice, used to ensure compliance with UN Security Council resolutions and to coordinate the actions or conduct of the Member States in international organizations and conferences.¹¹⁵ Another invention in the Maastricht TEU was “*joint actions*” which was adopted by the Council and meant to address a specific concern of the EU in areas where Member States had “*important interests in common*”. Once adopted, the joint action should, according to Article J3 (4), “*commit the Member States in the position they adopt and in the conduct of their activities.*” Unlike the supranational decision-making within Community law, the decision-making in CFSP matters was, except for a few exceptions, for example Article J 3 (2), governed by the rule of unanimity.

According to Bono, “*the Treaty of Maastricht “legalized” the CFSP and transformed the intergovernmental system of cooperation between sovereign Member States specific to the EPC into a system of Treaty law which laid the basis for the birth of a European Union conceived not as a mere form of words but rather as “an association of States established by Treaty” which, although not a full international organization, fulfilled some of the conditions laid down by international law for the existence of an international organization: the association of States established by Treaty had “a constitution” (the TEU) and “common organs” (the single institutional framework), with its own objectives, with specific rules relating to powers, procedures, legal norms, legal practices and common positions and enjoyed a certain autonomy from the Member States.*”¹¹⁶ The Treaty of Maastricht did not, however, confer upon the European Union an international legal personality distinct from that of its Member States which had enabled it the capacity to create rights and obligations in the

¹¹⁵ Bono, 2006, p. 344.

¹¹⁶ Ibid., p. 346-347.

international arena and thus fell short of a “*full international organization*”. The European Union, under the Treaty of Maastricht, was rather an association of States which acted in common for the purpose of achieving the objectives laid down in the TEU.¹¹⁷ Furthermore, the absence of judicial review of the ECJ, the fact that the Presidency of the Council was changed every six months, thus preventing continuity in the execution of CFSP actions and the need for consensus made the CFSP inefficient and created a need for Treaty reform.¹¹⁸

4.1.3.1.3. A CFSP founded on the rule of law but without judicial review by the Court of Justice (1999-the Lisbon Treaty)

The structural weaknesses of the CFSP in the Maastricht TEU were addressed in the Treaty of Amsterdam (Amsterdam TEU) and the Treaty of Nice (Nice TEU). Furthermore, the Treaty of Amsterdam confirmed, maintained and reinforced the autonomous and separate pillar structure of the European Union.¹¹⁹

For the first time, it was made crystal clear that the Union system is founded on the principle of rule of law and thus, this principle was according to Article 6 (1) Amsterdam TEU applicable to the CFSP.

The Treaty of Amsterdam did not establish a system of legal remedies and procedures designed to permit the ECJ to review the legality of CFSP measures. In Article 46 Amsterdam TEU, the principle of rule of law was excluded from the jurisdiction of ECJ. None of the CFSP provisions of Title V TEU were made subject to the jurisdiction of the ECJ, the exception being, as in the Maastricht TEU, when CFSP measures affect the EC Treaties, Article 46 (e) Amsterdam TEU. Instead, national authorities and the CFSP political organs were given the responsibility to ensure compliance of CFSP measures with the rule of law. The Presidency was, according to Article 18 Amsterdam TEU, to be responsible for the implementation of CFSP decisions, the Member States were, according to Article 14 (3) and Article 15 Amsterdam TEU, under a duty to conform to joint actions and ensure that their national policies conform to the common positions and the Council was, according to Article 11 and Article 14 (7) Amsterdam TEU, to ensure that all CFSP principles are complied with, as well as seek, appropriate solutions in the case of major difficulties in implementing a joint action.

According to Article 11, the CFSP was to be defined and implemented exclusively by the Union, not as in the Maastricht TEU by the Union and its Member States. The intergovernmental trait of the CFSP, introduced by the Maastricht TEU, was thus discarded as the Member States act by consensus outside the framework of the institutions. Further “*supranational*” concepts were introduced as well. Article 23 (1) introduced a limitation to the right of veto. The possibility for the use of qualified majority was expanded as well. Only the decision-making rules on security and defense policy, a part of the CFSP, was to be continued on the basis of unanimity and consensus, Article 23 (2). It should be noted though,

¹¹⁷ Ibid., p. 347.

¹¹⁸ Ibid.

¹¹⁹ Ibid., p. 351.

that the Amsterdam and Nice Treaties did not amount to “supranationalism” of the Union or the CFSP, even though it introduced some supranational concepts.¹²⁰

The Nice Treaty further amended CFSP provisions laid down by the Treaty of Amsterdam. It gave Member States the possibility to establish among themselves an enhanced cooperation “aimed at safeguarding the values and serving the interests of the Union as a whole by asserting its identity as a coherent force on the international scene”, Article 27 Nice TEU. It also rephrased the text of Article 24 Amsterdam TEU to make clear that international agreements, concluded in the area of CFSP by the Council, “shall be binding on the institutions of the Union”, thus underlining that agreements are concluded by the Union as a distinct entity rather than the Member States acting collectively and clarifying the question of a legal personality of the Union.¹²¹

Thus, the EPC was founded on the principle that policy should be outside the jurisdiction of the Court. The cooperation between the original six members was not regulated, except for vague principles of international law. Foreign policy competence has since then, as is the case with most competences, been transferred to the European Union which is demonstrated by the increasing supranationalism. The jurisdiction of the ECJ was, however, excluded from the CFSP throughout this period. If we look at this development from an accountability vs. rule of law perspective as discussed in chapter 3.1 it can be concluded that the lack of access to legal review was particularly serious as there was a lack of democratic legitimacy of the legislative branch of the EU.

4.1.3.2. The special nature of the CFSP

As is mentioned above, with the abolition of the three pillar structure, it would seem that CFSP would become a part of the EU-law as integrated as the former first pillar. However, The Lisbon Treaty rather underlined the exceptional position of the CFSP, something that becomes very clear in the wording of Article 24 (1) TEU that provides that, “[t]he common foreign and security policy is subject to specific rules and procedures”, and that, “[t]he specific role of the European Parliament and of the Commission in this area is defined by the Treaties.” Furthermore, in contrast with the former third pillar that is now regulated in the TFEU along with all other provisions, governing the European Union’s external action (Part V) and governed by supranational principles, the CFSP is now located in part V of the TEU where unanimity is the prevailing decision making procedure, thus reflecting intergovernmental principles.¹²²

Thus the Lisbon Treaty did not eradicate the pillar structure and especially not the second pillar. This was underlined by Javier Solana in his statement to the UK Foreign Affairs Committee in January 2008 where he stated that, “[t]he distribution of pillars – in particular the second pillar and the autonomy within that – is maintained”.¹²³ Thus, rather than merging

¹²⁰ Ibid., p. 357.

¹²¹ Ibid., p. 352.

¹²² Koehler, 2010, p. 61-62.

¹²³ J. Solana, oral evidence before the UK Foreign Affairs Committee, 8 January 2008 (Volume I – Q 616).

the first and second pillars, they are connected by the Lisbon Treaty under the umbrella of the Union.¹²⁴

Furthermore, the “*mutual non-affected clause*”, described further below, of Article 40 TEU confirms the distinction between other areas of EU external policies and CFSP. The CFSP is only mentioned in one article in the TFEU, Article 2(4) which provides that the Union shall have the competence to define and implement a CFSP. This division is necessary for the determination of the appropriate decision making procedures and legal bases.¹²⁵ Thus CFSP remains a “*special*” part of the EU legal system and in that sense, the old pillar structure remains, at least as far as the second pillar is concerned.

4.1.3.3. Division of competences between Member States and the Union – the special status

The division of competences, between the Member States and the Union in the CFSP and CSDP, is regulated in Article 2 (4) TFEU. It is thus neither within the area of exclusive competences in Article 3 TEU, nor within the “*shared*” competences in Article 4 TEU, nor within the “*supporting*” competences in Article 6 TFEU. In the respective provisions of the Constitutional treaty, the CFSP was placed between the supporting and shared category of competences.

The placement of the CFSP within the division of competences documents the special and unique role of the CFSP.¹²⁶ As other policy areas with clear foreign implications such as customs union, common commercial policy and the right to conclude international agreements belong to the Union’s exclusive competences and development cooperation and humanitarian aid belong to the shared competences it is obvious that there are remnants of the old pillar structure in the Lisbon treaty.¹²⁷ Even more so as Article 24 (1) TEU explicitly states that the CFSP is subject to specific rules and procedures.

Declaration No. 18 provides that, “*in accordance with the system of division of competences between the Union and the Member States as provided for in the Treaty on European Union and the Treaty on the Functioning of the European Union, competences not conferred upon the Union in the Treaties remain with the Member States.*”

It is thus obvious that the Member States are careful to guard their sovereignty and not transfer more competence than necessary to the Union.

Another sign of the Member States anxiety not to give up its sovereignty is found in Declaration No. 18, “*the representatives of the governments of the Member States, meeting in an Intergovernmental Conference, in accordance with the ordinary revision procedure provided for in Article 48(2) to (5) of the Treaty on European Union, may decide to amend the Treaties upon which the Union is founded, including either to increase or to reduce the competences conferred on the Union in the said Treaties.*”

¹²⁴ Van Vooren, 2009, p. 239.

¹²⁵ Van Elsuwege, 2010, p. 3.

¹²⁶ Wessels & Bopp, 2008, p. 10.

¹²⁷ Ibid.

4.1.3.4. CFSP and non-CFSP decisions – Division of competences between the different areas of the EU foreign policy

As the ECJ lacks jurisdiction over CFSP measures, to assess the problem of legal review in the EU foreign policy one must consider the extent of CFSP measures. The ECJ has the jurisdiction to determine the boundary between CFSP and non-CFSP decisions and is thus, to an extent, capable of deciding the extent of its own jurisdiction. In the past, there have also been cases where it has been argued that the Council has adopted measures under the CFSP to avoid the jurisdiction of the Court. In the following I will analyze the margin of discretion given to the Court when deciding on this issue.

What is then the Union competence? Article 24 (1) TEU states that, “[t]he Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defense policy that might lead to a common defense.”

However, as stated above, according to Article 40 CFSP actions are limited to those areas of foreign and security policy that do not infringe upon other powers of the Union.

Whereas Article 47 TEU old provided the CFSP to be subordinated to the external competences of the first pillar, Article 40 TEU gives equal protection to CFSP from encroachment by the other powers of the Union.¹²⁸ This provision aims to reinvigorate the CFSP as an important part of the external action of EU, however, while this is politically sound it creates problems from a legal perspective.¹²⁹

4.1.3.4.1. CFSP and Non-CFSP decisions

What is it then that constitutes a CFSP decision? The boundary between CFSP and non-CFSP decisions is rather unclear. The Court has stated that when choosing the legal basis for a decision, the decision, “*must rest on objective factors which are amenable to judicial review*”.¹³⁰ Traditionally the Court applies a “*centre of gravity test*” where the aim and content of the measure in question is examined and the “*leading objective*” decides which legal basis the measure will rest on.¹³¹ Thus, the dominant objective absorbs other possible legal bases, which are pursuing objectives of subsidiary nature.¹³²

However, this analysis is not well-suited to distinguish between non-CFSP and CFSP actions.¹³³ This is due to the fact that EU’s external policies are interconnected. This is emphasized in Article 21 TEU, which provides a list of objectives for EU external action and Article 23 TEU, which provides that EU external action shall be guided by the general principles and objectives of the EU, laid out in Chapter 1 TEU. CFSP specific objectives are

¹²⁸ Van Elsuwege, 2010, p. 8.

¹²⁹ Ibid.

¹³⁰ Case C-91/05, *Commission v. Council* [2008] ECR I-3651.

¹³¹ Van Elsuwege, 2010, p. 8.

¹³² Van Vooren, 2009(I), p. 7.

¹³³ Van Elsuwege, 2010, p. 9.

thus absent which makes it difficult to apply a centre of gravity test.¹³⁴ This will be illustrated in the following.

4.1.3.4.2. The CFSP objectives

As described above, the Lisbon Treaty aimed to increase the coherence of the EU foreign policy. One step to achieve this was to create overall objectives for the EU foreign policy, thus deleting the CFSP specific objectives.¹³⁵ The consequence of the objective-less CFSP will be described below.

Under Title V, *General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy*, Chapter 1, *General Provisions on the Union's External Action*, Article 21, (2) and (3) TEU it is provided that:

“2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

(g) assist populations, countries and regions confronting natural or man-made disasters; and

¹³⁴ Ibid.; Van Vooren, 2009(I), p. 8-9.

¹³⁵ De Baere, 2008, p. 108.

(h) promote an international system based on stronger multilateral cooperation and good global governance.

3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect."

These are the objectives that shall be pursued according to Article 23 TEU in all areas of the EU external action. The objectives are largely taken from the existing treaty provisions in the EC and EU Treaties, more specifically Articles 131, 174, 177 of the TEC and Article 11 TEU-old. Furthermore, they have to some extent been "cut loose" from the specific competence conferring articles of TEU-old and TEC. It is obvious that Article 21 TEU provides a wide set of objectives, many of them similar to objectives outside the CFSP. They are also objectives that were formerly linked to specific competences. This will be illustrated below with an example from Union competence in development cooperation.

Article 208 (1) TFEU, dealing with development cooperation within the framework of the Common Commercial Policy, provides that:

"Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action. The Union's development cooperation policy and that of the Member States complement and reinforce each other. Union development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries."

In the former Article 177 TEC it was stated that the Community policy would foster, "the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them", and, "the smooth and gradual integration of the developing countries into the world economy", as well as, "the campaign against poverty in the developing countries." These aims can now be found in Article 21 (2) (d) and (e). Thus, the new Article 208 (1) TFEU, provides that poverty reduction should be the primary objective of the development cooperation while the other objectives have been moved to the TEU as general objectives where they are to be taken into account by all other policies including the common commercial policy. Thus, in a hypothetical situation where the

ECJ is to decide whether a measure being both security and development falls within the CFSP or not, if that measure includes poverty reduction, the fact that development is a primary objective in the common commercial policy might be influential in the reasoning of the ECJ as it is now a primary objective of the common commercial policy.¹³⁶

Article 40 TEU provides that, “[t]he implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.”

This must thus mean that the implementation of the development policy, common commercial policy or environmental policy which must encompass the common objectives of Article 21 (2) TEU shall not affect the implementation of the CFSP which according to Article 23 TEU shall, “pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1”.¹³⁷

The unclear division between CFSP and non-CFSP matters is problematic when international agreements are to be adopted and negotiated as well. According to Article 218 (3) TFEU, “[t]he Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union’s negotiating team.”

Furthermore, according to Article 218 (6):

“The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

(i) association agreements;

(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

¹³⁶ Van Vooren, 2009(I), p. 6-7.

¹³⁷ Ibid., p. 11.

(iii) agreements establishing a specific institutional framework by organising cooperation procedures;

(iv) agreements with important budgetary implications for the Union;

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.”

The need for a line to be drawn between CFSP and non-CFSP when international agreements are to be negotiated and adopted is thus evident. How this line is to be drawn, however, is very hard to predict.

Reading Article 40 TEU in tandem with Article 1 TEU and 1 (2) TFEU, that provide that both treaties shall have the same legal value, makes the distinction between CFSP and non-CFSP measures even more problematic. Before the Lisbon Treaty, the Court had interpreted Article 47 TEU-old hierarchically, arguing along with the Commission that, “[e]verything that can be done through EC policies should not be done through the CFSP”.¹³⁸ Van Vooren discusses three important questions that need to be answered by the ECJ in future disputes regarding the distinction between CFSP and non-CFSP issues:

“How can or will the centre of gravity test be applied, given that the objectives and procedures have severely been reshuffled, and that the CFSP no longer has any objectives?

With the CFSP being an exception to the normal procedures, how extensively or restrictively will the exclusion of jurisdiction in that area be interpreted?

How does this fit in with a Union founded on the rule of law, succeeding to the Community (‘s single legal order) (Art. 2 TEU-new)?”¹³⁹

When deciding in such issues, the Court will have to be aware that Article 40 TEU leaves no room for hierarchical interpretation, thus not allowing any Union power to dominate over

¹³⁸ Ibid., p. 23.

¹³⁹ Ibid.

CFSP competence and that CFSP is now effectively objective-less.¹⁴⁰ These problems might be illustrated with the ECOWAS-case.

4.1.3.4.3. ECOWAS – as an example of the problematic division of competences

In the ECOWAS case, the question of where the line between CFSP and non-CFSP action is to be drawn was raised. This case was however decided on the provisions of TEU-old and the ECJ's solution to the clash of competences is no longer possible. It does, however, illustrate the problems associated with separating CFSP from non-CFSP decisions.

In 2005, the European Council adopted the Union's Strategy to Combat the Illicit Accumulation and Trafficking of Small Arms and Light Weapons. It explains that current wars are conducted by factions whose main tools are small arms and light weapons.¹⁴¹ Furthermore, the document outlines that the abundant presence of SALW has grave consequences in a wide array of fields including, the weakening of state structures, displacement of persons, declining economic activity and collapse of education services. According to the document, these trends significantly affect sub-Saharan Africa.¹⁴² According to the document, “[t]he European Union has unique assets for responding to this threat”, as it has at its disposal, “the Member States' civilian and military capabilities and can rely on the CFSP and ESDP instruments to implement them effectively”, and, “[i]t can also act under its partnership and cooperation agreements with the main world regions which cover the political, development and trade areas.”¹⁴³

It was in this context, in seeking the formalization of the Moratorium on the Import, Export and Manufacture of SALW into a treaty, a conflict, between the European Council and the Commission, arose on the appropriateness and timeliness of providing technical and financial assistance to the Economic Community of West African States (ECOWAS). The Commission was not in favor of such an arrangement and opined that if action was to be taken anyway, this should be done within the framework of the Community's development policy.¹⁴⁴

The Council ignored the opinion of the Commission and adopted a decision supporting the ECOWAS moratorium.¹⁴⁵ Consequently, the Commission brought 203 TEC proceedings against the decision, seeking annulment of the ECOWAS- decision as well as requesting that the foundational 2002 joint action decision relating to operations designed to discourage the dissemination of SALW was declared invalid. The Commission pursued, “annulment for lack of competence” on the basis of Article 47 TEU-old since the CFSP decision affects the Community powers in the field of development aid.¹⁴⁶ Article 47 TEU-old provided that, “nothing in this Treaty shall affect the Treaties establishing the European Communities”, and the issue at hand was how this provision should be interpreted.

¹⁴⁰ Ibid.

¹⁴¹ Council of the European Union, EU Strategy to Combat the Illicit Accumulation and Trafficking of SALW and their Ammunition, 13 January 2006.

¹⁴² Van Vooren 2009(I), p. 4.

¹⁴³ Ibid, p. 8.

¹⁴⁴ Van Vooren, 2009(II): 233.

¹⁴⁵ Ibid.

¹⁴⁶ Action brought on 21 February 2005 by the European Commission against the Council of the EU, OJ C 115, 14.05.2005, 10.

The ECJ followed its earlier case-law and ruled that a measure with legal effects adopted under Title V infringes Article 47 TEU-old whenever it could have been adopted on the basis of the EC treaty.¹⁴⁷ This was the interpretation favored by the Commission. The ECJ however added that, “[i]t is apparent from the case-law of the Court that, if it is established that the provisions of a measure adopted under Titles V or VI of the EU Treaty, on account of both their aim and their content, have as their main purpose the implementation of a policy conferred by the EC Treaty on the Community, and if they could properly have been adopted on the basis of the EC Treaty, the Court must find that those provisions infringe Article 47 EU.”¹⁴⁸

The ECJ thus upheld the hierarchical interpretation of Article 47 TEU-old, entailing a superiority of the Community over the Union’s CFSP. This conclusion was reached by using a “centre of gravity” reasoning.¹⁴⁹

In a centre of gravity reasoning, if examination of a Community measure reveals that it pursues a twofold objective and one of the objectives is predominant and the other objective is merely incidental, the measure must be founded on the legal basis required by the predominant objective.¹⁵⁰ However, if it is established that the measure simultaneously pursues several objectives, inseparably linked without one being incidental or secondary to the other, the measure must be found on both corresponding legal bases.¹⁵¹ As mentioned above, the SALW-decision affected both the CFSP and, according to the Commission, the field of development aid. The ECJ concluded that in the relation between the EU and the Community, the centre of gravity reasoning is not possible given the hierarchical approach to Article 47 TEU-old. Consequently, the ECJ concluded that if development and CFSP objectives are equally pursued by a measure under scrutiny, the EC legal base has to prevail.¹⁵² This solution is however no longer possible as the hierarchical approach of Article 47 TEU-old, is no longer possible.

There is thus no straight answer to the question of how the Court shall separate CFSP from non-CFSP decisions. The question is if it is even possible to draw a clear line between them. Several suggestions as to how this can be done have been provided in the academic literature. One suggestion is to treat CFSP as a *lex generalis*, used only when action under a more precise provision, *lex specialis*, is impossible.¹⁵³ This, however, is not feasible as the broad definition of the Union’s external competences in specific policy areas, commercial policy, development policy, humanitarian aid, and economic financial and technical cooperation with third countries, potentially reduces CFSP to a residual restricted category of external relations

¹⁴⁷ C-91/05 *Commission v. Council*, [2008] ECR I-3651, para. 60.

¹⁴⁸ *Ibid.*

¹⁴⁹ Van Vooren, 2009(II), 234.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² C-91/05 *Commission v. Council*, [2008] ECR I-3651, para. 77.

¹⁵³ Van Elsuwege, 2010, p. 9.

competences. Furthermore, it introduces a hierarchical relationship, not compatible with the wording of Article 40 TEU.¹⁵⁴

An alternative is to look at the specific nature of the EU instruments in the different fields of external action of the EU.¹⁵⁵ Such a characteristic of the CFSP can be found in Article 24 TEU and 31 TEU which stipulates an inability for the CFSP to adopt legislative acts. This inability, however, does not mean that acts adopted by CFSP are incapable of having legal effects. CFSP-acts adopted on the basis of a non-legislative procedure are capable of having legal effects which is illustrated by the possibility, provided for in Article 215 (2) TFEU, to adopt restrictive measures against legal and natural persons. Furthermore, it does not seem evident to assess the requirements for legislative actions without looking at the content and aim of the measure in practice.¹⁵⁶

Thus, it is very difficult to draw a clear line between CFSP and non-CFSP external actions by looking at the Treaty provisions.¹⁵⁷ While according to the treaty the ECJ shall not have the jurisdiction as far as CFSP decisions are concerned, the treaty provisions are not precise enough to avoid that the Court will have to decide in several cases on what constitutes a CFSP decision. The Court will thus be forced, within its wide margin of appraisal, to draw the line between CFSP and non CFSP decisions.

Thus the ECJ will have the capacity to rule on the legality of decisions, outside the CFSP. Whether the decision falls outside the CFSP or not is decided by the Court. Even though the Court does not have jurisdiction over CFSP decisions, it is the Court that decides what constitutes a CFSP decision. Without a clear definition, the Court will have a big margin of discretion when ruling over what constitutes a CFSP decision.

Whether the ECJ will extend its jurisdiction, thus getting jurisdiction over most of the EU foreign policy, or be more passive, will decide whether the lack of jurisdiction in the CFSP will pose a big problem for the rule of law in EU foreign policy or not.

4.1.3.5. Decision- making in the CFSP

The legal instruments and the institutions in the CFSP differ from those in other areas of the EU foreign policy. In contrast to the wide range of legal instruments that can be used in other areas of external action provided for in Article 289 TFEU, regulations, directives and decisions, the set of instruments in the CFSP are rather limited. The decision-making in the CFSP is a complex matter. I will in the following try to describe which institutions can decide what and which instruments they have at their disposal.

4.1.3.5.1. The binding nature of CFSP legal instruments

According to Article 21 (3) TEU, “[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid., p. 10.

¹⁵⁷ Ibid.

Commission, assisted by the Union Minister for Foreign Affairs, shall ensure that consistency and shall cooperate to that effect.”

In contrast to the old treaty, the Union Minister for Foreign Affairs is now responsible for the compliance along with the Council and the Commission. Thus there are three institutions responsible for horizontal coherence.

The principle of coherence, defined as a principle that guides foreign policy, is a crucial precondition for an efficient foreign policy.¹⁵⁸ This principle, in the case of the European Union, indicates on the one hand the degree of congruence between the external policies of the Union and the Member States (vertical direction) and on the other hand the level of internal coordination of EU policies (horizontal direction).¹⁵⁹

Article 24 (3) deals with the vertical coherence. It provides that:

“The Member States shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.”

The Council and the High Representative are responsible for the compliance with the principle of vertical coherence.

Neither the vertical nor the horizontal coherence has been much changed with the Lisbon treaty, except for the introduction of the Union Minister for Foreign Affairs and the High Representative as responsible for the coherence.¹⁶⁰ As the ECJ according to Article 24 (1) TEU, does not have jurisdiction over the aforementioned provisions, the legal implications of these provisions are small. The vertical coherence, something that has been an obstacle for the efficiency of the Unions foreign policy in the past, has thus not been improved with the Lisbon Treaty. The exclusion of ECJ jurisdiction over the vertical coherence thus, *“illustrates the lingering discrepancy between the Member States’ general willingness to cooperate and their more specific willingness to determine the character of the European foreign policy in concrete situations, and continues to limit the legal aspects of the EU’s foreign policy.”*¹⁶¹

The vertical coherence is further weakened as the *“loyalty”* and *“mutual solidarity”* provisions in Article 24 (3) TEU appear ambivalent in the face of Declaration 13 and 14. According to Declaration 13, *“[t]he Conference underlines that the provisions in the Treaty on European Union covering the Common Foreign and Security Policy, [...] do not affect the responsibilities of the Member States, as they currently exist, for the formulation and conduct*

¹⁵⁸ Koehler, 2010, p. 58.

¹⁵⁹ Ibid.

¹⁶⁰ Article 3 TEU, Article 11 (2) TEU.

¹⁶¹ Koehler, 2010, p. 59.

of their foreign policy nor of their national representation in third countries and international organisations.”

Furthermore, Declaration 14 emphasizes the sovereignty of national foreign policy as it provides that, “[t]he provisions covering the Common Foreign and Security Policy [...] will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State’s membership of the Security Council of the United Nations.”

Thus, the Member States wanted to avoid giving jurisdiction over the CFSP to the ECJ and also felt the need to, through declarations protect their national sovereignty in foreign policy. Similar to the earlier treaties, the Member States seem reluctant to transfer their foreign policy competence to the European Union. However, Article 24 (3) TEU creates an obligation for the Member States to comply with the Union’s actions. This is important as it means that action taken through the CFSP framework can create obligations for individuals and companies when the action is implemented in the Member States.¹⁶² The need for an accountable CFSP regime is thus evident. Or in the words of Piet Eeckhout:

“Is it acceptable that measures involving financial expenditure, measures creating institutes with legal personality, measures appointing persons to certain positions, measures with legislative scope, for example ordering the Member States to define terrorism in a certain way, measures imposing sanctions on individuals, measures, lastly, which set up EU military missions and define them, is it acceptable that all such measures are outside the jurisdiction of the EU courts? Is it acceptable that no court at the central EU level is able to review such measures?”¹⁶³

Furthermore, according to Eeckhout, judicial review, at the level of the Member States, does not offer a satisfactory alternative as even if a court in a Member State would declare a particular CFSP measure inapplicable it would only be able to do so in a national context and not on the EU-level.¹⁶⁴

4.1.3.5.2. The legal instruments

The legal instruments that can be used within the framework of the CFSP are several and are mostly similar to those found in the treaties preceding the Lisbon Treaty. According to Article 24 TEU, “the adoption of legislative acts shall be excluded”. Article 25 TEU provides that:

“The Union shall conduct the common foreign and security policy by:

- (a) defining the general guidelines;*
- (b) adopting decisions defining:*
 - (i) actions to be undertaken by the Union;*
 - (ii) positions to be taken by the Union;*

¹⁶² Eeckhout, 2005, p. 19.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

(iii) arrangements for the implementation of the decisions referred to in points (i) and (ii);

and by

(c) strengthening systematic cooperation between Member States in the conduct of policy.”

One of the more important changes introduced by the Lisbon Treaty is the legal instrument for the adoption of restrictive measures against third countries and against persons or organizations not controlled by a third country. This can be done in accordance with Article 215 TFEU which provides that,

“1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.”

Thus, firstly a decision is to be adopted under the CFSP framework in Chapter 2 TEU. The Council may then implement the decision by adopting specific restrictive measures under Article 215 TFEU.

The other of the aforementioned legal instruments can be used by the different institutions as follows.

4.1.3.5.3. The European Council

As of the Lisbon treaty, the European Council is a fully-fledged EU institution. Although prior to the Lisbon treaty, the declarations of the European Council served as important reference points for the implementation and formulation of the foreign policy by the EU institutions and the institutions of the Member States.¹⁶⁵ As the European Council formally became an EU institution, the authority of the European Council has from a legal perspective expanded. However, its functions were already exercised prior to the Lisbon Treaty.¹⁶⁶

The role of the European Council in the CFSP is according to Article 26 (1) TEU to, *“identify the Union’s strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions.”*

¹⁶⁵ Koehler, 2010, p. 68.

¹⁶⁶ Ibid.

The strategic interests and objectives of the Union shall according to Article 22 (1) TEU be identified on the basis of the principles and objectives set out in Article 21 TEU. It is thus the European Council that is responsible for the general guidelines of the CFSP. However, according to Article 15 (1) TEU, it cannot adopt legislative acts. Its power is in the fact that the guidelines decided by the European Council are according to Article 26 (2) TEU binding to the Council of Ministers as all related decisions must be based on these guidelines.

4.1.3.5.4. The Council of Ministers

Decisions on operational action shall, according to Article 28 TEU, be taken by the Council “[w]here the international situation requires”. The Council shall adopt the necessary decisions and shall “lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.” Decisions on positions of the Union may, according to Article 29 TEU, refer to, “a particular matter of geographical or thematic nature”.

4.1.3.5.5. The Commission

The Commission is not allowed to submit CFSP proposals on its sole initiative but it can do so for external action outside the CFSP according to Article 22 (2) TEU. However, it is according to Article 30 (1) TEU authorized to support the High Representative in making proposals. According to Article 36 (2) TEU, all remaining proposals are to be initiated by the Council.

4.1.3.5.6. The High Representative of the Union for Foreign Affairs and Security Policy

The High Representative for the FASP is according to Article 18 (2) TEU responsible for conducting the Union’s foreign and security policy. He shall, by his proposals, contribute to the development of that policy, which he shall carry out as mandated by the Council. The High Representative is according to Article 22 (2) and 30 (1) TEU explicitly authorized to submit proposals regarding the CFSP.

The High Representative for FASP, who according to Article 18 (2) TEU is responsible for conducting the Union’s foreign and security policy, has a stronger position compared to the former High Representative for the CFSP. Furthermore, the High Representative for FASP enjoys the right to submit proposals for the development of the CFSP and the common security and defense policy which shall be carried out as mandated by the Council, Article 18 (2) TEU.

The High Representative for the FASP shall also according to Article 18 (3) and Article 27 (1) TEU, chair the newly established Foreign Affairs Council and is simultaneously one of the Vice-Presidents of the Commission. Thus, the formation previously known as the Troika is now incorporated into the position of the High Representative of the FASP.

The aim of incorporating intergovernmental as well as supranational elements into the one position or the High Representative for the FASP is to increase the horizontal coherence of the European Union’s foreign policy.¹⁶⁷ The High Representative for the FASP shall,

¹⁶⁷ Ibid., p. 66.

according to Article 18 (4) TEU, “ensure the consistency of the Union’s external action“, and is as one of the Vice-Presidents of the Commission, “responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action”. This position can be interpreted in two ways. Firstly, the wide scope of the High Representative for the FASP’s responsibility can be interpreted as a single mandate over the external relation of the Commission, something that would constrain the power of certain Commissioners. Secondly, the position can be interpreted as an overall coordinating function that encloses all external dimension of the Commission’s policy.¹⁶⁸ Regardless of which interpretation one chooses, the High Representative obtains a special status within the Commission, resulting from the fact that he or she is appointed by the Council.¹⁶⁹

4.1.3.5.7. The European Parliament

The role of the European Parliament in the CFSP is limited. It cannot propose CFSP-acts but according to Article 36 TEU, the parliament is to be consulted by the High Representative of the Union for Foreign Affairs and Security Policy on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and informed of how those policies evolve. Furthermore, the High Representative of the Union for Foreign Affairs and Security Policy shall ensure that the views of the European Parliament are duly taken into consideration.

4.1.3.6. Limits to legal review in the CFSP

The ECJ has, as previously mentioned, according to Article 19 TEU the exclusive jurisdiction to ensure that the law is observed in the interpretation of the Treaties. However regarding CFSP, according to Article 24 (1), “[t]he Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.”

Article 40 TEU states that:

“The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.”

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

The Court is thus according to Article 40 TEU, as described above, responsible for upholding the division of competences.

According to the first paragraph of Article 275 TFEU, “[t]he Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.”

At first sight, it seems that both CFSP decisions adopted directly under Chapter 2 TEU as well as measures implementing them taken under Article 215 TFEU are excluded from the Court’s jurisdiction. This is however not necessarily the correct interpretation.¹⁷⁰

The implementation of CFSP measures according to Article 215 TFEU, in a pre-Lisbon setting, was done in accordance with the EC-Treaty and was thus within the Court’s jurisdiction.¹⁷¹ This seems to have changed with the Lisbon treaty as both the general and implementing decisions are, to start with, outside the Court’s jurisdiction.

The second paragraph of Article 275 TFEU provides that, “[h]owever, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.”

The legality of the decisions at hand is thus to be reviewed directly under Article 263 TFEU. The second paragraph can be interpreted as covering both CFSP decisions adopted directly under Chapter 2 as well as the Council decisions implementing them under Article 215 TFEU. Thus, while the first paragraph of Article 275 TFEU puts both non-implementing and implementing decisions outside the jurisdiction of the Court, the second paragraph brings them back in. However, even though they are brought back into the Court’s jurisdiction, it is not done without reducing the jurisdiction of the Court compared to the pre-Lisbon setting.¹⁷²

The second paragraph of Article 275 TFEU is only available to individuals and not to privileged applicants.¹⁷³ Under the pre-Lisbon setting, implementing measures adopted under Article 60, 301, and 308 TEC could be challenged by a Member State, the EP, the Council and the Commission as well according to Article 230 TEC.

Furthermore, a literal reading of the second paragraph indicates that only direct action is available for the concerned individuals and not, as in the pre-Lisbon setting, indirect action through the preliminary ruling procedure in Article 267 TFEU.¹⁷⁴ Thus the most logical interpretation of Article 275 TFEU is one that reduces the jurisdiction of the Court compared

¹⁷⁰ Hinarejos, 2009, p. 157.

¹⁷¹ Ibid.; See Articles 301, 60 and 308 TEC.

¹⁷² Hinarejos, 2009, p. 158.

¹⁷³ The second paragraph explicitly refers to the fourth paragraph of Article 263 TFEU which regulates standing for legal and natural persons.

¹⁷⁴ Hinarejos, 2009, p. 158.

with the pre-Lisbon setting as privileged applicants would not be able to challenge the restrictive measures and individuals would only be able to bring direct action against them.

To avoid this reduction of the Court's jurisdiction, the Court will have to interpret Article 275 TFEU in a different manner. A possible solution would be to interpret the first paragraph as only affecting CFSP decisions adopted under Chapter 2 TEU but not the decisions that are adopted to implement them under Article 215 TFEU. The implementing decisions would thus be covered by the normal powers of the Court as they were never part of the CFSP exception to begin with.¹⁷⁵ As a result, decisions adopted under Chapter 2 TEU could be reviewed only directly, while implementing decisions, adopted under Article 215 TFEU, could be challenged by individuals with standing as well as privileged applicants and indirectly.

Another possibility would be to interpret the second paragraph extensively and thus granting the Court not only the powers of direct review but also of indirect review in accordance with Article 267 TFEU.¹⁷⁶ While this would allow individuals to review both decisions adopted under Chapter 2 TEU as well as implementing decisions under Article 215 TFEU it would still exclude privileged applicants.¹⁷⁷

Finally, the Court could of course both interpret the second paragraph as "*bringing back in*" CFSP decisions under the Court's jurisdiction as well as allow for both direct and indirect review of such CFSP decisions. This would be the widest possible reading of the jurisdiction of the Court.¹⁷⁸

Whether the possibility for legal review as regards measures adopted under Article 215 TFEU has been improved or not, is thus not possible to answer. It can however be argued that the Court is unlikely to reduce its jurisdiction, hence, the Lisbon treaty has improved the access to legal review under the former second pillar.¹⁷⁹

Thus, the legality of decisions providing for restrictive measures against natural or legal persons within the framework of the CFSP might be reviewed by the court. Thus, despite being politically sensitive issues, the ECJ has, according to case law as well as the treaty, the ability to review the legality of such decisions.

Prior to the Lisbon Treaty, the exclusion of the jurisdiction of the ECJ was framed as a general rule. Within the current framework, however, it is framed as an explicit exception to the general rule that judicial control is all pervasive.¹⁸⁰ The practical implications of this arrangement might be that the ECJ will feel enabled to interpret the CFSP exception narrowly.¹⁸¹

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid., p. 159.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid., p. 160.

¹⁸⁰ Ibid., p. 150.

¹⁸¹ Ibid.

The limitation of the Courts jurisdiction, spelled out in Article 24 (1) TEU, excludes the possibility of a preliminary ruling according to Article 267 TFEU. Thus, if a national court is faced with a conflict between a measure of national law and a CFSP measure, it will not be able to ask for preliminary ruling as the ECJ is not competent to interpret the CFSP measure.¹⁸²

The limitation of the jurisdiction of the ECJ has thus been reduced with the Lisbon Treaty as far as restrictive measures against natural or legal persons are concerned. However, the same limitations as are provided for in Article 263 (4) TFEU will apply with the same consequences regarding the concept of rule of law as described above.¹⁸³ The access to legal review within the CFSP framework thus continues to be weak and is far from as extensive as under the former first pillar.

The jurisdiction of the ECJ is severely reduced in the CFSP. This must be considered as problematic and hardly compatible with the aim in Article 2 TEU. Granted, the access to judicial review for natural and legal persons is an improvement from the pre-Lisbon setting, it is problematic that important decisions can be taken with no possibility of legal review.

However, given the fuzzy boundary between CFSP and non-CFSP action, the ECJ is able to establish a case law that protects the rule of law by concluding that the CFSP should constitute more than a residual area of the EU foreign policy. Thus, the jurisdiction of the Court would resemble that of most constitutional systems where foreign policy is outside the jurisdiction of national courts. Most important is the access to judicial review for natural and legal individuals as they were the ones that suffered most by the lack of judicial review in the pre-Lisbon setting. The Lisbon treaty thus provides the ECJ with a golden opportunity, in contrast to the situation under earlier treaties, to establish a case law that respects the rule of law in foreign policy, at least to a degree that is commonly accepted in western constitutional systems. If, however, the ECJ would chose judicial abdication rather than judicial activism, there is a risk that the rule of law will not be respected in the EU foreign policy. It is of course impossible to predict which approach that will be chosen by the ECJ as, like we will see under the case law analysis, the ECJ has chosen both approaches in the past. The future will tell which approach will be preferred by the ECJ.

4.1.4. Concluding remarks

As shown above, there are problems regarding access to legal review in all the former pillars. However, according to most commentators the limitations of access to legal review under the first and third pillars do not constitute a serious problem for the EU as an entity under rule of law, a conclusion that I agree with. The limits to legal review under the former second pillar, however, do pose a big problem for the Union from a rule of law perspective. The situation has improved with the Lisbon Treaty but a large number of decisions will remain outside of the jurisdiction of the CFSP.

¹⁸² Ibid., p. 151.

¹⁸³ Ibid.

When disregarding the former pillar structure and looking at the access to legal review in EU foreign policy as a whole, it is obvious that it will in the future be determined by how the Court will draw the line between CFSP and non-CFSP provisions. With the current insecurity it is difficult to estimate the extent of the problem, however, it is safe to assume that regardless what role the CFSP will play in the future, the lack of access to legal review is a problem when looking at Article 2 TEU. The question is rather how big of a problem it will constitute in the future.

4.2 The doctrine of political question in the case-law of the European Courts

4.2.1. The sanctions cases

In the early 1990s, the ECJ had to decide in several cases involving sanctions against third countries.

4.2.1.1. FYROM

In *Commission v. Greece*, also known as the FYROM case, the legality of Greek trade sanctions against the Former Yugoslav Republic of Macedonia (FYROM) was decided.

With the break-up of Yugoslavia in the early 1990s, several new states were formed. Among them was the FYROM. Greece objected against the use of the name Macedonia as it regarded the name to be part of its own cultural heritage and complained that the FYROM promoted the idea of a unified Macedonia.¹⁸⁴ Greece thus decided unilaterally to prohibit trade with the FYROM, an action that was clearly in breach of the applicable EC law trade instruments. However, Greece relied on the old Article 224 that provided that, “[m]ember States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and security”.

The Commission brought action under the old Article 225 and sought a declaration that Greece had made improper use of the powers provided for in Article 224 of the EC Treaty in order to justify the unilateral measures prohibiting trade with FYROM, and by doing so failed to fulfill its obligations under Article 113 of the EC Treaty.¹⁸⁵ The Court, however, never ruled on the Commission’s action as the case was withdrawn after Advocate General Jacobs delivered his Opinion. The Opinion thus represents the only judicial authority.

In his Opinion, Advocate General Jacobs examined whether Greece could invoke the notions of “war” or “serious international tension constituting a threat of war”. He stated that this was a complex question that raises the fundamental issue of the scope of the Court’s power to

¹⁸⁴ Opinion of Advocate General Jacobs in Case C-120/90, *Commission v. Greece* [1996] ECR I-1513, para. 5.

¹⁸⁵ Case C-120/90, *Commission v. Greece* [1996] ECR I-1513.

exercise judicial review in such situations.¹⁸⁶ While arguing that it was clear that the Court had the power to review the legality of an action taken by a Member State under this heading, he stated that the scope and intensity of the review that can be exercised by the Court was however severely limited on account of the nature of the issues raised.¹⁸⁷ He argued that there was a paucity of judicially applicable criteria that would permit this Court, or any other court, to determine whether serious international tension exists and whether such tension constitutes a threat of war. He then stated that, “[t]he nature of the problem is encapsulated in remarks made by an English judge in a rather different context: ‘there are [...] no judicial or manageable standards by which to judge these issues, or to adopt another phrase [...] the court would be in a judicial no-man’s land.’”¹⁸⁸

The lack of judicially applicable criteria is a theme that runs throughout the whole Opinion. It is restated when he discusses the Commissions argument that the trade embargo was likely to increase tension and thus adversely affect the internal and external security of the country. He claims that the Commissions argument is very much a political assessment of an eminently political question and that there are simply no juridical tools of analysis for approaching such problems.¹⁸⁹ The same argument is used in regard to whether Greece has made improper use of the powers provided for in Article 224. The Advocate General claims that if a Member State considers, rightly or wrongly, that the attitude of a third State threatens its vital interests, its territorial integrity or its very existence, then it is for the Member State to determine how to respond to that perceived threat and that it is not for the Court to criticize the appropriateness of the Member State’s response, and to say that the chosen course of action is unlikely to achieve the desired aim or that the Member State would have a better prospect of successfully defending its interests by other means. He finally concludes that there are no judicial criteria by which such matters may be measured and that it is difficult to identify a precise legal test for determining whether a trade embargo is a suitable means of pursuing a political dispute between a Member State and a third State as the decision to take such action is essentially of a political nature.¹⁹⁰

Another theme that can be identified in the Opinion is that the question whether there was international tension constituting a threat of war had to be looked at from the subjective point of view of the concerned Member State and not from an outside objective perspective. According to the Advocate General, war is by nature an unpredictable occurrence and the transition from sabre-rattling to armed conflict can be swift and dramatic.¹⁹¹ Against that background, it was not for the Court to adjudicate on the substance of the dispute between Greece and FYROM and what the Court had to decide was whether in the light of all the circumstances, including the geopolitical and historical background, Greece could have had some basis for considering, from its own subjective point of view, that the strained relations

¹⁸⁶ Opinion of Advocate General Jacobs in Case C-120/90, *Commission v. Greece* [1996] ECR I-1513, para. 50.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*, para. 59.

¹⁹⁰ *Ibid.*, para. 65.

¹⁹¹ *Ibid.*, para. 52.

between itself and FYROM could degenerate into armed conflict.¹⁹² He finally concluded that from Greece's subjective point of view and if due weight is attached to the geopolitical environment and to the history of ethnic strife, border disputes and general instability that has characterized the Balkans for centuries, it could not be said that Greece was acting unreasonably by taking the view that the tension between itself and FYROM bears within it the threat of war.¹⁹³ Furthermore, the Advocate General referred to ECtHR case-law that stated that issues of national security are primarily a matter for the appraisal of the authorities of the State concerned, a reasoning similar to that in situation 1 and 5 in *Baker v. Carr*.¹⁹⁴

Looking at the Opinion of Advocate General Jacobs, it is evident that part of his reasoning is very similar to *Baker v. Carr*. Throughout the case he discusses, in relation to the difficulty in deciding in "eminently political questions", what the judge in *Baker vs. Carr* calls a "*lack of judicially discoverable and manageable standards*", (situation 2).¹⁹⁵ The emphasis throughout the Opinion on limited judicial review, lack of judicially applicable criteria and on the eminently political character of the issues, creates an impression of judicial abdication in the face of a Member States claims under Article 224. The Advocate General also referred to similar approaches under German, United Kingdom and ECHR law in support of judicial deference.¹⁹⁶ This line of reasoning suggests that there is a distinction between "*political questions*", i.e. the appropriateness of decisions, which the ECJ refrain from adjudicating on and "*legal questions*", i.e. procedural questions and adherence to EU law, to which the ECJ apply full judicial review.¹⁹⁷

However, looking closer at the Opinion, it is obvious that the Advocate General closely investigated why judicial deference was warranted by looking at facts such as the unpredictability of war. The Opinion thus included a substantial judicial review and it cannot be said that the Advocate General approached the issue with judicial deference. According to Eeckhout, the Opinion of Advocate General Jacobs is the EU judicial text which comes closest to establishing a doctrine of political question in EU law.¹⁹⁸ If the FYROM-case is to be discussed in a prudential v. constitutional perspective it can be argued that as the Advocate General did a substantial review, it did not from a constitutional perspective defer from legal review. The reason for abstaining from legal review was rather a result of a prudential approach. This becomes obvious in the last paragraphs of the Opinion where the Advocate General concludes that, "*[d]oubtless many informed commentators would agree with the Commission that Greece's conduct constitutes an overreaction and that Greece could better protect its interests by diplomatic methods. But that view rests on a political analysis which the Court is ill equipped to carry out.*" Furthermore the Advocate General stated, "*[a]ccordingly, emphasizing that in the circumstances of this case it is not open to the Court to take a view on the merits of the issues between Greece and FYROM, I am of the opinion*

¹⁹² Ibid., para. 54.

¹⁹³ Ibid., para. 56.

¹⁹⁴ Ibid., para. 55.

¹⁹⁵ *Baker v. Carr*, 369 US 186 (1962), 217.

¹⁹⁶ Opinion of Advocate General Jacobs in Case C-120/90, *Commission v. Greece* [1996] ECR I-1513, para. 51, 55 & 50.

¹⁹⁷ Van Elsuwege, 2010, p. 10.

¹⁹⁸ Eeckhout, 2005, p. 7.

that the Court should: [...] dismiss the application.”¹⁹⁹ Thus, it can be said that the Advocate General in the FYROM-case adopted a doctrine of political question.

4.2.1.2. CENTRO COM

Case C-124/95 *Centro-Com v HM Treasury and Bank of England*, known as the *Centro Com* case, also concerned trade sanctions against a newly formed state in the Balkans. This time it involved trade sanctions against Serbia and Montenegro that were laid down in an EC regulation implementing a Security Council resolution. According to the regulation Article 2 (a), exports of medical products and foodstuff were excluded from the embargo if notified to the UN Sanctions Committee.²⁰⁰ After having received the necessary approvals, an Italian company, *Centro Com*, had exported pharmaceutical products to Montenegro. The payments for those exports were to be debited to a bank account held by the National Bank of Yugoslavia with Barclays Bank in the UK, a procedure that had been done on numerous occasions. However, following reports of abuse of the authorization procedure established by the Sanctions Committee for the export of goods to Serbia and Montenegro the UK Treasury had decided to change its policy. Payment from Serbian and Montenegrin funds held in the UK for exports of goods exempt from the sanctions, such as medical products, was to be permitted only where those exports were made from the UK.²⁰¹ Thus, *Centro Com* was unable to receive its payment for the exported products.

The UK argued that its new policy constituted the exercise of national competence in the field of foreign and security policy and that performance of its obligations under the Charter and under resolutions of the United Nations falls within that competence.²⁰² While the Court accepted that the Member States have retained their competence in the field of foreign and security policy, it also emphasized that the powers retained by the Member States must be exercised in a manner consistent with Community law.²⁰³ Therefore, the Court looked at the common commercial policy and the sanctions regulations at issue and emphasized that the Member States cannot treat national measures whose effect is to prevent or restrict the export of certain products as falling outside the scope of the common commercial policy on the ground that they have foreign and security objectives.²⁰⁴

Consequently, the Court stated that while it is for the Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless respect the provisions adopted by the Community in the field of the common commercial policy.²⁰⁵ Thus, the question was whether the UK was allowed to restrict exports

¹⁹⁹ Opinion of Advocate General Jacobs in Case C-120/90, *Commission v. Greece* [1996] ECR I-1513, para. 71, 73.

²⁰⁰ Council Regulation 1432/92 prohibiting trade between the EEC and the Republics of Serbia and Montenegro [1992] OJ L 151/4.

²⁰¹ Case C-124/95 *Centro-Com v HM Treasury and Bank of England* [1997] ECR I-81, para. 13-15.

²⁰² *Ibid.*, para. 23.

²⁰³ *Ibid.*, para. 24-25.

²⁰⁴ *Ibid.*, para. 26.

²⁰⁵ *Ibid.*, para. 27.

on the ground of public security as provided for in Article 11 of the EC's general export regulation.²⁰⁶

The UK argued that, having regard to the difficulties involved in applying the system of authorizations issued by the Sanctions Committee, the new policy of the UK treasury was necessary in order to ensure that the sanctions imposed by United Nations Security Council Resolution were applied effectively, as it allowed the United Kingdom authorities themselves to check the nature of goods exported to Serbia and Montenegro.²⁰⁷ The Court argued that the concept of public security within the meaning of Article 11 of the Export Regulation covers both a Member State's internal security and its external security and that, consequently, the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the external security of a Member State.²⁰⁸ Thus, a measure intended to apply sanctions imposed by a resolution of the United Nations Security Council in order to achieve a peaceful solution to the situation in Bosnia-Herzegovina, which forms a threat to international peace and security, falls within the exception provided for by Article 11 of EC's general export regulation.²⁰⁹

However, according to the Court, a Member State's recourse to Article 11 of the Export Regulation ceases to be justified if Community rules provide for the necessary measures to ensure protection of the interests enumerated in that article.²¹⁰ In the current case, the Sanctions Regulation, designed to implement, uniformly throughout the Community, certain aspects of the sanctions imposed by the United Nations Security Council, lays down the conditions on which exports of medical products to Serbia and Montenegro are to be authorized. The authorization in this case was that those exports must be notified to the Sanctions Committee and export authorization must be issued by the competent authorities of the Member States.²¹¹

Under these circumstances, national measures adopted by a Member State precluding the release of Serbian or Montenegrin funds in exchange for exports to those republics unless Member State's authorities have previously checked the nature of the products in question and issued export authorization cannot be justified, as effective application of the sanctions can be ensured by another Member State's authorization procedures, as provided for in the Sanctions Regulation, in particular the procedure of the Member State of exportation.²¹² Therefore, Member States must place trust in each other as far as concerns the checks made by the competent authorities of the Member State from which the products in question were dispatched and nothing in the present case suggested that the system provided for by Article 3

²⁰⁶ Council Regulation 2603/69 establishing common rules for exports [1969] OJ Spec. Ed. (II) 950.

²⁰⁷ Case C-124/95 *Centro-Com v HM Treasury and Bank of England* [1997] ECR I-81, para. 43.

²⁰⁸ *Ibid.*, para. 44.

²⁰⁹ *Ibid.*, para. 45.

²¹⁰ *Ibid.*, para. 46.

²¹¹ *Ibid.*, para. 47.

²¹² *Ibid.*, para. 48.

of the Sanctions Regulation, whereby the Member States issue export authorizations, had not functioned properly.²¹³

Finally, the Court stated that, since Article 11 of the Export Regulation forms an exception to the principle of freedom to export laid down in Article 1 of the Export Regulation, it must, on any view, be interpreted in a way which does not extend its effects beyond what is necessary for the protection of the interests which it is intended to guarantee.²¹⁴ As there were less restrictive measures available, for example resorting to administrative collaboration with the authorities of other Member States, the Court concluded that the UK policy was contrary to the combined provisions of the export regulation and the sanctions regulation.²¹⁵

In contrast to the FYROM case, neither the Court, nor the Advocate General in his opinion, in this case emphasized the political nature of the sanctions and national competence in foreign policy matters. Neither were the nature of war or the nature of security discussed when the Court motivated its decision. The public security exception was interpreted strictly. Even though the Member States are required under national law to abide by the UN Charter and Security Council resolutions, and even though they retain competence in the area of security and foreign policy, the Court concluded that they could not act outside the EC law when a comprehensive sanctions regulation was adopted. Advocate General Jacobs discussed this in his Opinion. He argued that the United Kingdom's argument on national competence in the field of foreign and security policy appeared to suggest that the Member States have more leeway in interpreting, applying, or supplementing Community acts which have a foreign or security policy dimension than they have in respect of other Community acts. This could according to the Advocate General not be accepted. He instead suggested that the interpretation of a Community act depends on its objectives, its terms and its context. The fact that it has a foreign or security policy dimension may therefore have an impact on its interpretation, but it does not in principle mean that the Member States have more leeway.²¹⁶ While the FYROM case came very close to a political questions doctrine, the *Centro Com* case suggests that the Court is willing to review foreign policy matters such as trade embargos, even when it is argued that they concern the security of a Member State. Thus, the ECJ did not abstain from applying legal review due to neither the prudential approach nor the constitutional approach. Neither the fact that the Member States retain competence in the area of security and foreign policy nor the fact that the decisions in question regarded the nature of war and security was enough to make the court refrain from applying judicial review. It has also been argued that what made this case different from the FYROM case, thus enabling judicial review, was the existence of relevant EU-legislation adopted under the legal basis of the common commercial policy.²¹⁷

²¹³ Ibid., para. 49-50.

²¹⁴ Ibid., para. 51.

²¹⁵ Ibid., para. 52-53.

²¹⁶ Opinion of Advocate General Jacobs in Case C-124/95 *Centro-Com v HM Treasury and Bank of England*, [1996] ECR I-84, para. 43.

²¹⁷ Van Elsuwege, 2010, p. 11.

4.2.1.3. BOSPHOROUS

The Bosphorous case was the first case in which the ECJ had to interpret an EC-sanctions regulation. In contrast, the FYROM case was about the interpretation of the EC-treaty and the Centro Com case was about the interpretation of a common commercial policy regulation. Bosphorus Airways was a Turkish company which operated principally as an air charterer and travel organizer. By a lease agreement of April 1992 it leased, for a period, two aircrafts owned by the Yugoslav national airline JAT. The agreement provided for the leasing of the aircraft only and excluded cabin and flight crew, who were provided by Bosphorus Airways which thus had complete control of the day-to-day management of the aircraft for that period. JAT, however remained the owner of the aircraft.²¹⁸

The Council had in April 1993, adopted Regulation 990/93, concerning trade between the EEC and the Federal Republic of Yugoslavia (Serbia and Montenegro), in implementation of Security Council resolutions.²¹⁹ Article 8 of the regulation provided that, “*all vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia shall be impounded by the competent authorities of the Member States.*” The wording of Article 8 of the regulation was in substance identical to the relevant passage in the Security Council resolution 820 (1993).²²⁰

It was clear that the transaction between Bosphorus Airways and JAT was entered into in complete good faith and was not intended to circumvent the sanctions against the Federal Republic of Yugoslavia (FRY). Furthermore, in application of those sanctions, the rent due under the lease was paid into blocked accounts, and was thus not paid to JAT. Finally, the aircrafts were used exclusively by Bosphorus Airways for flights between Turkey on the one hand and several Member States and Switzerland on the other.²²¹

When one of the aircrafts was preparing to take off following maintenance operations at Dublin Airport, the Minister directed it to be impounded under Article 8 of the EC regulation on the ground that it was an aircraft in which a majority or controlling interest was held by a person or undertaking in or operating from the FRY.²²² He acted after having consulted the UN Yugoslavia Sanctions Committee which argued that the aircraft came within the scope of the resolution and therefore had to be impounded.²²³ Bosphorous applied to the High Court in Ireland for judicial review and the case ended up in the ECJ.

Bosphorous Airlines argued that Article 8 of the EC regulation does not apply to aircraft whose day-to-day operation and control are entrusted for four years to an undertaking which

²¹⁸ Case C-84/95 *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECR I-3953, para. 2.

²¹⁹ Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L 102/14.

²²⁰ The Security Council resolution 820 (1993), para. 16.

²²¹ Case C-84/95 *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECR I-3953, para. 3.

²²² *Ibid.*, para. 4.

²²³ Opinion of Advocate General Jacobs in Case C-84/95 *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General*, [1996] ECR I-3956, para. 46.

is not based in or operating from the FRY, even if an undertaking in or operating from that republic may have a reversionary interest as owner of the aircraft. It thus contended that there was a distinction between ownership and control and as the aircraft was controlled by Bosphorous, Article 8 should not apply.²²⁴

The Advocate General argued that the wording of Article 8, when applied to the facts of the present case, appeared to leave little room for doubt. It referred to a “*majority or controlling interest [...] held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro)*”. The term “*interest*” was very broad, encompassing all types of property interest, and it was established in the main proceedings that JAT continues to be the exclusive owner of the aircraft.²²⁵ Regarding the opinion of the UN Yugoslavia Sanctions Committee, he argued that due regard should be given to the opinion of the Sanctions Committee; it consisted of representatives of States which are members of the Security Council, and their views must carry considerable weight as the Sanctions Committee has developed into an important standing body for the day-to-day supervision of the enforcement of the sanctions and can promote the consistent interpretation and application of the resolutions by the international community. However, he argued, it seemed questionable whether in the present case the Sanctions Committee’s opinion could be regarded as binding if only because such an effect is not provided for by the relevant provisions of the resolutions.²²⁶

The Court adopted the reasoning of the Advocate General and argued that nothing in the wording of Article 8 suggests that it is based on a distinction between ownership of an aircraft on the one hand and its day-to-day operation and control on the other. Nor is it anywhere stated in that provision that it is not applicable to an aircraft owned by a person or undertaking based in or operating from the FRY if that person or undertaking does not have day-to-day operation and control of the aircraft.²²⁷ It was also argued by the Court that the regulation had to be interpreted in the light of its aims and context which included UN resolutions.²²⁸ Thus the wording of the resolution confirms that Article 8 of the regulation was to apply to any aircraft which was the property of a person or undertaking based in or operating from the FRY, and that it was not necessary for that person or undertaking also to have actual control of the aircraft. The word “*interest*” in the resolution could not, on any view, exclude ownership as a determining criterion for impounding. Moreover, the word “*interest*” was used in conjunction with the word “*majority*”, which clearly implied the concept of ownership.²²⁹ This was also confirmed by other language versions of the regulation.²³⁰

²²⁴ Case C-84/95 *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECR I-3953, para. 8.

²²⁵ Opinion of Advocate General Jacobs in Case C-84/95 *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General*, [1996] ECR I-3956, para. 31.

²²⁶ *Ibid.*, para. 46.

²²⁷ Case C-84/95 *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECR I-3953, para. 12.

²²⁸ *Ibid.*, para. 14.

²²⁹ *Ibid.*, para. 15.

²³⁰ *Ibid.*, para. 16.

Furthermore, the Court argued that the impounding of any aircraft owned by a person or undertaking based in or operating from the FRY, even if an undertaking such as Bosphorus Airways has taken over its day-to-day operation and control, contributes to restricting the exercise by the FRY and its nationals of their property rights and is thus consistent with the aim of the sanctions, namely to put pressure on that republic.²³¹

By contrast, the use of day-to-day operation and control, rather than ownership, as the decisive criterion for applying the measures prescribed by Article 8 would jeopardize the effectiveness of the strengthening of the sanctions, which consists of impounding all means of transport of the FRY and its nationals, in order to further increase the pressure on that republic. The mere transfer of day-to-day operation and control of means of transport, by a lease or other method, without transferring ownership would allow that republic or its nationals to evade application of those sanctions.²³²

In the Bosphorous case, the legal status of Security Council resolutions and opinions of Sanctions Committees were discussed but neither the Advocate General, nor the Court made any attempt to clarify the exact legal status. More interestingly, the Bosphorous case raised the issue of how sanctions relate to fundamental human rights such as the right of property. Bosphorous Airways argued that the impounding of the aircraft would infringe Bosphorus's fundamental rights, in particular its right to peaceful enjoyment of its property and its freedom to pursue a commercial activity, a claim that according to the Advocate General raised an important issue and was thus examined in detail.²³³ Firstly, he analyzed the right to property, protected under Article 1 of the First Protocol to the ECHR and as guaranteed by EC law. He agreed with Bosphorous Airways that the impounding of the aircraft was a severe restriction on the exercise by Bosphorous Airways of its property rights.²³⁴ On the other hand it was also obvious that there was a particularly strong public interest in enforcing embargo measures decided by the United Nations Security Council. Indeed, he argued, it was difficult to think of any stronger type of public interest than that of stopping a civil war. The international community had taken the view that, in order to stop the war, it was necessary to put pressure on the FRY. Accordingly, the Security Council decided to adopt, and subsequently strengthen, economic sanctions, which were implemented by the Community. Unavoidably, such sanctions affect property rights, including those of innocent economic operators and in that respect Bosphorus Airways was in no way in a unique position. Many others were likely to have suffered severe losses from the embargo measures. However, according to the Advocate General, such losses are inevitable if the sanctions are to be effective.²³⁵

That did not according to the Advocate General mean that in such circumstances any type of interference with the right to property should be tolerated. If it was demonstrated that such interference was completely unreasonable in the light of the aims which the competent

²³¹ Ibid., para. 17.

²³² Ibid., para. 18.

²³³ Ibid., para. 19; Opinion of Advocate General Jacobs in Case C-84/95 *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General*, [1996] ECR I-3956, para. 50 ff.

²³⁴ Opinion of Advocate General Jacobs in Case C-84/95 *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General*, [1996] ECR I-3956, para. 63.

²³⁵ Ibid., para. 64.

authorities sought to achieve, it would be necessary for the Court to intervene. However in the present case, the decision to impound the aircraft on the ground that it was owned by an undertaking in the FRY could not be regarded as unreasonable in the light of the aims of the sanctions regulation. Thus the sanction measures did in the view of the Advocate General justify the contested decision.²³⁶

The Court agreed with the Advocate General in this issue and referred to settled case-law that the fundamental rights invoked by Bosphorous Airways were not absolute and that their exercise could be restricted if justified by objectives of general interest pursued by the Community.²³⁷ Furthermore, it argued that any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions. Moreover, the importance of the aims pursued by the regulation at issue was such as to justify negative consequences, even of a substantial nature, for some operators.²³⁸ The Court then reviewed the aims and justifications of the sanctions and concluded that as compared with an objective of general interest, so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law, the impounding of the aircraft in question, which was owned by an undertaking based in or operating from the FYR, cannot be regarded as inappropriate or disproportionate.²³⁹

In the Bosphorous case, the Court did show some deference to the policy-makers, especially at the UN level. It did not attempt a significant review of the fact that the sanctions had to extend to all of transport owned or controlled by nationals of the FYR. However, according to Eeckhout, the judgment does not amount to judicial abdication as the Court did examine the sanctions regulation which effectively was a copy of a UN resolution, on the basis of general principles of EC-law.²⁴⁰ As that review went to “*the heart*” of the regulation, it also went to the heart of the resolution.²⁴¹ What makes this case especially interesting from a political question perspective is that the ECJ actually did do a human rights review of a UN resolution, a matter clearly in the sphere of foreign policy. In contrast with the FYROM case where Advocate General Jacobs seemed very reluctant to review matters of security and foreign policy, the Bosphorous case demonstrates that the ECJ is not afraid to review these matters. Thus, like in *Centro-Com*, neither a prudential or constitutional approach of the doctrine of political question was adopted. Eeckhout argues that even though the Court did not strike the regulation on grounds of human rights, the examination was meaningful and essentially

²³⁶ *Ibid.*, para. 65.

²³⁷ Case C-84/95 *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECR I-3953, para. 21.

²³⁸ *Ibid.*, para. 22-23.

²³⁹ *Ibid.*, para. 24-26.

²⁴⁰ Eeckhout, 2005, p. 12.

²⁴¹ *Ibid.*

correct.²⁴² Ultimately, he argues, the judgment struck the right kind of balance between law and policy.²⁴³

4.2.1.4. WERNER

Finally, in the Werner case, regarding export of industrial products to Libya, the ECJ concluded that a measure whose effect is the prevention or restriction of the export of certain products cannot be treated as falling outside the scope of the common commercial policy, and thus consequently the scope of judicial review, on the ground that it has foreign policy and security objectives.²⁴⁴ Like in *Centro-Com* and *Bosphorous*, neither a prudential or constitutional approach to the doctrine of political question was adopted by the Court.

4.2.2. Competence cases

As previously stated, the question of competences is a central issue in EU-foreign policy and the CFSP. With the Lisbon treaty, significant changes were done in the area of CFSP competences and thus, the old case-law relating to the issue is no longer relevant. However, regarding competence in a wider perspective, two high-profile Opinions by the ECJ, which according to Eeckhout were crucial in the development of this area of law, might say something about how the Court is handling competence clashes in foreign policy matters involving the Member States and the Union. A field in which there is strong pressure on the ECJ to recognize national competences and not push for a widening of the external powers of the EU.²⁴⁵

4.2.2.1. OPINION 1/94

In Opinion 1/94, the ECJ limited the scope of the common commercial policy as the Court ruled that it did not encompass the entire spectrum of WTO-law, which includes trade in services and the commercial aspects of intellectual property rights.²⁴⁶ The decision has been regarded as reluctance from the Court to confirm external competence, and thus been considered to herald a new phase of judicial retrenchment.²⁴⁷ However, according to Eeckhout, this assessment depends on looking at the common commercial policy as an “*ever expanding universe*”. When the EEC treaty was drafted, its authors could not envisage the development of international trade policy to the wide extent that is WTO, encompassing trade in services and commercial aspects of intellectual property rights. The Court might thus have been reluctant to, through judicial pronouncement rather than political consensus a transfer of powers from the Member States to the community. In that sense, the Court was deferent to the political authorities of the Member States and adopted a constitutional approach of the doctrine of political question. However, according to Eeckhout, this deference was appropriate as the division of powers between the Member States and the Union is best decided at political level.²⁴⁸ Even though the Court has a role to play, it should not, according

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Case C-70/94, *Werner v. Germany* [1995] ECR I-3189, para. 10.

²⁴⁵ Eeckhout, 2005, p. 13.

²⁴⁶ Opinion 1/94 *re the competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228 (6) of the EC Treaty*, [1994] ECR I-5267.

²⁴⁷ Eeckhout, 2005, p. 12.

²⁴⁸ Eeckhout, 2005, p. 13.

to Eeckhout, be expected to take truly fundamental decisions effectively expanding the Union competence.²⁴⁹ Opinion 1/94 also demonstrates that judicial activism on part of the ECJ, so feared by the Member States, will not necessarily happen.

The Court did, however, not show deference regarding a claim from the Commission that EC legal acts confirmed the extension of the common commercial policy to intellectual property and transport.²⁵⁰ After examining the legal acts, the court concluded that a mere practice of the Council cannot derogate from the rules laid down in the Treaty and cannot, therefore, create a precedent binding on Community institutions with regard to the correct legal basis.²⁵¹ Like in the FYROM case, the Court carefully examined the legal acts that were referred to by the Commission before it came to its conclusion. Thus there was a legal review and the Court did not adopt a constitutional approach to the doctrine of political question as it did not accept the Commissions claim.²⁵²

4.2.2.2. OPINION 2/94

Opinion 2/94 regarded the competence of the Community to accede to the ECHR.²⁵³ The important part of this Opinion, as far as this thesis is concerned, is the final obstacle the Court saw in recognizing that the Union had competence to join the ECHR. The Court argued that no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field, thus, in the absence of express or implied powers for this purpose, it is necessary to consider whether Article 235 of the EC Treaty may constitute a legal basis for accession.²⁵⁴ The Court concluded that Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. However, that provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. Thus, Article 235 cannot be used as a basis for the adoption of provisions, whose effects would, in substance be to amend the Treaty without following the procedure which it provides for that purpose.²⁵⁵ The Court concluded that accession to the ECHR constituted such an amendment and that the Community had no competence to accede to the Convention.²⁵⁶

²⁴⁹ Ibid.

²⁵⁰ Opinion 1/94 *re the competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Article 228 (6) of the EC Treaty*, [1994] ECR I-5267, para. 51.

²⁵¹ Ibid., para. 52.

²⁵² Eeckhout, 2005, p. 13.

²⁵³ Opinion 2/94 *re the accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759.

²⁵⁴ Ibid., para. 27-28.

²⁵⁵ Ibid., para. 29-30.

²⁵⁶ Ibid., para. 35-36.

Thus, the ECJ adopted a constitutional approach and left the decision of accession to the political authorities, once again deferring to the political authorities.²⁵⁷ However, Opinion 1/94 and 2/94 cannot, according to Eeckhout, be considered to constitute judicial abdication in the realm of foreign affairs as even though the ECJ demonstrates some measure of deference, it must be recognized that this area of case-law is characterized by dense legal analysis and argument.²⁵⁸

4.2.3. WTO-cases

In several cases regarding direct effect of WTO rules in the EU legal order, the ECJ's arguments have been of political nature and have adopted a position of judicial self-restraint.²⁵⁹

4.2.3.1. PORTUGAL V. COUNCIL

In *Portugal v. Council*, the Court ruled that, with some exceptions, WTO law could not serve as a basis for review of the legality of Community measures.²⁶⁰ To reach that conclusion, the Court first analyzed the WTO law, in particular the disputed settlement provisions.²⁶¹ From that analysis the Court concluded that WTO law does not require direct effect. The Court then considered whether there was a basis in Community law itself for recognizing direct effect of WTO law, more particularly, the application of the WTO agreements in the Community legal order.²⁶² The Court argued that it had to be noted that, according to its preamble, the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view at “*entering into reciprocal and mutually advantageous arrangements*” and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community.²⁶³

Furthermore, the Court argued, it is common ground that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.²⁶⁴ Thus, the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO agreements which are based on “*reciprocal and mutually advantageous arrangements*” may lead to disuniform application of the WTO rules.²⁶⁵ The Court argued that to accept that the role of ensuring that Community law complies with those rules devolves directly on that the Community judicature would deprive the legislative or

²⁵⁷ Eeckhout, 2005, p. 14.

²⁵⁸ Ibid.

²⁵⁹ Van Elsuwege, 2010, p. 13.

²⁶⁰ Case C-149/96 *Portugal v Council* [1999] ECR I-8395.

²⁶¹ Ibid., para. 34-52.

²⁶² Ibid., para. 42.

²⁶³ Ibid.

²⁶⁴ Ibid., para. 43.

²⁶⁵ Ibid., para. 45.

executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.²⁶⁶

While the Court seems to focus on the reciprocity argument, Eeckhout argues that it is no reciprocity as such which leads the ECJ to deny WTO law direct effect.²⁶⁷ It is rather the impact of direct effect on the EU's political institutions as if direct effect was granted, those institutions would lose the scope of manoeuvre which they currently possess as regards the implementation of WTO law, in particular with regard to disputes with other WTO members.²⁶⁸ The hands of the EU's political institutions would be much more tied up than the hands of their negotiation partners and ultimately the Court was not willing to take the step of tying the hands of the EU's executive and legislative organs.²⁶⁹

Thus, the Court defers to the EC legislature in terms of respecting any specific policies, current or future, that may cause WTO friction.²⁷⁰ However, it also does so in light of the statement which was inserted by the Council in the preamble of Decision 94/800 concerning the conclusion of the WTO Agreement according to which "*by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts*"²⁷¹ While the ECJ did not base its argument on that statement, it was referred to as an element confirming its analysis.²⁷²

According to Eeckhout, in political question terms, the judgment in *Portugal v. Council* comes fairly close to judicial abdication.²⁷³ If the judicial argument is disentangled, Eeckhout argues that the Court shows great deference to the political institutions.²⁷⁴ It is never explained by the Court why these institutions need scope of manoeuvre in the WTO other than by referring to the reciprocity issue. It is however no secret that this was the exact issue which the Council and the Commission regarded as the crucial reason for their opposition to the judicial application of WTO law.²⁷⁵ According to Eeckhout, the reference to major trading partners in *Portugal v. Council* is of course primarily code for the United States where Congress has ensured that the courts have no role in enforcing WTO law.²⁷⁶ Thus, the Court adopted a constitutional approach of the doctrine of political question, showing deference to the political authorities.

I would argue that, in the wider perspective of the objectives of the EU's foreign policy, the *Portugal v Council* case is problematic. It is, as has been described above, supposedly an objective for the EU to promote the value of rule of law. In this case, however, rather than

²⁶⁶ *Ibid.*, para. 46.

²⁶⁷ Eeckhout, 2005, p. 15.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ Council Decision EC No 94/800 of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [1994] OJ L 336/1.

²⁷² Case C-149/96 *Portugal v Council* [1999] ECR I-8395, para. 48.

²⁷³ Eeckhout, 2005, p. 15.

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

taking a stand and actively promoting the value of rule of law by leading by example, the Court promoted the solution that was most practical from a political perspective and adapted to the EU's counterparts and their constitutional tradition. If this position is to be expanded to other areas of the Union's foreign policy, it would effectively lead to the European Union adapting lower standards in environmental protection as that is done by its major trading partners, for example China. While it might have been necessary to not give WTO law direct effect for a number of reasons, the argument that it cannot be done as it is not done by the EU's counterparts seems very problematic and not in line with the objectives of the EU's foreign policy.

4.2.3.2. Other cases regarding WTO law

In several cases regarding direct effect of WTO rules in the EU legal order, the ECJ's arguments have been of political nature and have adopted a position of judicial self-restraint.²⁷⁷ In the *International Fruit Company* case²⁷⁸, the Court refused direct effect of a GATT provision due to the fact that GATT is based on the principle of negotiations between parties and characterized by the flexibility of its settlement of disputes. Direct effect of the provision would affect the possibility of the parties to solve the dispute within the GATT structures.²⁷⁹

Furthermore, the ECJ has argued that accepting direct effect in the EU legal order would create an imbalance between the Union and its counterparts as it would deprive the legislative and executive organs the same room of manoeuvre that their trading partners enjoy in negotiations.²⁸⁰ The Court has also concluded that full judicial review of WTO rules would jeopardize the political freedom of the Union in a WTO dispute.²⁸¹ It is thus obvious that the Court has adopted a constitutional approach of the doctrine of political question in the examined WTO-cases, showing deference to the political authorities.

4.2.4. Individual sanctions cases

4.2.4.1. OMPI

In the OMPI case, the Court of First Instance (CFI), now the General Court, decided on the legality of economic and financial sanctions, implementing a CFSP common position. The Organisation des Modjahedines du peuple d'Iran (OMPI) was founded in 1965 and set itself the objective of replacing the regime of the Shah of Iran, then the mullahs, regime, by a democracy. In 1981 it took part in the foundation of the National Council of Resistance of Iran (NCRI), a body defining itself as the "*parliament in exile of the Iranian resistance*". It was, at the time of the facts giving rise to the dispute, composed of five separate organizations and an independent section, making up an armed branch operating inside Iran.²⁸²

²⁷⁷ Van Elsuwege, 2010, p. 13.

²⁷⁸ Joined Cases 21 to 24/72, *International Fruit Company* ECR [1972] 1219.

²⁷⁹ Ibid. p. 21.

²⁸⁰ Case C-149/96, *Portugal v. Council* [1999] I-8395, para. 47.

²⁸¹ Joined Cases C-120/06 and 121/06, *FIAMM v. Council and Commission* [2008] ECR I-6513.

²⁸² Case T-228/02 *Organisation des Modjahedines du Peuple d'Iran (OMPI) v. Council* [2006] ECR II-4665, para. 1.

Following the events of 11 September 2001, on 28 September 2001, the United Nations Security Council adopted Resolution 1373 (2001) laying down strategies to combat terrorism by all means, in particular the financing thereof. Paragraph 1(c) of that resolution provides that all States must freeze, without delay, funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled by such persons; and of persons and entities acting on behalf of, or at the direction of, such persons and entities.²⁸³ However, Resolution 1373 (2001) did not, identify the persons and entities in question, but left it to the States to identify them. The Council took the view that the resolution needed to be implemented in the Community through a Council Common Position and Regulation, which ordered the freezing of the funds and other financial assets or economic resources of persons and entities included in a list to be established and regularly updated by Council decisions.²⁸⁴ OMPI was added to the list in an update of the Common Position and the decision containing the list.²⁸⁵ The OMPI then brought action before the Court of First Instance claiming that the Court should annul Common Positions 2002/340 and 2002/462 and also Decision 2002/460, in so far as those acts concern it.²⁸⁶

The Court found that:

“Because the Community Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the Councils assessment of the factors as to appropriateness on which such decisions are based.”²⁸⁷

The Court concluded that the contested decision does not contain a sufficient statement of reasons and that it was adopted in the course of a procedure during which the applicant’s right to a fair hearing was not observed. Furthermore, the Court argued that it was not, even at this stage of the procedure, in a position to review the lawfulness of that decision.²⁸⁸ Thus, it was on the ground that OMPI’s rights of fair hearing had not been respected during the implementation of the decision that the Court annulled the contested decision in respect of the

²⁸³ The Security Council resolution 1373 (2001).

²⁸⁴ Common Position 2001/930/CFSP on combating terrorism (OJ 2001 L 344, p. 90) and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

²⁸⁵ Council Decision 2002/334/EC of 2 May 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2001/927 (OJ 2002 L 116, p. 33).

²⁸⁶ Case T-228/02 *Organisation des Modjahedines du Peuple d’Iran (OMPI) v. Council* [2006] ECR II-4665, para. 18.

²⁸⁷ *Ibid.*, para. 159.

²⁸⁸ *Ibid.*, para. 173.

applicant. The lawfulness of the decision was not discussed by the Court which adopted a constitutional approach, showing deference to political authorities.

4.2.4.2. SEGI

In *Segi and Gestoras Pro-Amnistia v. Germany and Others (Segi)*, the ECtHR, the organizations sought review of their listing as terrorist organizations in Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism.²⁸⁹ While not being an EU court, the ECtHR's decision is significant as an indicator of the problems of judicial review in the EU.²⁹⁰ *Segi* described itself as the movement of Basque youth with members in all the provinces of the Basque lands in France and in Spain. Its aim was to campaign on youth issues and protect the Basque identity, Basque culture and the Basque language. *Gestoras Pro-Amnistia* described itself as a non-governmental organisation for the protection of human rights in the Basque lands, particularly those of political prisoners and exiles.²⁹¹

The names of both the applicant associations appeared on the annexed list to Common Position 2001/931/CFSP. However, according to the list, they were only subject to Article 4 of the position. Article 4 of Common Position 2001/931/CFSP provided that:

“Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon member States.”

Thus, no sanctions were imposed on them; they were merely branded as terrorist organizations. This, according to the organizations, violated several of their human rights and freedoms under the ECHR, for example the right to a hearing and fair trial, freedom of expression and the right to presumption of innocence.²⁹²

The Court, however, declared the actions inadmissible as its established case law provided that it is not possible to complain against a law in abstracto or against a potential violation of one's rights.²⁹³ The Court claimed that it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention, it is necessary that the law should have been applied to his detriment.²⁹⁴ The ECtHR then discussed the

²⁸⁹ Common Position (2001/931/CFSP) on the application of specific measures to combat terrorism.

²⁹⁰ Eeckhout, 2005, p. 20.

²⁹¹ ECtHR, Application No 6422/02, decision of 23 May 2002, para. 1-2.

²⁹² *Ibid.*, para. 5.

²⁹³ *Ibid.*, para. 7.

²⁹⁴ *Ibid.*

intergovernmental character of the CFSP and of the challenged provisions of the common positions and found that Article 4 of the Common Position 2001/931/CFSP might be used as a legal basis for concrete measures but did not in itself add any new powers which could be exercised against the organizations.²⁹⁵ Any concrete measures such as those which have been adopted or might be in the future would be subject to the form of judicial review established in each legal order concerned, whether international or national.²⁹⁶ The mere fact that the names of the two applicants appeared in the list referred to in that provision as “groups or entities involved in terrorist acts” may have been embarrassing, but the link was according to the Court much too tenuous to justify application of the ECHR.²⁹⁷ Thus, the listing did not amount to an indictment or the establishment of guilt.

Eeckhout argues that the decision of the ECtHR in *Segi* was not courageous.²⁹⁸ As EU common positions are binding to the Member States, a person expressly listed as a terrorist in such an act is likely to be affected by this in the sense of the rights guaranteed by the ECHR.²⁹⁹ Even if the applicants would have challenged the national application of the common position in question, as suggested by the Court, that challenge could only concern that application, leaving the European-level branding of the two organizations as terror organizations intact.³⁰⁰ According to Eeckhout:

“Shifting judicial review to the national level may turn it into some kind of Sisyphus job: no matter how often national implementing measures are challenged, even successfully, the European listing would remain, because national courts would in all likelihood be reluctant to review it. Imagine for one moment that I am tomorrow listed as a terrorist in an EU common position, wholly erroneously I hasten to add. Does this not affect my human rights and fundamental freedoms in European contemporary society?”³⁰¹

The question raised by Eeckhout is important as it demonstrates that access to judicial review on a national level is not enough as far as access to legal review in the area of CFSP is concerned. Thus, it cannot be argued that the lack of access to judicial review within the CFSP can be compensated by access to legal review at a national level as regardless of the judgment in the national court, the decision will still remain on a European level.

After ECtHR’s decision, *Segi* brought an action in damages against the listing before the CFI.³⁰² The action was, however, not admitted by the CFI. The CFI, concluded that it followed from Article 46 EU that the only judicial remedies envisaged was contained in Article 35(1), (6) and (7) TEU-old, and comprised the reference for a preliminary ruling, the action for annulment and the procedure for settling disputes between Member States and thus

²⁹⁵ *Ibid.*, para. 8-9.

²⁹⁶ *Ibid.*, para. 9.

²⁹⁷ *Ibid.*

²⁹⁸ Eeckhout, 2005, p. 21.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² Case T-338/02 *Segi v Council*, [2004] ECR II-1647.

they did not provide for an action of damages. Furthermore, the Court added that the guarantee of respect for fundamental rights referred to in Article 6(2) TEU-old was not relevant to the present case, even though it was expressly listed in Article 46 (d) TEU-old as coming within the ECJ's jurisdiction, as Article 46 TEU-old did not involve an extension of jurisdiction where jurisdiction was, as in the current case, lacking in the first place.³⁰³ The Court then discussed Segi's argument that it had no effective remedy. It claimed that, "[c]oncerning the absence of an effective remedy invoked by the applicants, it must be noted that indeed probably no effective judicial remedy is available to them, whether before the Community Courts or national courts, with regard to the inclusion of Segi on the list of persons, groups or entities involved in terrorist acts [...] [h]owever, the absence of a judicial remedy cannot in itself give rise to Community jurisdiction in a legal system based on the principle of conferred powers, as follows from Article 5 EU".³⁰⁴

Thus, while there existed a significant gap in EU-law prior to the Lisbon Treaty regarding access to judicial remedies, according to Eeckhout, the CFI shied away from creating its own jurisdiction on the basis of the effective-remedy imperative.³⁰⁵ While this would have been an enormous step to take, it would not have been an unheard of as is demonstrated by the *Les Verts* and *Chernobyl* rulings.³⁰⁶ The Court thus, to some extent, showed deference in regard to the political authorities as it would not expand its jurisdiction despite the obvious flaw in the EU legal system. Rather than addressing the problem it merely concluded that the problem existed. Both the ECtHR and the CFI, like in *OMPI*, adopted a constitutional approach.

4.2.4.3. The *Kadi* and *Al Barakaat* cases³⁰⁷

The *Kadi* and *Al Barakaat* cases concerned the scope of jurisdiction of the ECJ to decide on the lawfulness of EU regulations implementing United Nations Security Council resolutions.

On 15 October 1999 the Security Council adopted Resolution 1267 (1999) that provided that all the States must freeze funds and other financial resources that had any relation to the Taliban regime. On 19 December 2000 the Security Council adopted Resolution 1333 (2000) that instructed the UN Sanctions Committee to maintain an updated list, based on information provided by the States and regional organisations, of the individuals and entities designated as associated with Usama bin Laden, including those in the Al-Qaeda organisation. On 6 March 2001, in order to implement the resolution, the Council adopted Regulation (EC) No 467/2001. Annex I to the regulation contained a list of persons, entities and bodies associated with the Taliban regime.

Following obligations under further Security Council resolutions, the Council adopted Regulation (EC) No 881/2002 on the basis of Articles 60 and 301 TEC, which provide for sanctions against third countries, and Article 308 TEC. Article 308 provided that, "[i]f action by the Community should prove necessary to attain, in the course of the operation of the

³⁰³ *Ibid.*, para. 36-37.

³⁰⁴ *Ibid.*, para. 38.

³⁰⁵ Eeckhout, 2005, p. 22.

³⁰⁶ Case 249/83 *Les Verts v European Parliament* [1986] ECR 1339 and Case C-70/88 *European Parliament v Council* [1990] ECR I-2041.

³⁰⁷ Joined Cases C-402/05P and C-415/02, *Kadi and Al Barakaat* ECR [2008], I-6351.

common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.” The Annex of the regulation contained a list of persons, groups and entities affected by the freezing of funds imposed by Article 2 of that same regulation. Article 2 provided that:

“All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.”³⁰⁸

Among those listed in the Annex was Al-Qadi, Yasin (aka Kadi, Shaykh Yassin Abdullah) of Saudi Arabia and Barakaat International Foundation (aka Al Barakaat) in Sweden. Kadi and Al Barakaat both sought annulment of Regulation (EC) No 881/2002 in so far it related to them on grounds of lack of competence and of breach of fundamental rights.

The CFI found that with particular regard to Article 307 TEC, providing that, “[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty”, and to Article 103 of the Charter of the United Nations, providing that, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”, reference to infringements either of fundamental rights as protected by the Community legal order or of the principles of the Community legal order could not affect the validity of a Security Council measure or its effect in the territory of the Community and that it therefore must be considered that resolutions of the Security Council fall, in principle, outside the ambit of the Court’s judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the CFI argued that the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.³⁰⁹

Nonetheless, the CFI concluded that it was empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law,

³⁰⁸ Council Regulation (EC) No 881/2002 of 27 May 2002, OJ (2002) L 139/10.

³⁰⁹ Case T-315/01, *Kadi v. Council and Commission*, ECR [2005] II-3649, para. 224-225.

including the bodies of the United Nations, and from which no derogation is possible.³¹⁰ Thus, according to the Court, there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they would fail to do so, however improbable that may be, the resolution would bind neither the Member States of the UN nor, in consequence, the Community.³¹¹

The CFI concluded, after a careful examination, that there was no violation of *jus cogens*. Thus, even though the CFI did a judicial review of the resolution, *jus cogens* does not offer the same standard of review as general principles of Community law. The CFI thus showed deference to the Security Council and, according to Eeckhout, its approach, despite the review on grounds of *jus cogens*, amounted to judicial abdication.³¹²

Regarding the Court's view on whether the regulation was adopted properly, the CFI did not accept Article 60 and 301 TEC as a satisfactory legal ground for the adoption of the contested regulation.³¹³ However, recourse to Article 308 TEC, in order to supplement the powers to impose economic and financial sanctions conferred on the Community by Articles 60 TEC and 301 TEC, was, according to the CFI, justified by the consideration that, as the world now stands, states can no longer be regarded as the only source of threats to international peace and security. According to the Court, the fight against international terrorism and its funding was unarguably one of the Union's objectives under the CFSP, as they were defined in Article 11 EU, even where it did not apply specifically to third countries or their rulers. Thus, like the international community, the European Union should not, according to the Court, be prevented from adapting to those new threats by imposing economic and financial sanctions not only on third countries, but also on associated persons, groups, undertakings or entities engaged in international terrorist activity or in any other way constituting a threat to international peace and security.³¹⁴ Thus, the applicants claim that the regulation was not adopted properly was dismissed.

In his Opinion, Advocate General Maduro stated that:

“I disagree with the respondents. They advocate a type of judicial review that at heart is very similar to the approach taken by the Court of First Instance under the heading of jus cogens. In a sense, their argument is yet another expression of the belief that the present case concerns a ‘political question’ and that the Court, unlike the political institutions, is not in a position to deal adequately with such questions. The reason would be that the matters at issue are of international significance and any intervention of the Court might upset globally-coordinated efforts to combat terrorism. The argument is also closely connected with the view that courts are ill equipped to

³¹⁰ Ibid., para. 226.

³¹¹ Ibid., para. 230.

³¹² Eeckhout, 2005, p. 25.

³¹³ Case T-315/01, *Kadi v. Council and Commission*, ECR [2005] II-3649, para. 97.

³¹⁴ Ibid., para. 131, 133-134.

*determine which measures are appropriate to prevent international terrorism. The Security Council, in contrast, presumably has the expertise to make that determination. For these reasons, the respondents conclude that the Court should treat assessments made by the Security Council with the utmost deference and, if it does anything at all, should exercise a minimal review in respect of Community acts based on those assessments.”*³¹⁵

He thus clearly took the stance that the CFI’s decision amounted to judicial abdication and his language, when he refers to the issue as a “*political question*” is very similar to that used by the Court in *Baker v. Carr*. In fact, it can be argued that he thought that the CFI had adopted a prudential as well as a constitutional approach to the doctrine of political question. However, instead of legitimizing judicial abdication when faced with political questions, he argues that:

*“The fact that the measures at issue are intended to suppress international terrorism should not inhibit the Court from fulfilling its duty to preserve the rule of law. In doing so, rather than trespassing into the domain of politics, the Court is reaffirming the limits that the law imposes on certain political decisions. This is never an easy task, and, indeed, it is a great challenge for a court to apply wisdom in matters relating to the threat of terrorism. Yet, the same holds true for the political institutions. Especially in matters of public security, the political process is liable to become overly responsive to immediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few. This is precisely when courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of tomorrow. Their responsibility is to guarantee that what may be politically expedient at a particular moment also complies with the rule of law without which, in the long run, no democratic society can truly prosper.”*³¹⁶

Thus, the argument that the political nature of the issue at stake only allowed for a limited legal review was firmly rejected by the Advocate General. Instead, he pointed out the necessity of judicial review in matters of public security and the importance of the principle of rule of law. The Opinion of Advocate General Maduro is very different from the Opinion of Advocate General Jacobs in the *FYROM*-case and can be viewed as a rejection of the doctrine of political question.

The ECJ confirmed Advocate General Maduro’s Opinion and stated that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the EC Treaty, which establish a complete system

³¹⁵ Opinion of Advocate General Maduro in Case C-402/05 *Yassin Abdullah Kadi v. Council of the European Union And Commission of the European Communities*, [2008] ECR I-1, para. 43.

³¹⁶ *Ibid.*, para. 45.

of legal remedies and procedures designed to enable the Court to review the legality of acts of the institutions. An international agreement cannot, according to the ECJ, affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of its exclusive jurisdiction. Thus, limits to the scope of review by the ECJ can only be established on the basis of EU constitutional law. Furthermore, the Court argued that according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. It is also, according to the Court, clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts and that measures incompatible with respect for human rights are not acceptable in the Community.³¹⁷

Thus, the Court concluded that, *“the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.”*³¹⁸

Thus, the ECJ allowed for full judicial review of the regulation and rejected the doctrine of political question, adopted by the CFI.

4.2.5. Concluding remarks

Of the examined cases, it was only in the FYROM-case that a prudential approach to the political question doctrine was adopted. The constitutional approach can however be found in the FYROM-case, Opinion 1/94, Opinion 2/94, Portugal v. Council, the WTO-cases, the OMPI-case and the Segi-case. However, with the staunch rejection of a doctrine of political question in the Kadi-case, the Centro-Com-case and the Bosphorous-case it can hardly be concluded that there exists a doctrine of political question in the case-law of the European Courts. While it can be argued that the Court, on several occasions, showed too much deference to political authorities, it did not do so in a way that demonstrated a judicial abdication at the detriment of rule of law but rather a sensible respect for the division of powers. It can thus not be argued that access to legal review is limited due to the case-law of the European Courts.

³¹⁷ Joined Cases C-402/05P and C-415/02, *Kadi and Al Barakaat* ECR [2008], I-6351, para. 281-284.

³¹⁸ *Ibid.*, para. 326.

5. Concluding reflections

Thus, the limits to judicial review in the EU foreign policy can be considered a problem for the EU to be considered as an entity under the rule of law. The European courts however, have demonstrated that they are not willing to abdicate from their role as constitutional arbiters to the detriment of rule of law and there is thus room for optimism in the sense that the European courts will try to hold on to their jurisdiction, as provided for in the Lisbon treaty.

As mentioned above, the limitations of legal review in the EU foreign policy is not a unique constitutional arrangement but rather the norm in most constitutional systems. Furthermore, the EU treaties are a result of negotiations between the Member States who have shown themselves staunch in their protection of their national sovereignty. One should therefore not be too alarmed by the problems of rule of law in the EU foreign policy or view them as something exceptional.

However, the credibility of the EU when trying to export its values is of course damaged as the EU itself does not live up to the values they are supposed to export. This is perhaps the most serious problem with the limits to access to legal review. It could also be argued that rather than being content with a constitutional arrangement that mirrors that of most constitutional traditions, the EU should lead by example by providing an extensive access to legal review.

As can be seen in the case-law analysis, the problems associated with lack of legal review regarding decisions that imposed sanctions on individuals were addressed in the Lisbon treaty. The jurisdiction of the European courts thus seems to increase as the EU develops. It can therefore be argued that the development is going in the right direction.

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