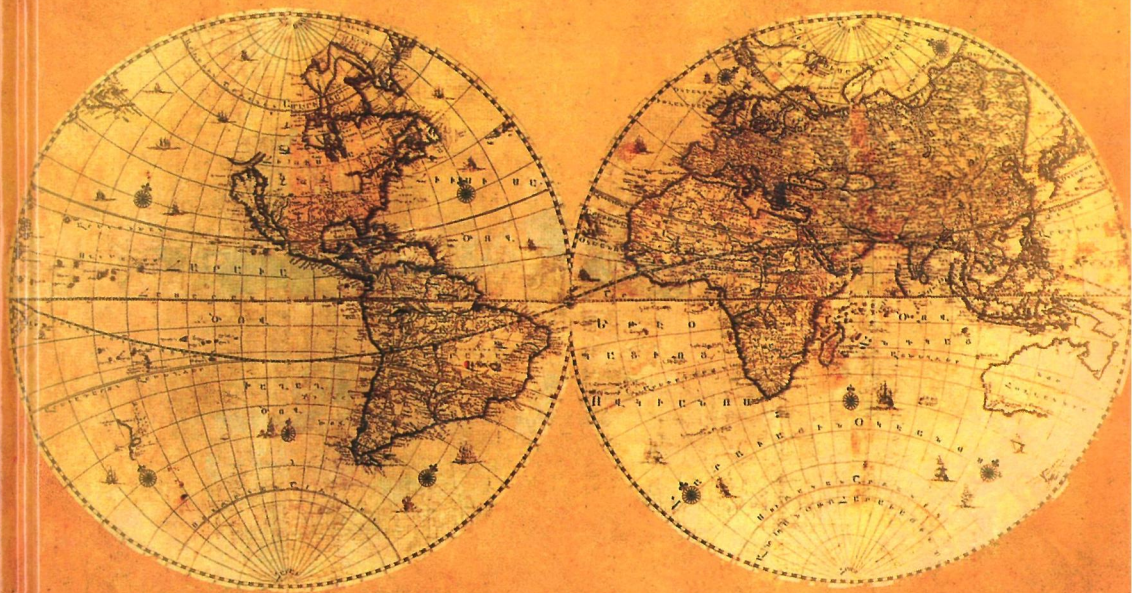


1W//590950(039)

# Foreign Affairs and the EU Constitution

*Selected Essays*



ROBERT SCHÜTZE

CAMBRIDGE

# CONTENTS

<i>List of figures</i>	page xv
<i>List of tables</i>	xvi
<i>Acknowledgements</i>	xvii
<i>Table of cases</i>	xix
<i>List of international instruments</i>	xxvii
<i>List of EU Treaty articles (selection)</i>	xxx
<i>List of abbreviations</i>	xxxii

Introduction	1
--------------	---

## **PART I International law and the EU Constitution: normative aspects 9**

### **On ‘federal ground’: the European Union as an (inter)national phenomenon 11**

Introduction	11
--------------	----

1 The ‘supranational’ Europe: a (very) brief history	12
2 The European Union in the light of the American federal tradition	19
(a) The foundational dimension: Europe’s ‘constitutional treat(ies)’	22
(b) The institutional dimension: a European Union of states and people(s)	26
(c) The functional dimension: the division of powers in Europe	29
(d) Overall classification: the European Union on federal middle ground	31
3 The European Union in the light of the European federal tradition	32
(a) Posing the sovereignty question: the ‘Maastricht Decision’	35
(b) Europe’s statist tradition unearthed: three constitutional denials	38
Conclusion	43

2	On ‘middle ground’: the European Union and public international law	47
	Introduction	47
	1 International norms formally binding on the Union: monism and the politics of direct effect	49
	(a) International agreements as direct sources of European law	49
	(aa) The direct effect of international agreements – a political question?	50
	(bb) Indirect effects of international agreements in the European legal order	54
	(b) Customary international law in the European legal order	56
	2 ‘External’ international treaties and Union succession: from the GATT to the United Nations?	60
	(a) Constitutional design: the United Nations and the Union legal order	62
	(b) The Union judiciary and UN Security Council Resolutions	65
	(aa) The traditional approach: European autonomy with an ‘internationalist’ streak	65
	(bb) A new approach? <i>Yusuf</i> and the ‘subordination’ of the European legal order	70
	Conclusion	77
	Coda: <i>Kafka, Kadi, Kant</i>	80
3	The ‘succession doctrine’ and the European Union	91
	Introduction	91
	1 External perspective: functional succession in international law	92
	(a) Treaty succession and unions of states	94
	(b) Bridging the gap: the (limited) direct responsibility of member states	99
	2 Internal perspective: functional succession in European law	103
	(a) Survival without succession: Article 351 and prior Member State agreements	104
	(aa) The ‘supremacy’ of international treaties: internal and external limits	104
	(bb) Temporal limits to treaty continuity: Article 351(2) TFEU	106
	(b) Survival with succession: the theory and practice of functional succession	109
	(aa) The European Court and the practice of Union succession	110
	(bb) Bridging the gap: the Member States as ‘trustees’ of the Union	116
	Conclusion	117

- 4 European law and Member State agreements: an ambivalent relationship? 120
- Introduction 120
- 1 International agreements of the Member States prior to the EU Treaties 123
- (a) The ‘suspended supremacy’ of European law – Article 351 TFEU 125
- (b) International ‘debts’: the theory and practice of Union succession 125
- (aa) The General Agreement on Tariffs and Trade (1947) – a ‘settled’ relationship 128
- (bb) The European Convention on Human Rights (1950) – a relationship to be settled? 131
- (cc) The UN Charter (1945) – an unsettled relationship? 134
- 2 International agreements of the Member States after the creation of the EU 135
- (a) Agreements between Member States of the Union 138
- (aa) *Inter se* agreements between all Member States – a flight into international law? 139
- (bb) *Excursus*: the ambivalent nature of ‘Community Conventions’ under ex-Article 293 EC 146
- (cc) The constitutional regime governing *inter se* agreements of some Member States 150
- (b) International agreements between Member States and third states 155
- (aa) International agreements with third states and the non-discrimination principle 156
- (bb) Material conflicts with European law – a flight into dual federalism? 160
- Conclusion 170
- PART II Foreign affairs and the EU Constitution:  
vertical aspects 173**
- 5 Federalism and foreign affairs: mixity as an (inter)national phenomenon 175
- Introduction 175
- 1 Federal states and foreign affairs: comparative constitutional perspectives 176
- (a) The ‘closed’ federation: the United States of America 177
- (aa) Constitutional certainties: the plenary scope of the treaty power 178
- (bb) Constitutional ambivalences: the treaty-making powers of the states 181

(b)	The 'open' federation: the German federal state in constitutional history	185
(aa)	The scope of the federal treaty power: three competing constitutional views	186
(bb)	The autonomous treaty-making powers of the member states	188
(c)	Conclusion: federal states, foreign affairs and (the absence of) mixed agreements	190
2	The European Union and foreign affairs: pure and mixed agreements	193
(a)	The scope of the European Union's treaty powers: the doctrine of parallelism	195
(b)	The scope of the Member States' treaty powers: constitutional and legislative pre-emption	198
(c)	Mixed agreements and foreign affairs: Europe's federal constitutional convention	201
	Conclusion	206
6	Dual federalism constitutionalised: the emergence of exclusive competences	209
	Introduction	209
1	Constitutional genesis: exclusive points on a canvas of shared powers	212
(a)	Constitutional genesis no. 1: the Common Commercial Policy	213
(b)	Constitutional genesis no. 2: the conservation of biological resources of the sea	218
(c)	Constitutional genesis no. 3: Opinion 1/76 and 'constitutional necessity' in the external sphere	223
2	From judicial pointillism towards broader constitutional lines?	225
(a)	Grander constitutional designs and the Union's exclusive powers	226
(aa)	The 1984 Draft Treaty Establishing the European Union	226
(bb)	The Maastricht Treaty and the '1992' vision of the European Commission	227
(cc)	The Treaty Establishing a Constitution for Europe (2004)	229
(b)	Ontology and functionality: constitutional guidelines for the discovery of exclusive competences?	231
	Conclusion	232
7	Parallel external powers in the European Union: from 'cubist' perspectives towards 'naturalist' constitutional principles?	237

Introduction	237
1 The existence of implied external powers: the doctrine(s) of parallelism	241
(a) The genesis of implied external powers and the ‘triumph of parallelism’	242
(b) Towards a theory of implied external powers: three competing conceptions	248
2 The enigmatic nature of parallel competences: exclusive, shared, joint?	256
(a) Historical vestiges: the two jurisprudential lines of exclusive implied external powers	257
(aa) ‘Subsequently exclusive’ parallel powers through internal legislation: the <i>ERTA</i> doctrine	257
(bb) Naturally exclusive external powers through constitutional ‘necessity’: the remarkable transformation of the Opinion 1/76 <i>ratio decidendi</i>	258
(b) Cubist perspectives: the constitutional peculiarities of the parallel competence paradigm	269
(aa) Conceptual antipodes: exclusive competence versus doctrine of pre-emption	270
(bb) Excursus: ‘mixed up’ in the Luxembourg Compromise – shared powers versus mixed agreements	277
Conclusion	283
8 The <i>ERTA</i> doctrine and cooperative federalism	287
<b>PART III Foreign affairs and the EU Constitution: horizontal aspects</b>	299
9 External Union powers: competences and procedures	301
Introduction	301
1 The external competences of the Union	303
(a) The Common Foreign and Security Policy	306
(b) The Union’s special external powers	307
(c) The residual treaty power: Article 216 TFEU	309
(d) The relationship between the CFSP and the special external competences	311
2 The nature of external competences	314
(a) The <i>sui generis</i> nature of the CFSP competence	315
(b) Article 3(2) TFEU: subsequent exclusive treaty powers	317
(aa) Three lines of exclusivity: codifying constitutional practice?	317
(bb) Subsequent exclusivity: criticising constitutional theory	319

3	External decision-making procedures	320
	(a) The 'specificity' of CFSP decision-making procedures	321
	(aa) Institutional actors and institutional balance	321
	(bb) Voting arrangements in the Council	322
	(b) The Union's (ordinary) treaty-making procedure	324
	(aa) Initiation and negotiation	325
	(bb) Signing and conclusion	327
	(cc) Modification, suspension (and termination)	328
	(dd) Union succession to international agreements of the Member States	329
4	Sharing external power: constitutional safeguards of unitarianism	331
	(a) Mixed agreements: an international and political safeguard	332
	(b) The duty of cooperation: an internal and judicial safeguard	335
	(aa) Member States as 'trustees of the Union'	336
	(bb) 'Reversed' subsidiarity: restrictions on the exercise of shared state power	337
	Conclusion	340
10	External Union legislation: international agreements	343
	Introduction	343
	1 Conditions for direct effect	345
	(a) The dimensions of direct effect	346
	(b) The constitutional nature of direct effect	349
	2 Double pre-emption: international agreements in the European legal order	354
	Conclusion	357
11	The 'treaty power' and parliamentary democracy: comparative perspectives	359
	Introduction	359
	1 The 'treaty power' in the United States	362
	(a) Article II treaties with the 'advice and consent' of the Senate	363
	(b) Article I: the ( <i>ex post</i> ) congressional-executive agreement	367
	(c) Executive agreements: presidential unilateralism – old and new	372
	(aa) Article II and sole executive 'agreements'	372
	(bb) Delegating Article I powers: the ( <i>ex ante</i> ) congressional-executive agreement	374
	(d) Excursus: terminating (and suspending) treaties or agreements	377
	2 The 'treaty power' in the European Union	380
	(a) The 'ordinary' treaty procedure: Article 218 TFEU	383

(aa) Proposal and negotiation phase	384	
(bb) Conclusion and Parliament: consultation or consent?		386
(b) In particular: CFSP agreements and the European Parliament	389	
(c) Executive agreements: inherent and delegated treaty powers	392	
(aa) Commission agreements	392	
(bb) Executive agreements by other Union institutions and bodies	396	
(d) Excursus: terminating (and suspending) treaties or agreements	399	
Conclusions (and comparisons)	401	
<b>12 External Union policies: a substantive overview</b>	<b>407</b>	
Introduction	407	
1 Common Commercial Policy	409	
(a) The Union's CCP competence: scope and nature	411	
(b) Decision-making and treaty-making procedure(s)	417	
(c) Tariff and trade agreements: multilateral and bilateral	418	
(aa) The WTO Agreement: structure and content	418	
(bb) Bilateral trade agreements of the Union	421	
(d) (Autonomous) liberalisation and protective measures	421	
2 Development cooperation	426	
(a) Development policy: general relations	427	
(aa) (Indirect) development cooperation under the Common Commercial Policy	427	
(bb) From trade to aid: direct development policy	431	
(i) Constitutional foundations: the development cooperation competence	431	
(ii) Legislative foundations: the development cooperation instrument	435	
(b) Development policy: special relations	437	
(aa) Associating ACP countries: from Lomé to Cotonou	438	
(bb) The European Development Fund	441	
3 Common Foreign and Security Policy	443	
(a) CFSP: constitutional foundations	445	
(aa) Competence(s), instruments, procedures	445	
(bb) Institutional infrastructure	447	
(b) Union 'strategies': words for the world	450	
(c) From words to actions I: CSDP 'missions'	452	
(d) From words to actions II: restrictive measures	456	
(aa) Restrictive measures: competence and procedure	456	
(bb) Counter-terrorism measures and judicial review	458	



4 Association and accession	461
(a) 'Constitutional' association(s): overseas countries and territories	462
(b) 'Contractual' association(s): Article 217 TFEU	463
(aa) Bilateral association: the customs union with Turkey	464
(bb) EFTA: the European Economic Area	467
(c) 'Special' association(s): the European Neighbourhood Policy	470
(d) Accession: the Union's enlargement 'policy'	474
(aa) Pre-accession: eligibility and admissibility	476
(bb) Accession agreements: procedural and substantive aspects	478
Conclusion	480
Appendix: Foreign affairs provisions in the EU Constitution (selection)	482
<i>Index</i>	509