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Me and My Shadow: The European Court of Justice and the Disintegration of European Union Law

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Abstract

The European Court of Justice (“the ECJ” or “the Court”) is widely recognized as one of the world’s most successful international tribunals and has been held up as a model for others. Its reputation is in large measure based on its contribution to the “constitutionalization” of the European Community Treaties and to the functioning of the common market, particularly in the 1960s and 1970s. What has perhaps received less attention is the range of mechanisms employed by the Member States since the late 1980s to contain what they regard as expansive lawmaking by the ECJ. Those mechanisms have sometimes generated new waves of activism on the part of the ECJ as it has sought to compensate for their perceived defects. Is this frosty dialogue between the ECJ and the Member States conducive to the healthy development of the European Union and its legal order? If not, what can be done to break the pattern? In Part I, I attempt to anchor discussion of these issues in some of the academic literature on the post-war proliferation of international courts and tribunals. In Part II, I describe briefly some of the main decisions on which the reputation of the ECJ is based. The third (and longest) Part is concerned with Member State responses to expansive lawmaking by the ECJ. The final section attempts to answer the two questions posed at the end of the preceding paragraph.

ARTICLES

ME AND MY SHADOW: THE EUROPEAN COURT OF JUSTICE AND THE DISINTEGRATION OF EUROPEAN UNION LAW

*Anthony Arnall**

INTRODUCTION

The European Court of Justice (“the ECJ” or “the Court”) is widely recognized as one of the world’s most successful international tribunals and has been held up as a model for others.¹ Its reputation is in large measure based on its contribution to the “constitutionalization” of the European Community Treaties and to the functioning of the common market, particularly in the 1960s and 1970s. What has perhaps received less attention is the range of mechanisms employed by the Member States since the late 1980s to contain what they regard as expansive lawmaking by the ECJ. Those mechanisms have sometimes generated new waves of activism on the part of the ECJ as it has sought to compensate for their perceived defects. Is this frosty dialogue between the ECJ and the Member States conducive to the healthy development of the European Union and its legal order? If not, what can be done to break the pattern?

In Part I, I attempt to anchor discussion of these issues in some of the academic literature on the post-war proliferation of international courts and tribunals. In Part II, I describe briefly some of the main decisions on which the reputation of the ECJ is based. The third (and longest) Part is concerned with Member State responses to expansive lawmaking by the ECJ. The final

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1. See FRANCIS JACOBS, *THE SOVEREIGNTY OF LAW: THE EUROPEAN WAY* 130-36 (2007); KATRIN NYMAN-METCALF & IOANNIS PAPAGEORGIOU, *REGIONAL INTEGRATION AND COURTS OF JUSTICE* 112-13 (2005); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 276 (1997); Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 *CAL. L. REV.* 957, 970 (2005).

section attempts to answer the two questions posed at the end of the preceding paragraph.

I. BACKGROUND

Since the end of the Second World War, there has been a remarkable growth in the number and use of international courts and tribunals. An early pace-setter was the European Court of Human Rights (“ECtHR”), set up in 1950 under the European Convention on Human Rights.² It was followed soon after by the Court of Justice of the European Coal and Steel Community established by the Treaty of Paris in 1951.³ That Court was to morph into the ECJ, which now exercises jurisdiction under the Treaties on which the European Union is based. More recent examples are the Appellate Body of the World Trade Organization⁴ and the International Criminal Court.⁵ How can this proliferation of international courts and tribunals be explained? Why have so many independent States agreed to abide by the decisions of courts and tribunals they may not be able to control and which might interpret a treaty they have signed in ways that run counter to their own conception of their national interests? Helfer and Slaughter sum up the benefits that States derive from international courts and tribunals like this:⁶

Independent tribunals act as trustees to enhance the credibility of international commitments in specific multilateral contexts. They do so by raising the probability that violations of those commitments will be detected and accurately labeled as noncompliance. Such violations create short-term material and reputational costs for the state in default. But detection

2. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

3. Treaty establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

4. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

5. Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

6. See Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 904 (2005); see also Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints*, 98 AM. J. INT'L L. 247, 273 (2004) (referring to “the frequent use of ambiguities in treaties as agreements to disagree”).

of these violations also encourages future compliance, maximizing the long-term value of the agreement to all parties to the multilateral regime, including the defecting state.⁷

Posner and Yoo suggest that such tribunals should be seen:

as a response to the problem of treaty interpretation . . . states can no more describe all contingencies in their treaties than private parties can address all contingencies in their contracts . . . an arbitrator can reduce the transaction costs of writing treaties by enforcing the hypothetical optimal treaty.⁸

The increasing use of judicial mechanisms to resolve international disputes has not been universally welcomed, with some observers, notably in the United States, seeing it as undemocratic and a threat to the achievement of national policy objectives.⁹ However, the trend has been applauded by scholars of international law, who have argued that tribunals such as the ECJ help contribute to the global rule of law.¹⁰ Many of the explanations given above for the establishment of international courts and tribunals apply directly to the ECJ. As Garrett, Kelemen and Schulz observe, it may be argued that “the member governments have given the ECJ autonomy to increase the effectiveness of the incomplete contracts the governments have signed with each other (that is, the EU treaty base).”¹¹ They go on:

Governments understand that having a well-defined rule of law fosters mutually beneficial economic exchange. But it is very difficult, if not impossible, to write complete contracts (in the case of the EU, treaties). Delegating authority to the ECJ is thus essential to the efficient functioning of the rule of law in Europe.¹²

Some striking examples of the way the ECJ has used its authority are given in the next section. They illustrate clearly the

7. See Helfer & Slaughter, *supra* note 6, at 904.

8. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 17-18 (2005).

9. See *id.* at 4-5; see also Steinberg, *supra* note 6, at 248.

10. See Helfer & Slaughter, *supra* note 1, at 290-98, 387. Posner & Yoo, *supra* note 1, at 969, state that “among international law scholars the impartiality and effectiveness of independent international tribunals are articles of faith.”

11. Geoffrey Garrett, R. Daniel Kelemen & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT’L ORG. 149, 150 (1998).

12. *Id.* at 156.

link between enhancing the credibility of the Member States' commitments to each other, the rule of law and the achievement of substantive policy aims. They also underline the importance of the preliminary rulings procedure in empowering domestic actors, thereby reducing the capacity of national governments to control the development of Community law.¹³ The development of a body of precedent, treated as highly persuasive if not formally binding, took the sting out of some decisions of the Court by enabling it to present them as applications of established principles in new circumstances.¹⁴ As Garrett, Kelemen and Schulz put it: "the greater the clarity of ECJ case law precedent, the lesser the likelihood that the Court will tailor its decisions to the anticipated reactions of member governments."¹⁵

II. THE IMPACT OF THE EUROPEAN COURT OF JUSTICE

A. Constitutionalization

The European Community ("EC") Treaty did not say anything about the relationship between Community law and national law. Could the former be invoked in the national courts of the Member States? If so, did it enjoy primacy over inconsistent provisions of national law? The Court drew on the inherent logic of the Treaty to answer those questions in the affirmative, thereby departing from the fundamental principle of international law that the effect of treaties in the national courts of the States Parties is governed by domestic law. In a famous passage, the Court declared in *Van Gend en Loos v. Nederlandse Administratie der Belastingen*:¹⁶

[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law not only imposes obligations on indi-

13. See Karen J. Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121, 133 (1998); Helfer & Slaughter, *supra* note 6, at 903-07.

14. See ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* ch. 17 (2d ed. 2006). On the precedential significance of WTO Appellate Body decisions, see Steinberg, *supra* note 6, at 254.

15. Garrett, Kelemen & Schulz, *supra* note 11, at 150.

16. Case 26/62, [1963] E.C.R. 1, Summary ¶ 3.

viduals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.¹⁷

In *Costa v. E.N.E.L.* less than eighteen months later, the Court made explicit what was implicit in *Van Gend en Loos*, that Community law prevailed over national law in the event of a conflict.¹⁸

The Court's decision in *Van Gend en Loos* involved filling a gap in the Treaty in a way which ran counter to the views expressed by three of the then six Member States which took part in the case,¹⁹ as well as those of Advocate General Roemer. However, it now seems almost self-evident that the common market would have been undermined if the effect of the Treaty had been permitted to vary from one Member State to another by according it direct effect and/or primacy in only some of them. The Court's subsequent case law made it clear that not only provisions of the Treaty, but also those of Community acts might produce direct effect (though, in the case of directives, only against the State and its organs).²⁰ Many years later, the Court went a step further by recognizing that Member States may have to award damages to individuals to compensate them for loss caused by the past application of national rules which were contrary to Community law.²¹ Although the Treaty was (and remains) silent on the issue, such liability was described by Advocate General Léger in one case as the "indispensable adjunct" to the doctrine of primacy.²²

17. *Id.* ¶ 12; cf. Agreement Creating the European Economic Area, Opinion 1/91, [1991] E.C.R. I-6079, ¶ 21 (delivered at the end of 1991, where the Court spoke of the Member States' having limited their sovereign rights "in ever wider fields").

18. See *Costa v. E.N.E.L.*, Case 6/64, [1964] E.C.R. 585.

19. Belgium, Germany and the Netherlands.

20. See *Marshall v. Southampton & South-West Hampshire Area Health Auth.*, Case 152/84, [1986] E.C.R. 723; *Faccini Dori v. Recreb*, Case C-91/92, [1994] E.C.R. I-3325.

21. See *Francovich & Others v. Italy*, Cases C-6/90 & C-9/90, [1991] E.C.R. I-5357.

22. See *Queen v. Ministry of Agric., Fisheries and Food*, Case C-5/94, [1996] E.C.R. I-2553, 2572. Later in the same Opinion, the Advocate General remarked: "Respect for primacy requires not only that legislation contrary to Community law should

B. *Achieving Policy Objectives*

Striking illustrations of the practical importance of the doctrine of direct effect in helping the Community to achieve its policy objectives are provided by three decisions of the Court, two on freedom of movement and one on social policy.

Essential to the proper functioning of the common market are the right of establishment and the freedom to provide services. These were originally the subject respectively of Articles 52 and 59 EEC, which prohibited discrimination on grounds of nationality and required national restrictions to be abolished by the end of the transitional period (December 31, 1969).²³ Both articles required the Council to draw up a general program setting out how freedom of movement was to be achieved. The general programs were to be implemented by Council directive. Although both general programs were adopted in 1961 by the Council, it was unable to agree to the legislation necessary to give effect to them by the end of the transitional period.²⁴

The Court was called upon to consider the consequences of this in *Reyners v. Belgium*,²⁵ a case on the right of establishment. It declared that, from the end of the transitional period, Article 52 "had the character of a provision which is complete in itself and legally perfect."²⁶ The absence of Council directives could not deprive that article of any effect:

In laying down that freedom of establishment shall be attained at the end of the transitional period, Article 52 . . . imposes an obligation to attain a precise result, the fulfilment of which had to be made easier by, but not made dependent on, the implementation of a programme of progressive measures.²⁷

Thus, once the transitional period had expired, directives were no longer necessary to give effect to the Treaty prohibition against discrimination on grounds of nationality, which the Treaty itself required the national courts to uphold. Six months

be disapplied. It requires also that damage resulting from its application in the past should be made good." *Id.* at 2580.

23. See Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

24. See ARNULL, *supra* note 14, at 464.

25. Case 2/74, [1974] E.C.R. 631.

26. *Id.* ¶ 12.

27. *Id.* ¶ 26.

later, the Court gave judgment in *Van Binsbergen v. Bedrijfsvereniging Metaalnijverheid*,²⁸ in which the approach taken in the *Reyners* case was extended to Article 59.²⁹

In another case decided two years later, the Court took a similar approach. Its decision was perhaps even more striking than *Reyners* and *Van Binsbergen* because the area concerned—social policy—might at the time have seemed tangential to the Treaty's objectives. Among the rather anodyne provisions devoted to the subject in the Treaty, however, was one which was to assume great practical importance. Article 119 EEC provided, in its first paragraph, that "[e]ach Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."³⁰ The full implications of that provision began to emerge in *Defrenne v. Sabena*,³¹ decided in 1976, at a time when social policy had moved up the Community's political agenda.³² One of the issues in *Defrenne* was whether the applicant could rely on Article 119 in the national courts, in other words, whether it produced direct effect. Describing the principle of equal pay as "part of the foundations of the Community," the Court held that, in the case of forms of discrimination which could be "identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question," Article 119 would produce direct effect.³³ Although the article was formally addressed to the Member States, that did not preclude the grant of rights to "any individual who has an interest in the performance of the duties thus laid down."³⁴ Moreover, the prohibition contained in the article "applies not only to the action of public authorities, but also extends to all agreements

28. Case 33/74, [1974] E.C.R. 1299.

29. The year in which those cases were decided, 1974, was one in which the Court made a particularly major contribution to completing the common market: between the two, the Court in *Procureur du Roi v. Dassonville* gave a broad scope to one of its other cornerstones—Article 28 EC on the free movement of goods. Case 8/74, [1974] E.C.R. 837. More recently, the Court has been responsible for the rapid development of the concept of citizenship of the Union introduced at Maastricht. See Consolidated Version of the Treaty establishing the European Community arts. 17-22, O.J. C 321 E/37, at E/153 (2006) [hereinafter EC Treaty]; ARNULL, *supra* note 14, ch. 14.

30. EEC Treaty, *supra* note 23, art. 119.

31. Case 43/75, [1976] E.C.R. 455.

32. See generally CATHERINE BARNARD, *EC EMPLOYMENT LAW* 8-10 (3rd ed. 2006); JEFF KENNER, *EU EMPLOYMENT LAW: FROM ROME TO AMSTERDAM AND BEYOND* 23-26 (2003).

33. *Defrenne*, [1976] E.C.R. 455, ¶ 18.

34. *Id.* ¶ 31.

which are intended to regulate paid labour collectively, as well as to contracts between individuals."³⁵ In other words, Article 119 was capable of producing not just vertical but also horizontal direct effect, even where this meant interfering with the terms of private contracts and collective labor agreements.

The referring court had asked from what date Article 119 might produce direct effect. The text of the article³⁶ might have appeared to provide the answer to that question, but doubt had arisen because of differing views taken by the Member States and the Commission about its practical implications. The Court acknowledged that their conduct had created uncertainty as to the effect of Article 119. In those circumstances, the Court concluded that, except in the case of those who had already brought proceedings, Article 119 could not be invoked in support of claims for equal pay in respect of periods which preceded the date of the Court's judgment.³⁷ The Court had never before limited the temporal effect of one of its judgments in this way. It was criticized for doing so by Hamson.³⁸ He argued that the power to declare what the law is as to the future but to leave the past untouched was "inherently the mark of the legislative function" and that the Court had been compelled to take this position because of its over-enthusiastic development of the doctrine of direct effect.³⁹ Although the device is used very sparingly, I shall refer below to another case, again concerning Article 119, where it was employed by the Court.

C. *The Jurisdiction of the European Court of Justice*

The Court's constitutionalizing tendencies were evident not only at the interface of Community law and national law, but also in relation to the scope of its own jurisdiction. Here the Court found support in Article 164 (now 220) EC, which requires it to ensure that "the law"—one might say the rule of law⁴⁰—is observed in the interpretation and application of the EC Treaty. That duty played an important part in another case

35. *Id.* ¶ 39.

36. The first stage of the transitional period ended December 31, 1961. The text stated: "Each Member State shall during the first stage ensure and subsequently maintain . . ." EEC Treaty, *supra* note 23, art. 119.

37. April 8, 1976.

38. C. J. Hamson, *Methods of Interpretation—A Critical Assessment of the Results*, in REPORTS OF A JUDICIAL AND ACADEMIC CONFERENCE 11-15 (1976).

39. *Id.*

40. See JACOBS, *supra* note 1, at 37; Anthony Arnall, *The Rule of Law in the Euro-*

in which the Court engaged in a conspicuous exercise in gap-filling. Before the amendments introduced at Maastricht, the Council and the Commission were the only Community institutions referred to in Article 173 (now 230) EC, the Treaty provision on annulment proceedings.⁴¹ The status of the European Parliament under that provision became the subject of great controversy, particularly after the first set of direct elections to the Parliament in 1979.⁴²

In *Les Verts v. European Parliament*, the Court held that its jurisdiction under Article 173 was not limited to measures adopted by the Council and the Commission.⁴³ In so doing, it made a series of highly significant statements about the nature of the system established by the Treaty and the importance of judicial review. It began by emphasizing that the Community was based on the rule of law and that neither the Member States nor the institutions could avoid review of whether the measures they adopted were compatible with the Treaty, described by the Court as "the basic constitutional charter."⁴⁴ The Treaty, it said, "established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions."⁴⁵ Although Article 230 only mentioned acts of the Council and the Commission, the general scheme of the Treaty was to make a direct action available against any measure adopted by the institutions which was intended to have legal effect. The Court concluded:

An interpretation of Article 173 of the Treaty which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 and to its system. Measures adopted by the European Parliament in the context of the EEC Treaty could encroach on the powers of the Member States or of the other institutions, or exceed the

pean Union, in *ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION* 239-55 (Anthony Arnall & Daniel Wincott eds., 2002).

41. See Trevor C. Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 *INT'L & COMP. L.Q.* 213, 228 (1993).

42. See *RENAUD DEHOUSSE, THE EUROPEAN COURT OF JUSTICE* 97-104 (1998); Kieran Bradley, *The Variable Evolution of the Standing of the European Parliament in Proceedings before the Court of Justice*, 8 *Y.B. EUR. UNION L.* 27 (1988).

43. Case 294/83, [1986] *E.C.R.* 1339.

44. *Id.* ¶ 23.

45. *Id.*

limits which have been set to the Parliament's powers, without its being possible to refer them for review by the Court. It must therefore be concluded that an action for annulment may lie against measures adopted by the European Parliament intended to have legal effects *vis-à-vis* third parties.⁴⁶

What about the Parliament's capacity to bring annulment proceedings? After some hesitation,⁴⁷ the Court held in the *Chernobyl* case⁴⁸ that the Parliament had the right to bring such proceedings where their purpose was to protect its prerogatives. Since the Court was responsible under the Treaties for ensuring respect for the law, it had to be able to protect the institutional balance and the prerogatives of the Parliament. The fact that the Treaties contained no provisions conferring on the Parliament the right to bring annulment proceedings might constitute "a procedural gap,"⁴⁹ but this could not be allowed to outweigh the fundamental need to ensure respect for the institutional balance created by the Treaties. Since the Parliament had claimed that it had not been able to participate to the full extent contemplated by the Treaty in the legislative process leading to the adoption of the contested act, its prerogatives were in issue. The action was therefore admissible.

The decisions in *Les Verts* and *Chernobyl* are regarded by some of the Court's critics as typifying its predilection for expansive lawmaking.⁵⁰ However, the main consideration underlying the Court's decision in *Les Verts* seems to have been a desire to ensure that no institution which had acquired the power to adopt acts affecting the legal rights of third parties could escape judicial review.⁵¹ The result was to provide a judicial remedy when the Parliament exceeded the limits of its powers.⁵² The

46. *Id.* ¶ 25.

47. *See* Parliament v. Council, Case 302/87, [1988] E.C.R. I-5615.

48. Parliament v. Council, Case C-70/88, [1990] E.C.R. I-2041.

49. *Id.* ¶ 26.

50. *See, e.g.,* SIR PATRICK NEILL, *THE EUROPEAN COURT OF JUSTICE: A CASE STUDY IN JUDICIAL ACTIVISM* 29, 46 (European Policy Forum 1995); *see also* TREVOR C. HARTLEY, *CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION* 35-36 (1999); TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 74-76 (6th ed. 2007); Trevor C. Hartley, *The European Court, Judicial Objectivity and the Constitution of the European Union*, 112 L.Q. Rev. 95, 101 (1996).

51. *See* Parti écologiste "Les Verts" v. European Parliament, Case 294/83, [1986] E.C.R. I-1339, ¶¶ 2, 24, 25.

52. The value of that remedy to the Council and the Member States was emphasized soon afterwards when the Court upheld a claim brought against the Parliament by

Chernobyl decision was motivated by the related consideration that there was no point in including in the Treaty detailed rules about the Parliament's prerogatives if those prerogatives could be ignored by the other institutions with impunity. The Court was again concerned to ensure that the institutions acted within the limits of their powers, an essential attribute of the rule of law, which it was the Court's duty to uphold. At Maastricht, the Member States amended the text of Article 173 (now 230) to give effect to both decisions.⁵³

An equally bold example of gap filling, this time in the interests of maintaining the unity of the Community legal order, is provided by the Court's decision in *Foto-Frost v. Hauptzollamt Lübeck-Ost*,⁵⁴ a reference under Article 234 (ex 177) EC concerning the role of national courts when confronted with a challenge to the validity of a Community act. While national courts of last resort are in principle required by the third paragraph of Article 234 to refer such questions to the Court, the Treaty appears to leave inferior courts free to decide them for themselves. However, it would be highly undesirable for a national court to declare a Community act invalid in the absence of a ruling to that effect from the Court of Justice. The decision of the national court would not take effect in other Member States, where the contested act would in principle continue to apply. The result would be to undermine legal certainty and the uniform application of Community law. The Court accordingly held that, while national courts could reject unfounded challenges to the validity of Community acts, they did not have the power to declare such acts invalid.⁵⁵ The requirement of uniformity, which it was the purpose of Article 234 to ensure, was "particularly imperative" when the validity of a Community act was in issue: "Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental

the Council, supported by the German, French and United Kingdom Governments. *See Council v. European Parliament*, Case 34/86, [1986] E.C.R. 2155, ¶¶ 2, 5, 8.

53. *See Consolidated Version of the Treaty on European Union*, O.J. C 321 E/1 (2006) [hereinafter TEU]. The European Parliament was finally elevated to the status of a privileged applicant by the Treaty of Nice.

54. *Foto-Frost v Hauptzollamt Lübeck-Ost*, Case 314/85, [1987] E.C.R. 4199, ¶ 1.

55. The rule is qualified in proceedings before national courts for interim measures. *See id.* ¶ 19; *Atlanta Fruchthandelsgesellschaft v. Bundesamt für Ernährung und Forstwirtschaft*, Case C-465/93, [1995] E.C.R. I-3761.

requirement of legal certainty.”⁵⁶ The Court pointed out that it had exclusive jurisdiction to entertain actions for the annulment of Community acts. The “coherence of the system of judicial protection established by the Treaty”⁵⁷ required that, where the validity of a Community act was challenged before a national court, the power to declare the act invalid should also be reserved to the Court of Justice.

Foto-Frost was a genuinely difficult case and once again the decision was the subject of criticism.⁵⁸ There is certainly force in the argument that the terms of Article 234 do not support the view that all national courts, whether or not covered by the third paragraph of the article, are bound to refer questions of validity to the Court. Advocate General Mancini said that he considered that “the elliptical wording of Article [234] is attributable to a singular but not impossible oversight” on the part of the Treaty’s authors.⁵⁹ In his view, the textual arguments led to “such dangerous and anomalous results as to overshadow the undeniable uneasiness which one feels in rejecting them.”⁶⁰ The judgment achieved directly what could have been achieved indirectly by laying down strict guidelines for the national courts on the exercise of their discretion to refer in validity cases, something which would clearly have fallen within the jurisdiction of the Court. Unlike *Les Verts* and *Chernobyl*, however, *Foto-Frost* has never been embodied in an amendment to the Treaty.

III. MEMBER STATE RESPONSES TO EXPANSIVE LAWMAKING BY THE EUROPEAN COURT OF JUSTICE

The relationship between an international tribunal and the states which set it up has been likened to that which exists between a principal and an agent. As Posner and Yoo point out, “whenever a principal relies on an agent, it incurs the risk that the agent will perform inadequately or self-interestedly . . . this is the problem of agency slack.”⁶¹ It may result in decisions which

56. See *Foto-Frost*, [1987] E.C.R. 4199, ¶ 1.

57. *Id.*

58. See NEILL, *supra* note 50, at 36-40; HARTLEY, CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION, *supra* note 50, at 34; Hartley, *The European Court*, *supra* note 50, at 100.

59. *Foto-Frost*, [1987] E.C.R. 4199, ¶ 5.

60. *Id.*

61. See Posner & Yoo, *supra* note 8, at 23.

fall outside the “win set” of the participating states, that is, the range of responses that they consider acceptable. To put the point another way, agency slack may lead a tribunal to give decisions which go beyond the limits of the “strategic space”⁶² within which the contracting states are content to allow it to operate. What can states do *ex ante* to prevent such decisions from being taken? How might they react *ex post* if they are?

Helfer and Slaughter⁶³ offer a typology of the mechanisms available to contracting states. The *ex ante* mechanisms they identify include:

- Precisely defined substantive rules;
- Reservations to substantive rules;
- Reservations to a tribunal’s jurisdiction;
- Rules to regulate access and procedure.

The *ex post* mechanisms they identify include:

- Reinterpretation of substantive rules;
- Challenges to the legitimacy of a tribunal or of a particular decision;
- Noncompliance or partial compliance.⁶⁴

Helfer and Slaughter also refer to a more amorphous category of so-called “discursive constraints . . . generated by interactions among participants in the global community of law and internalized by tribunal members.”⁶⁵ Writing about political constraints on expansive judicial lawmaking by the World Trade Organization Appellate Body, Steinberg⁶⁶ adds a further *ex post* mechanism: unilateral exit.

To what extent, if any, have devices like these been used to constrain lawmaking by the ECJ? Alter remarks:

Because of the decision-making rules of the EU, the political threat to alter the Court’s role is usually not credible. The ECJ can safely calculate that political controversy will not translate into an attack on its institutional standing, thus it will not need to reconcile its behavior with a country’s political preferences.⁶⁷

62. See Steinberg, *supra* note 6, at 275.

63. See Helfer & Slaughter, *supra* note 6, at Table 3.

64. *Id.*

65. *Id.*

66. See Steinberg, *supra* note 6, at 267.

67. See Alter, *supra* note 13, at 138-39.

She quotes an observation by Pollack about the procedure for amending the Treaty, which requires the agreement of all the Member States followed by ratification by each one in accordance with its own constitutional requirements.⁶⁸ Because of the cumbersome nature of that procedure, Pollack calls it “a relatively ineffective and noncredible means of member state control.”⁶⁹ Alter acknowledges that decisions of the ECJ on the meaning of a Community act may in principle be reversed by amending the act in question, but says that this happens relatively infrequently “because ECJ decisions usually affect member states differently, so there is not a coalition of support to change the disputed legislation.”⁷⁰

Garrett, Kelemen and Schulz also draw attention to the difficulty of amending the Treaties, while pointing out that the growth in qualified majority voting since the Single European Act has reduced the difficulty of securing the passage of amending legislation.⁷¹ None the less, they say that it may be argued that “the judges of the ECJ realize that their power is ultimately contingent on the acquiescence of member states and hence are reticent to make decisions of which governments disapprove.”⁷² The “specter of coordinated responses” to the case law, they say, “will make the ECJ more reticent to make adverse decisions.”⁷³ Moreover, they point out that the Court’s capacity to develop its case law as it sees fit “is contingent on a stable statutory and constitutional base in which governments allow the ECJ considerable latitude in the translation of its general mandate into specific decisions.”⁷⁴

For the first thirty years or so of its existence—from the entry into force of the EEC Treaty to that of the Single European Act—the ECJ did indeed benefit from a “stable statutory and constitutional base.”⁷⁵ During that period, the Treaty base remained substantially unchanged and the Luxembourg Compro-

68. See TEU, *supra* note 53, art. 48, O.J. C231 E/1, at E/34.

69. See Alter, *supra* note 13, at 139 (quoting Mark Pollack, *Delegation, Agency and Agenda Setting in the EC*, 51 INT’L ORG. 99, 119 (1997)).

70. *Id.* at 136; see Garrett, Kelemen & Schulz, *supra* note 11, at 160.

71. In many cases it remains necessary for the Commission to submit an appropriate proposal. See Garrett, Kelemen & Schulz, *supra* note 11, at 160.

72. *Id.* at 150.

73. *Id.* at 151.

74. *Id.* at 155.

75. *Id.*

mise cast its long shadow over decision-making in the Council. It was then that the Court laid the foundations of the new legal order with its decisions in *Van Gend en Loos* and *Costa v. E.N.E.L.* and took the initiative in kick-starting the common market in cases like *Reyners*, *Van Binsbergen* and *Defrenne*.⁷⁶ Attempts by France, the author of the empty-chair crisis of 1965 which led to the Luxembourg Compromise, to curb the power of the Court in 1968⁷⁷ and again in 1980⁷⁸ came to naught because of lack of support from the other Member States.

The signing of the Single European Act in 1986, however, inaugurated a long period of constitutional instability (which the Treaty of Lisbon may finally bring to an end)⁷⁹ in which the Treaty amendment procedure did not prevent the Member States from confronting the activism of the Court. Although, as noted above, some bold decisions—*Les Verts* and *Chernobyl*, for example—were in fact subsequently incorporated in the Treaty, the range of devices Member States have used to contain the Court is often underestimated. In what follows, I divide them into five categories modeled on those identified by Helfer and Slaughter and by Steinberg. They are as follows: (a) defining and reinterpreting rules and reservations; (b) restricting jurisdiction and controlling procedure; (c) delegitimization and non-compliance; (d) exit; and (e) discursive constraints.

A. *Defining and Reinterpreting Rules and Reservations*

This began in a small way. As is well known, the Single European Act was intended to compensate for the Community's failure to establish a properly functioning common market by providing for the completion of a so-called internal market by a new deadline, December 31, 1992. It was envisaged that this

76. See Alter, *supra* note 13, at 132.

77. See *id.*

78. See Garrett, Kelemen & Schulz, *supra* note 11, at 164; see also HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE 354-55 (1986).

79. The Member States signed the Treaty of Lisbon on December 13, 2007. The Presidency Conclusions of the European Council meeting, held the following day, make it clear that the new Treaty is intended to provide the Union "with a stable and lasting institutional framework" and that the Member States "expect no change in the foreseeable future." Council of the European Union, Presidency Conclusions—Brussels, Dec. 14, 2007, 16616/1/07 REV 1, ¶ 6 (Feb. 14, 2008). Institutional matters are expressly excluded from the mandate of the Reflection Group set up to identify the key issues the Union is likely to face in the longer term. *Id.* ¶ 9.

would be done on the basis of a new Article 100a (now 95) EC, which for the first time permitted the Council to adopt by qualified majority vote measures for the approximation of national laws. However, mindful of the way the ECJ had, in *Reyners, Van Binsbergen* and *Defrenne*, treated deadlines originally laid down in the Treaty, the Member States issued a declaration that stated: "Setting the date of 31 December 1992 does not create an automatic legal effect."⁸⁰ The declaration was not legally binding and the deadline was in any event largely met.⁸¹ None the less, it proved to be the harbinger of more elaborate attempts by the Member States to restrict the interpretative possibilities open to the Court.

The Treaty on European Union signed in Maastricht in 1991 contained three legally-binding protocols conceived as direct responses to the case law of the Court. Two—on abortion⁸² and property in Denmark,⁸³ respectively—were intended to address concerns specific to individual Member States, but the third was of general application and concerned the principle which the Court had in *Defrenne* described as part of the foundations of the Community, that of equal pay for men and women laid down in Article 119 EEC. In *Barber*,⁸⁴ the Court had to decide whether that article applied to a private occupational pension scheme which laid down different pensionable ages for men and women. The Court pointed out that such schemes derived from the employment relationship between their members and a particular employer, by whom they were financed. It followed that Article 119 was infringed where they laid down pensionable

80. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] (amending EEC Treaty, *supra* note 23).

81. See Criminal Proceedings Against Wijzenbeek, Case C-378/97, [1999] E.C.R. I-6207; see also A.G. Toth, *The Legal Status of the Declarations Annexed to the Single European Act*, 23 COMMON MKT. L. REV. 803 (1986); H.G. Schermers, *The Effect of the Date 31 December 1992*, 28 COMMON MKT. L. REV. 275 (1991); Stine Andersen & Andrew Glen-cross, Pre-Emptying the Court: Member State Expectations, Political Oversight and the Nexus of Law and Politics in the EU (paper presented at the EUSA Biennial Conference, Montreal (May 17-19, 2007)).

82. See Soc'y for the Prot. of the Unborn Child Ir. v. Grogan & Others, Case C-159/90, [1991] E.C.R. I-4685 (prompting the protocol annexed to the Treaty on European Union and to the Treaties establishing the European Communities).

83. See *Commission v. Greece*, Case 305/87, [1989] E.C.R. 1461 (prompting the protocol on the acquisition of property in Denmark).

84. *Barber v. Guardian Royal Exchange Assurance Group*, Case C-262/88, [1990] E.C.R. I-1889.

ages which varied according to a member's gender.⁸⁵ However, the use of pensionable ages which differed in this way was widespread in the Member States. Moreover, two Council directives had encouraged the belief among interested parties that this was lawful. To avoid upsetting the financial balance of schemes based on different pensionable ages for men and women, the Court therefore ruled that the direct effect of Article 119 "may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of this judgment" except by those who had already brought legal proceedings.⁸⁶

Unfortunately, the words "entitlement to a pension" were ambiguous.⁸⁷ Did they mean that equality was required in relation to *pensions paid* after the date of the judgment (May 17, 1990) or only in relation to contributions paid in respect of *periods of employment* completed after that date? In the later case of *Ten Oever*,⁸⁸ Advocate General van Gerven said that "the practical importance of the answer to this question is enormous"⁸⁹ and observed that the second of the two alternatives set out above "would deprive the *Barber* judgment of almost all retroactive effect. In practical terms, it would mean that the full effect of the judgment would be felt only after a period of about 40 years."⁹⁰

The ambiguity created by the *Barber* judgment prompted the Member States to take action. The Maastricht Treaty included a protocol⁹¹ attributing to the Court's ruling the most limited form of retroactive effect compatible with the terms of the judgment. It stated:

For the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the

85. *Id.* ¶ 3.

86. *Id.* ¶ 45.

87. This seems to have been due to a blunder by the Court. See ARNULL, *supra* note 14, at 550. However, Garrett, Kelemen and Schulz suggest that the Court "may have made a vague ruling in order to gauge the reaction of member governments." Garrett, Kelemen & Schulz, *supra* note 11, at 166.

88. *Ten Oever v. Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf*, Case C-109/91, [1993] E.C.R. I-4879, ¶ 10.

89. *Id.* As Advocate General van Gerven pointed out, there were a number of intermediate possibilities. See *id.*

90. *Id.*

91. Protocol concerning Article 119, O.J. C 191/68 (1992) (the so-called "*Barber Protocol*").

case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.⁹²

The *Ten Oever* case was decided shortly before the Maastricht Treaty entered into force. The Court was not therefore bound, when the case fell to be decided, by the terms of the *Barber Protocol*. Be that as it may, the Court ruled that, subject to the normal exception for those who had already brought a claim, "equality of treatment in the matter of occupational pensions may be claimed only in relation to benefits payable in respect of periods of employment subsequent to 17 May 1990, the date of the *Barber* judgment."⁹³ The ruling in *Ten Oever* on the temporal effect of *Barber* was subsequently confirmed on several occasions,⁹⁴ although it soon became apparent that, if it was unwilling to directly challenge the understanding of the *Barber* ruling embodied in the protocol, the Court was not prepared to give it a broad interpretation.⁹⁵

At Amsterdam, Article 119 was again the subject of a Treaty change apparently designed to reverse a decision of the Court. In *Kalanke v. Bremen*, the Court had restrictively interpreted a provision on affirmative action contained in a directive on equal treatment for men and women.⁹⁶ The Court's decision proved to be out of keeping with the prevailing political climate. The Member States accordingly agreed to insert in Article 119 (now 141) a new paragraph 4, providing:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvan-

92. *Id.*

93. *Ten Oever*, [1993] E.C.R. I-4879, ¶ 19.

94. *See, e.g.*, *Moroni v. Collo GmbH*, Case C-110/91, [1993] E.C.R. I-6591; *Neath v. Steeper*, Case C-152/91, [1993] E.C.R. I-6935; *Coloroll Pension Trustees Ltd. v. Russell*, Case C-200/91, [1994] E.C.R. I-4389.

95. *See* *Defrenne v. Sabena SA*, Case C-166/99, [2000] E.C.R. I-6155; *DEI v. Evrenopoulos*, Case C-147/95, [1997] E.C.R. I-2057; *Vroege v. NCIV Instituut voor Volkshuisvesting BV & Stichting Pensioenfonds NCIV*, Case C-57/93, [1994] E.C.R. I-4541; *Bestuur van het Algemeen Burgerlijk Pensioenfonds v. G.A. Beune*, Case C-7/93, [1994] E.C.R. I-4471.

96. *See* *Kalanke v. Bremen*, Case C-450/93, [1995] E.C.R. I-3051.

tages in professional careers.⁹⁷

A declaration (No. 28) adopted by the Intergovernmental Conference ("IGC") made it clear that, despite its gender-neutral language, that paragraph was intended to be of benefit primarily to women.⁹⁸ Its practical effect seems so far to have been marginal.

In the run-up to the Treaty of Amsterdam, the United Kingdom made certain more general suggestions for reducing the influence of the Court.⁹⁹ One was for a simplified procedure for the amendment of Council legislation which had been interpreted by the Court in a way which failed to reflect the intentions of its authors, a suggestion designed to overcome any reluctance on the part of the Commission to submit the necessary proposals. Another was that a protocol should be annexed to the Treaties to the effect that, "when faced with more than one possible interpretation of provisions of Community law, the Court shall, unless there is a clear contrary intention, prefer the interpretation which least constrains the freedom of the Member States."¹⁰⁰

These proposals did not find favor with the other Member States, but they did agree to make special provision for certain Member States (including the United Kingdom) which had concerns about the activism of the Court. The Protocol on the position of the United Kingdom and Ireland was intended to limit the effect in those Member States of provisions on visas, asylum, immigration and other policies related to the free movement of persons in a new Title IV inserted in Part Three of the EC Treaty.¹⁰¹ Article 2 of the Protocol provides as follows:

[N]one of the provisions of Title IV of the Treaty establishing the European Community, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Community pursuant to that Title, and no deci-

97. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam].

98. Declaration (No. 28) on Article 119(4) of the Treaty establishing the European Community, Nov. 10, 1997, O.J. C 340, at 136.

99. See Anthony Arnall, *The ECJ, the UK and the IGC*, 21 *EUR. L. REV.* 349 (1996).
100. *Id.* at 349-50.

101. See Protocol on the position of the United Kingdom and Ireland, O.J. C 310/353 (2004) [hereinafter United Kingdom and Ireland Protocol]; see also Treaty of Amsterdam, *supra* note 97, O.J. C 340.

sion of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the *acquis communautaire* nor form part of Community law as they apply to the United Kingdom or Ireland.¹⁰²

The drafting of that provision, redolent of the common law style, is quite unlike that of the EC Treaty, at least in its original form. It was evidently designed to protect the United Kingdom (and Ireland) even from judges as inventive as those of the Court of Justice. Its effect on the cohesion of the Community legal order was more serious than that of the responses to the case law we have so far considered because it excluded the two Member States concerned (though they could opt in if they wished)¹⁰³ from a policy area in which nearly all the other Member States were to participate. A similar provision was included in the Protocol on the position of Denmark.¹⁰⁴ Both provisions will continue to apply after the entry into force of the Treaty of Lisbon.

The Union's Charter of Fundamental Rights led to both an attempt to fetter the Court's lawmaking and special arrangements for two Member States.¹⁰⁵ Solemnly proclaimed by the European Parliament, the Council and the Commission for the first time in Nice in December 2000, the Charter was not initially legally binding.¹⁰⁶ Nonetheless, it had been drafted with a view to its acquiring binding force in the future and it was incorporated in the Constitutional Treaty. The so-called horizontal provisions of the Charter, however, dealing with its interpretation

102. United Kingdom and Ireland Protocol, *supra* note 101, art. 2, O.J. C. 310/353.

103. *Cf.* United Kingdom v. Council, Case C-77/05 (ECJ Dec. 18, 2007) (not yet reported); United Kingdom v. Council, Case C-137/05 (ECJ Dec. 18, 2007) (not yet reported).

104. *See* EC Treaty, *supra* note 29, Protocol on the position of Denmark, O.J. C 321 E/37, at E/201.

105. *See generally* Andersen & Glencross, *supra* note 81.

106. The Court has nonetheless recently begun to cite it as an element of its reasoning. *See, e.g.*, Laval un Partneri, Case C-341/05 (Dec. 18 2007) (not yet reported); Int'l Transport Workers' Fed'n v. Viking Line, Case C-438/05 (Dec. 11, 2007) (not yet reported); Advocaten voor de Wereld, Case C-303/05 (May 3, 2007) (not yet reported); Unibet, Case C-432/05 (Mar. 13, 2007) (not yet reported); Parliament v. Council, Case C-540/03 (June 27, 2006) (not yet reported).

and application, were amended to contain its potential effect on national law, particularly national constitutions.¹⁰⁷ Moreover, while the substantive provisions of the Charter were left unchanged, a set of “explanations” drawn up when the Charter was originally drafted to provide guidance on its interpretation were reinforced and accorded enhanced status.¹⁰⁸ The intention seems to have been to limit the strategic space of the ECJ (and other courts) when ruling on the meaning and effect of the Charter.¹⁰⁹ The Treaty of Lisbon gives legal effect to the modified version of the Charter¹¹⁰ and refers specifically to its horizontal provisions and the explanations.¹¹¹ Moreover, it purports to qualify the effect of the Charter in two Member States (Poland and the United Kingdom).¹¹²

B. *Restricting Access and Controlling Procedure*

Since Maastricht, the Member States have imposed a series of formal restrictions on the Court’s jurisdiction to enable them to bring within the scope of the Treaties particular areas of policy without subjecting them to every aspect of the so-called Com-

107. See Treaty establishing a Constitution for Europe arts. II-112, II-113, O.J. C 310/1 (2004) [hereinafter Constitutional Treaty].

108. The explanations were not mentioned in the original text of the Charter. See Charter of Fundamental Rights of the European Union, O.J. C 364/1 (2000) [hereinafter Charter of Fundamental Rights]. Article II-112(7) required the courts of the Union and the Member States to give the explanations “due regard.” Constitutional Treaty, *supra* note 107, art. II-112(7). In addition, the Charter preamble was altered to include a reference to them.

109. See in particular the explanation of the relationship between Article II-107 (enshrining the right to an effective remedy and to a fair trial) and the admissibility of annulment actions.

110. The modified version was solemnly proclaimed by the European Parliament, the Council and the Commission in Strasbourg on December 12, 2007, the day before the Treaty of Lisbon was signed in Lisbon. see Charter of Fundamental Rights, O.J. C 303/1 (2007). The modified version will replace the original version as from the entry into force of the Treaty of Lisbon.

111. See TEU, *supra* note 53, art. 6(1), as amended. For the text of the modified explanations, see Explanations Relating to the Charter of Fundamental Rights, O.J. C. 303/17 (2007).

112. See Treaty of Lisbon, Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, O.J. C 306/1 (2007), at 156; see also *id.*, Declaration by the Czech Republic on the Charter of Fundamental Rights of the European Union, O.J. C 306/01, at 267; *id.*, Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union, O.J. C 306/01, at 270; *id.* Declaration by the Republic of Poland on the application of the Charter of Fundamental Rights of the European Union in Relation to Poland and the United Kingdom, O.J. C 306/01, at 270.

munity method. Thus, Article L (later 46) of the Treaty on European Union (“TEU”) excluded from the jurisdiction of the Court all the new provisions on foreign and security policy (Title V, the “second pillar”) and virtually all those on justice and home affairs (Title VI, the “third pillar”).¹¹³ The second pillar, whose origins lay in Title III of the Single European Act on European cooperation in the sphere of foreign policy, has remained essentially intergovernmental in nature,¹¹⁴ as perhaps befits its nature. The third pillar has been brought progressively within the jurisdiction of the Court, but in a way which reveals deep misgivings among at least some Member States about the way it discharges its functions.

At Amsterdam, the Member States introduced into the Treaties a series of new provisions designed to establish an “Area of Freedom Security and Justice” (“AFSJ”). The relevant provisions were split between the third pillar (renamed “Police and Judicial Cooperation in Criminal Matters”) and the first pillar, where, as mentioned above, a new Title IV was inserted in Part Three of the EC Treaty. Both sets of provisions were brought within the jurisdiction of the Court, but not in the classic manner. The most striking innovations concerned the preliminary rulings procedure. Separate procedures were devised for Title IV and for the third pillar, each of which differed from the procedure laid down in Article 234 EC.

Under Article 68 EC,¹¹⁵ only national courts of last resort may—and indeed must—seek preliminary rulings on the interpretation of Title IV and the validity and interpretation of acts of the institutions based on it. Provision is also made for the Council, the Commission and the Member States to ask the Court for a ruling on how the provisions of the Title and acts adopted under it should be interpreted.¹¹⁶ However, lower national

113. See TEU, *supra* note 53, art. 46, O.J. C. 321 E/1, at E/33.

114. See *id.*, art. 11(1), O.J. C 321 E/1, at E/14 (as amended) & art. 240a TFEU.

115. EC Treaty Article 67(2) enables the provisions of Title IV concerning the Court to be adapted by the Council. In June 2006, the Commission issued a communication suggesting that the Council should align the jurisdiction of the Court under that Title with the general scheme of the EC Treaty. See Commission of the European Communities, Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection, COM (2006) 346 Final, at 3 (June 2006). That suggestion may now have been overtaken by the Treaty of Lisbon.

116. Rulings given by the Court in response to such requests do not affect judg-

courts have no power to ask the Court for preliminary rulings in cases covered by Title IV.¹¹⁷ In addition, the Court has no jurisdiction to rule on Council measures "relating to the maintenance of law and order and the safeguarding of internal security."¹¹⁸ This self-evidently makes the procedure less effective in securing the uniform application of the law and upholding individual rights.¹¹⁹ Although ostensibly based on a wish to prevent the Court from being inundated by references in immigration and asylum cases, the removal of the right to refer from lower national courts seems to have been motivated in part by a desire to contain the influence of the Court.¹²⁰

The preliminary rulings procedure applicable post Amsterdam to the third pillar differs even more fundamentally from the classic procedure of Article 234. Article 35(1) TEU confers on the Court jurisdiction "to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them."¹²¹ However, under Article 35(2), Member States may choose whether or not to accept the Court's jurisdiction.¹²² Those who wish to do so may opt to allow all their courts to refer or confine the right to refer to their top courts.¹²³ In neither case does the Treaty impose an obligation to refer on such courts.¹²⁴ Again, the Court's jurisdiction is limited in cases involving law and order and internal security.

It may also be noted that Article 35(6), in terms reminiscent of Article 230 EC, gives the Court jurisdiction to review the legal-

ments of national courts which have become *res judicata*. See EC Treaty, *supra* note 29, art. 68(3), O.J. C 321 E/37, at E/70.

117. See *id.* art. 68(1), O.J. C 321 E/37, at E/70.

118. See *id.* art. 68(2), O.J. C 321 E/37, at E/70.

119. See the Court's report on the application of the TEU, Wkly. Proc. of the Ct. of Just. 15/95 (May 22-26, 1995).

120. See Alter, *supra* note 13, at 9.

121. TEU, *supra* note 53, O.J. C 321 E/1, at E/27.

122. Of the twenty-seven Member States, fifteen have, at the time of writing, made declarations under Article 35(2) TEU accepting the jurisdiction of the Court. See Koenderaad Lenaerts, *The Rule of Law and the Coherence of the Judicial System of the European Union*, 44 COMMON MKT. L. REV. 1625, 1633 n.49 (2007).

123. Of the fifteen Member States who have accepted the Court's jurisdiction under Article 35(2) TEU, two (Spain and Hungary) have, at the time of writing this paragraph, confined the right to refer to their highest courts. See *id.*

124. Cf. EC Treaty, *supra* note 29, art. 234, third para., O.J. C 321 E/37, at 147-48.

ity of framework decisions and decisions adopted under the third pillar, but only in actions brought by a Member State or the Commission.¹²⁵ Private parties have no right to bring such proceedings. Article 35(7) TEU gives the Court jurisdiction to rule on certain disputes between Member States or between Member States and the Commission.¹²⁶ However, there is no provision for the Commission to bring infringement proceedings against Member States it considers to be in breach of their third pillar obligations.¹²⁷

These provisions may be said to have represented an advance on those in force previously, but they raised jurisdictional questions of considerable complexity. The Court in its case law has sought to compensate for their shortcomings and, as far as possible, to eliminate divergences from the “gold standard” represented by its classic powers under the EC Treaty. Three cases in particular are worth mentioning. The first two concern preliminary references under Article 35(1) TEU, while the third concerns annulment proceedings.

In the first case, *Pupino*,¹²⁸ a reference made under Article 35 TEU, the Court emphasized the parallels between that provision and Article 234 EC and proceeded to apply its case law under the latter article on the types of body entitled to refer and the admissibility of references. More dramatically, the Court went on to hold that the duty of consistent interpretation applicable under the EC Treaty extended to framework decisions adopted under the third pillar, even though the TEU contained no equivalent of Article 10 (ex 5) EC, which had played an important part in the development of that duty.¹²⁹

The Court went even further in the second case, *Gestoras*

125. In *Commission v. Council*, Case C-176/03, [2005] E.C.R. I-7879, an action for annulment brought by the Commission under Article 35(6) TEU, the Court controversially quashed a third pillar framework decision on the use of the criminal law to protect the environment on the ground that it should have been adopted under the EC Treaty. See *Commission v. Council*, Case C-440/05, (ECJ Oct. 23, 2007) (not yet reported).

126. See TEU, *supra* note 53, art. 35(7), O.J. C 321 E/1, at E/28.

127. On the consequences of the lack of any provision for infringement proceedings under the third pillar, see *Lenaerts*, *supra* note 122, 1639-40.

128. Case C-105/03, [2005] E.C.R. I-5285.

129. See *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, Case C-106/89, [1990] E.C.R. I-4135, ¶ 8.

Pro-Amnistía v. Council,¹³⁰ which raised the legal status of common positions adopted by the Council under the third pillar. The Court accepted that Article 35 TEU did not give it jurisdiction to hear actions for damages.¹³¹ Drawing on case law concerning the action for annulment under the EC Treaty, however, it ruled that the right to make a reference for a preliminary ruling under Article 35 TEU existed “in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties.”¹³² It was therefore imperative “to make subject to review by the Court a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act.”¹³³ A national court which had serious doubts about whether a common position was intended to produce such effects could therefore make a reference to the Court under Article 35 TEU, even though Article 35(1) did not refer to common positions.¹³⁴

In the third case, *Airport Transit Visas*,¹³⁵ the Commission sought the annulment of a joint action adopted by the Council under the original version of the third pillar, which made no provision for the Court to review the legality of such acts. The Commission had brought the action under Article 230 EC, but the United Kingdom Government argued that the Court had no jurisdiction since the contested act had been adopted outside the framework of the EC Treaty. If that argument had prevailed, the Court would have been unable to prevent the Council and the Member States from evading the decision-making processes laid down in the EC Treaty. The Court therefore rejected it. Article M (now 47) TEU,¹³⁶ which the Court had jurisdiction to apply,¹³⁷ made it clear that measures such as the contested joint

130. Case C-354/04 P, [2007] 2 C.M.L.R. 22; *see also* Segi v. Council, Case C-355/04 P, [2007] 2 C.M.L.R. 23; *cf.* Organisation des Modjahedines du Peuple d’Iran v. Council, Case T-228/02, [2007] 1 C.M.L.R. 34 [hereinafter OMPI].

131. *See Gestoras Pro-Amnistía*, [2007] 2 C.M.L.R. 22, ¶ 46.

132. *Id.* ¶ 53.

133. *Id.* ¶ 54.

134. *Cf. id.*, Opinion by Advocate General Mengozzi, 2 C.M.L.R. 22, ¶ 116.

135. Commission v. Council, Case C-170/96, [1998] E.C.R. I-2763; *cf.* OMPI, [2007] 1 C.M.L.R. 34; Spain v. Eurojust, Case C-160/03, [2005] E.C.R. I-2077.

136. *Cf.* Constitutional Treaty, *supra* note 107, art. III-308, O.J. C 310/1, at 138 (2004); *see* Treaty of Lisbon, *supra* note 112, art. 1, O.J. C 306/01, at 32 (inserting a new art. 25b TEU).

137. *See* TEU, *supra* note 53, art. 47, O.J. C 321 E/1, at E/33.

action were not intended to affect the EC Treaty. The Court declared: "It is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of . . . the Treaty on European Union, do not encroach upon the powers conferred by the EC Treaty on the Community."¹³⁸

The position would have been greatly simplified by the Constitutional Treaty, which would have replaced Title IV EC and Title VI TEU with a single set of provisions on the AFSJ, all of which would in principle have been subject to the classic powers of the Court. The only remnant of the present regime¹³⁹ would have limited the Court's jurisdiction in cases involving law and order and internal security. The Treaty of Lisbon will have essentially the same effect. For a transitional period of five years from its entry into force, however, the pre-existing powers of the Court under the third pillar will continue to apply to Union acts in the field of police and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon. Once that transitional period has ended, those acts will cease to apply to one Member State (the United Kingdom) if it does not wish to accept the powers of the Court in this area.¹⁴⁰

It is also worth noting in this context the very limited reforms contained in the Constitutional Treaty,¹⁴¹ and later incorporated in the Treaty of Lisbon,¹⁴² to the standing rules applicable to private applicants in annulment actions before the Union Courts (ECJ and Court of First Instance). To cut a long story short, the effect of the existing rules is that private applicants may only seek the annulment of Community acts which are not addressed to them where they can establish direct and individual concern. Two cases decided in 2002¹⁴³ underlined the capacity of the latter concept to deprive private applicants of effective ju-

138. *Commission v. Council*, Case C-170/96, [1998] E.C.R. I-2763, ¶ 16.

139. See Constitutional Treaty, *supra* note 107, art. III-377, O.J. C 310/1, at 163.

140. See Treaty of Lisbon, *supra* note 112, Protocol on Transitional Provisions art. 10, O.J. C 306/1, at 163. Union acts in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon which are subsequently amended will continue to apply to Denmark in their original form. See *id.*, Protocol on the Position of Denmark art. 2, O.J. C 321 E/37, at E/201.

141. See Constitutional Treaty, *supra* note 107, art. III-365(4), O.J. C 310/1, at 160.

142. See Treaty of Lisbon, *supra* note 112, art. 2, O.J. C.306/1, 109 (amending art. 230(4) of the EC Treaty).

143. See *Unión de Pequeños Agricultores v. Council*, Case C-50/00 P, [2002] E.C.R. I-6677; see also *Jégo-Quéré v. Commission*, Case T-177/01, [2002] E.C.R. II-2365.

dicial protection of their rights. To avoid that result, in one of them, Advocate General Jacobs proposed a new, more relaxed, test of individual concern which would have permitted the applicants to proceed.¹⁴⁴ The ECJ, however, said that reform of the system currently in force would require the Treaty to be amended.¹⁴⁵ Such an amendment was included in the Constitutional Treaty and later incorporated in the Treaty of Lisbon, but it is limited in scope. The test of individual concern must still be satisfied by a private applicant challenging an act which is not addressed to him or her, unless it is “a regulatory act which is of direct concern to him or her and does not entail implementing measures.”¹⁴⁶ The position of legislative acts is unchanged. The Member States seemed to have wished to do no more than was absolutely necessary to address certain problems that had arisen in the recent case law, though the position is slightly nuanced because of the ECJ’s consistent failure to interpret the relevant provision of the EC Treaty (Article 230) in an expansive way.¹⁴⁷

Alongside these restrictions on access to the Court, both directly and through the national courts, the Member States have also retained control over the Court’s procedures. The International Court of Justice and the ECtHR each have the right to draw up their own rules of procedure,¹⁴⁸ but the same latitude has never been extended to the ECJ. Before the entry into force of the Treaty of Nice, the Court had to wait for the unanimous approval of the Council before introducing changes to its Rules of Procedure. This sometimes caused considerable delay. To enable it to act more rapidly, the Court suggested to the pre-Nice IGC that it should have the right to amend its Rules of Procedure without seeking the approval of the Council. That suggestion failed to attract the support of all the Member States, although they did agree to permit the Council to grant its approval by qualified majority.¹⁴⁹ The maintenance of the requirement of Council approval reflected a certain wariness on the

The latter decision was reversed on appeal. See *Commission v. Jégo-Quéré*, Case C-263/02 P, [2004] 2 C.M.L.R. 12.

144. See Opinion of Advocate General Jacobs, *Unión de Pequeños Agricultores*, [2002] E.C.R. I-6677.

145. See *id.*

146. See *id.*

147. See ARNULL, *supra* note 14, at 69-94.

148. See ECHR, *supra* note 2, art. 26(d); Rome Statute, *supra* note 5, art. 30.

149. See EC Treaty, *supra* note 29, art. 223, last paragraph, O.J. C 321/37, at E/142.

part of the Member States at the idea of giving the Court a free hand to organize its own work.¹⁵⁰ It means that the Court has to explain and justify any proposed changes to the Member States before they can be introduced. The effect of the dialogue the Court must enter into with the Member States when it wishes to amend its Rules of Procedure may be illustrated by the changes it proposed in 2007, to provide for the introduction of an urgent preliminary rulings procedure in the context of the AFSJ.¹⁵¹ The Member States insisted on a procedure which would allow them all to participate fully in the proceedings before the Court, even though it had also proposed an alternative procedure which would have been quicker.

Some important rules on the functioning of the Court are contained, not in its Rules of Procedure, but in the Statute of the Court. Before the entry into force of the Treaty of Nice, some of the provisions of the Statute¹⁵² could be amended by the Council, acting unanimously at the request of the Court and after consulting the Commission and the European Parliament.¹⁵³ Since the entry into force of the Treaty of Nice,¹⁵⁴ the Council has had the power to amend nearly all the provisions of the Statute.¹⁵⁵ The Council acts unanimously (a) at the request of the Court of Justice and after consulting the European Parliament and the Commission, or (b) at the request of the Commission and after consulting the European Parliament and the Court of Justice. Before the Treaty of Nice, the Commission had no power to request that changes should be made to the Statute. The loss by the Court of its exclusive right of initiative means that it no longer has the power to block such changes.

C. *Delegitimization and Non-Compliance*

The ECJ has sometimes been the target of attacks by politi-

150. Cf. Arjen W.H. Meij, *Guest Editorial: Architects or Judges? Some Comments in Relation to the Current Debate*, 37 COMMON MKT. L. REV. 1039, 1042 (2000).

151. See Council Decision No. 2008/79/EC, Euratom, O.J. L 24/42 (2008) (amending the Statute of the Court of Justice); Rules of Procedure, O.J. L 24/39 (2008) (amending the Rules of Procedure of the Court of Justice).

152. See EEC Treaty, *supra* note 23, Protocol on the Statute of the Court of Justice, Title III, at 283.

153. See *id.* art. 188.

154. EC Treaty, *supra* note 29, art. 245, O.J. C 321 E/37, at 150.

155. See *id.* (all except the provisions contained in Title I "Judges and Advocates-General").

cians seeking to undermine its legitimacy as a court of law. A famous example is the speech in the House of Lords by Baroness Thatcher during a debate on the ratification by the United Kingdom of the Maastricht Treaty. She observed that “some things at the Court are very much to our distaste.”¹⁵⁶ She went on:

It has by its decisions greatly extended the powers of the centralised institutions against the nation state. Its methods of interpreting the law are totally different from those of our courts and nothing like so exact or so good. The court draws upon the objective of European integration to inform all its rulings by which over a period of time it has therefore furthered decisions towards a unitary European state. . . . It is busy reinterpreting so many things to give itself and the Community more powers at our expense. That court does not have constitutional checks and balances to temper its power. What was tolerable in a few cases is not bearable on the scale it is happening now.¹⁵⁷

A similar attack was launched by the then Austrian Chancellor, Wolfgang Schüssel, on the eve of his country’s presidency of the Union in January 2006. In a newspaper interview, he criticized the ECJ for systematically expanding the Union’s jurisdiction.¹⁵⁸ His attack seemed to have been inspired mainly by a decision of the Court that restrictions applied to students from other Member States who wished to study at Austrian universities were unlawful.¹⁵⁹

Attacks of this type may have a number of purposes, such as to persuade the Member States that something should be done to rein the Court in; to act as a warning to the Court; or to reduce the political price of non-compliance with its rulings. I suggested above that isolated shots across the Court’s bows are unlikely to have much impact. Attempts by the Member States to confine the Court within its strategic space have already been considered. It is therefore to the issue of non-compliance that I now turn.

The authors of the EC Treaty envisaged that compliance by

156. Margaret Thatcher, House of Lords (June 7, 1993), *available at* <http://www.margaretthatcher.org/speeches/displaydocument.asp?docid=108314>.

157. *Id.*

158. See Mark Beunderman, *Fresh EU Presidency Attacks European Court of Justice*, *EU OBSERVER*, Jan. 3, 2006.

159. See *Commission v. Austria*, Case 147/03, [2005] E.C.R. 5969.

the Member States with their obligations would be policed by the Commission and they established a novel mechanism to enable it to do so. This involved an application by the Commission to the Court, which could declare the defaulting State to be in breach of the Treaty.¹⁶⁰ A weakness of that mechanism was that it did not originally provide for the imposition of sanctions on the defendant. The consequences of that weakness were initially concealed, at least in part, by the doctrines of direct effect and primacy, which had the effect of enlisting the support of the national courts in enforcing Community law. In the 1980s, however, there was a rise in the number of cases in which rulings by the Court against delinquent Member States were not complied with in the absence of further action by the Commission. This led to the introduction at Maastricht of a new provision (Article 228(2) EC) enabling the Court to impose potentially substantial financial sanctions on Member States.¹⁶¹

The procedure was a heavy one, involving a second application to the Court after it had become apparent that a State was not complying with a judgment finding it in breach of the Treaty. Nonetheless, the Commission's Annual Reports on Monitoring the Application of Community Law show that the sanctions procedure is starting to play a useful role in encouraging Member States to comply with their Treaty obligations.¹⁶² Most sanctions applications by the Commission are settled before the Court gives judgment, so the number of cases in which sanctions are actually imposed is small.¹⁶³ The Treaty of Lisbon, like the Constitutional Treaty, reforms the sanctions procedure by enabling the Commission to seek the imposition of a financial penalty in its initial application to the Court, but only in cases concerning the incorrect implementation of a directive.

We may conclude that, while non-compliance by Member States with rulings of the ECJ has been a problem in the past, there are now relatively few instances of such behavior. The sin-

160. See EC Treaty, *supra* note 29, art. 226, O.J. C 321 E/37, at E/144.

161. See *id.* art. 228(2), O.J. C 321 E/37, at E/145.

162. Francis Snyder, *The Effectiveness of European Community Law*, 56 MOD. L. REV. 19, 19-54 (1993).

163. See, e.g., Commission v. France, Case 304/02, [2005] E.C.R. I-6263; Commission v. Spain, Case 278/01, [2003] E.C.R. I-14141; Commission v. Hellenic Republic, Case 387/97, [2000] E.C.R. I-5047; cf. Commission v. Germany, Case 503/04, [2007] C.M.L.R. 40.

gling out in the Treaty of Lisbon, however, of actions involving the implementation of directives betrays a certain wariness on the part of the Member States of the manner in which the Court might employ the sanctions procedure.

D. *Exit*

Steinberg observes: "In the contemporary [World Trade Organization] context, the threat of unilateral exit has limited credibility because it would be costly."¹⁶⁴ The same is undoubtedly true of the European Union. No Member State has left what is now the Union since it was founded over 50 years ago.¹⁶⁵ At present, the Treaties do not provide for the withdrawal of a Member State, though there seems little doubt that a State which was politically determined enough could withdraw if it so wished. The formal position would in any event change with the entry into force of the Treaty of Lisbon which, like the Constitutional Treaty,¹⁶⁶ lays down a procedure to be followed where a Member State decides to withdraw.¹⁶⁷ In the last resort, it would not be possible to force the departing State to comply with that procedure. That State, however, would in all likelihood wish to retain the best possible relations with the remaining Member States after its departure and one day might even wish to rejoin the Union. There might, therefore, be strong political reasons for it to comply with the procedure laid down in the Treaty. Whether the mere existence of the procedure, with its implicit recognition that Union membership is not permanent, encourages disgruntled Member States to invoke it remains to be seen. By offering a way out, it might conceivably make the more enthusiastic Member States less tolerant of laggards.

E. *Discursive Constraints*

Helfer and Slaughter refer to a "suite of structural controls and informal signaling devices by which states convey to a tribunal when it is approaching the politically palatable limits of its

164. See Steinberg, *supra* note 6, at 267.

165. Although Greenland, a province of Denmark, withdrew in 1985 following the introduction of home rule in 1979. See Friedl Weiss, *Greenland's Withdrawal from the European Communities*, 10 EUR. L. REV. 173 (1985).

166. See Constitutional Treaty, *supra* note 107, art. I-60, O.J. C 310/1, at 40.

167. See TEU, *supra* note 53, art. 49(a), O.J. C 321 E/1, at E/27, as amended.

authority.”¹⁶⁸ “A web of relationships built upon the forms and function of law,” they say, “validates certain forms of legal analysis and strategic decision making while discouraging others.”¹⁶⁹ Judges who “venture beyond these discursive parameters risk significant damage to their standing in the eyes of other actors in the community.”¹⁷⁰

The importance of the role played by the national courts of the Member States in giving effect to Community law has made the Court’s relationship with national judges vital to the proper functioning of the Community legal order. The success of the preliminary rulings procedure, once described by the Court as “the veritable cornerstone of the operation of the internal market,”¹⁷¹ depends for its efficaciousness on the willingness of national courts to make references and apply conscientiously the rulings they are given. This makes the Court more dependent on the cooperation of its national counterparts than most other international tribunals.¹⁷²

The Court has sometimes been willing to adjust its case law in response to signs of serious dissent from national courts. The most famous example is the development of its case law on the general principle of respect for fundamental rights. As is well known, this represented a response to case law of the German courts suggesting that, in the absence of any protection for fundamental rights at the Community level, they would test the validity of Community acts against the fundamental rights enshrined in the German Constitution.¹⁷³ Similarly, the hostile re-

168. Helfer & Slaughter, *supra* note 6, at 930.

169. *Id.* at 953.

170. *Id.*

171. See the Court’s Report on the Application of the TEU in *The Proceedings of the Court of Justice and Court of First Instance of the European Communities*, Doc. No. T-15/95, ¶ 11 (May 22–26, 1995).

172. National courts may sometimes have reasons of their own for cooperating with the ECJ. See J.H.H. WEILER, *THE CONSTITUTION OF EUROPE* 197 (1999); see also Karen Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in *THE EUROPEAN COURTS AND NATIONAL COURTS-DOCTRINE AND JURISPRUDENCE* 241 (Anne-Marie Slaughter, Alec Stone Sweet & J.H.H. Weiler eds., 1998). *But cf.* Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 *INT’L ORG.* 41, 65 (1993).

173. Among many accounts, see ARNULL, *supra* note 14, at ch.10. The failure of the Constitutional Treaty might conceivably prompt a renewal of national judicial restiveness. See Hjalte Rasmussen, *Present and Future European Judicial Problems after Enlargement and the Post-2005 Ideological Revolt*, 44 *COMMON MKT. L. REV.* 1661, 1662 (2007); see also ARNULL, *supra* note 14, at 665. Perhaps to reassure national courts, in *Advocaten*

ception accorded to the Court's case law on the direct effect of directives in the courts of France and Germany¹⁷⁴ appears to have influenced its decision in the famous *Marshall* case¹⁷⁵ that directives could not impose obligations on individuals.

F. Summary

The table on the following page summarizes the variety of ways in which the Member States have sought to reduce agency slack and confine the Court within its strategic space.¹⁷⁶

APPRAISAL AND CONCLUSION

It has not been my intention in this paper to add to the debate on whether the Court is an autonomous actor, able to disregard the interests of Member States, or whether it has depended for its success on the consent of those States.¹⁷⁷ There is much to be said for the verdict of Garrett, Kelemen and Schulz that "[t]he ECJ is manifestly neither master nor servant" of national governments.¹⁷⁸ Indeed, it is rather as if the Member States have been engaged in an elaborate game of chess with the Court. When they drew up the Treaties, they handed the Court the white pieces, which it proceeded to use with great panache in the 1960s and 1970s to establish a strong position in the center of the board. In the 1980s and 1990s, the Member States captured a few of the Court's pieces and developed some of their own. We now seem to have entered the middle-game, in

voor de Wereld, the Court reviewed the validity of a third-pillar framework decision for compatibility with general principles of law said to be "reaffirmed" in the Charter of Fundamental Rights. Case C-303/05 (May 3, 2007) (not yet reported).

174. See Jens Plötner, *Report on France*, in *THE EUROPEAN COURTS AND NATIONAL COURTS*, *supra* note 172, at 48-50 (referring to the decision of the French Conseil d'Etat of December 22, 1978 in *Minister of the Interior v. Cohn-Bendit*, 1 C.M.L.R. 543 (1980)); see also Juliane Kokott, *Report on Germany*, in *THE EUROPEAN COURTS AND NATIONAL COURTS*, *supra* note 172, at 116; see also Pierre Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 EUR. L. REV. 155, 169-70 (1983).

175. See *Marshall v. Southampton & South-West Hampshire Area Health Auth.*, Case 152/84, [1986] E.C.R. 723.

176. The letters in parentheses after certain entries in the second column denote the treaty in which the relevant step was taken, using the following abbreviations: SEA: Single European Act; TEU: Treaty on European Union; ToA: Treaty of Amsterdam; ToN: Treaty of Nice; CT: Constitutional Treaty; ToL: Treaty of Lisbon.

177. See Alter, *supra* note 13, at 121-22; see also Garrett, Kelemen & Schulz, *supra* note 11, at 149-50.

178. Garrett, Kelemen & Schulz, *supra* note 11, at 175; see also Andersen & Glen-cross, *supra* note 81.

| Mechanism | Examples |
|--|---|
| <p>A. Defining and Reinterpreting Rules and Reservations</p> | <ul style="list-style-type: none"> • Declaration on internal market deadline (SEA) • Protocol on abortion (TEU) • Protocol on property in Denmark (TEU) • “<i>Barber</i>” protocol (TEU) • Affirmative action amendment to Article 141 (ex 119) EC (ToA) • Protocol on position of UK and Ireland (ToA) • Protocol on position of Denmark (ToA) • Revised Charter of Fundamental Rights (CT/ToL) • Protocol on the application of the Charter to Poland and the UK (ToL) |
| <p>B. Restricting Access and Controlling Procedure</p> | <ul style="list-style-type: none"> • Article 46 (ex L) TEU • Jurisdiction over AFSJ (Articles 68 EC and 35 TEU) (ToA) • Protocol on Transitional Provisions (ToL) • Reform of standing rules in annulment actions brought by private applicants (CT/ToL) • Procedure for changing Rules of Procedure/Statute of the Court (ToN) |
| <p>C. Delegitimization and Non-Compliance</p> | <ul style="list-style-type: none"> • Public expressions of political disapproval • Failure to comply with judgments • Sanctions procedure (TEU/CT/ToL) |
| <p>D. Exit</p> | <ul style="list-style-type: none"> • Withdrawal procedure (CT/ToL) |
| <p>E. Discursive Constraints</p> | <ul style="list-style-type: none"> • Relations with national courts |

which each player’s moves are based on a calculation of the tactical possibilities in the position. Since neither player is likely to resign or achieve checkmate, the risk is that the game will end in stalemate.

This state of affairs hardly seems conducive to the healthy development of the Union. The effectiveness of the judicial arrangements for the AFSJ created at Amsterdam is in inverse proportion to their Heath Robinson complexity. Yet they are the product of concern on the part of some Member States at least as to the consequences if new substantive provisions were subjected to the classic powers of the Court. The Court's response has predictably been to attempt to align the Amsterdam arrangements with those very powers, but in so doing it is likely to have confirmed the suspicions of those who had wanted to limit its jurisdiction. In the same way, the Charter of Fundamental Rights could and should have been a short and accessible catalogue of basic rights, but misgivings about (among other things) what the Court would make of it have resulted in complex horizontal provisions and lengthy "explanations" which make its effect hard to assess, even for specialists and even if it is assumed to be binding.

Not only have attempts been made in these areas to curtail the jurisdiction of the Court, or to influence the way it exercises its jurisdiction, but some Member States have decided to opt out, wholly or partly, from the arrangements concerned. The United Kingdom and Poland were unable to accept the status accorded to the amended Charter and revised "explanations" by the Treaty of Lisbon without a special protocol "clarifying" the internal effect and justiciability of the Charter. The United Kingdom, Ireland and Denmark opted out at Amsterdam of the new Title IV of Part Three of the EC Treaty, opt outs which will be preserved in the Treaty of Lisbon. Only fifteen of the Member States have accepted the preliminary rulings jurisdiction of the Court under the third pillar. The extension by the Treaty of Lisbon of the classic powers of the Court to what is now the third pillar may result in the withdrawal of the United Kingdom from acts it currently accepts and divergence between the versions of acts applicable in Denmark and those applicable elsewhere in the Union. It is hard to deny that this ad hoc legal disintegration is partly attributable to the record of the Court.¹⁷⁹

179. For examples of differentiation in the legal framework not related to the role of the Court, see DERRICK WYATT & ALAN DASHWOOD, *EUROPEAN UNION LAW* 113-16 (5th ed. 2006); cf. TEU, *supra* note 53, arts. 27a-27e, 40-40b, 43-45, O.J. C 321 E/1, at 21-22, 29-30, 31-33; EC Treaty, *supra* note 29, arts. 11, 11a, O.J. C 321 E/1, at E/47-48 (dealing with so-called enhanced cooperation). These provisions are to be replaced by a new

If the Court operates in the shadow of the Member States, the reverse is also true: the Member States clearly operate in the shadow of the Court. Not only have they intervened frequently in response to expansive lawmaking by the Court, but their own approach to new initiatives has been influenced by assumptions about the Court's likely reaction. What can be done to break the circle? The answer to that question must acknowledge the Court's role as the architect of many of the features that have made the Union so successful: the establishment, on the basis of respect for the rule of law and fundamental rights, of the largest single market in the world.¹⁸⁰ It is for that reason that the Court is seen as a model by States seeking to replicate the Union in other parts of the globe. This rules out any institutional change which would superimpose on the Court a higher body, a sort of European Conseil Constitutionnel,¹⁸¹ to preempt or correct the Court. The result of such an innovation would be to undermine the rule of law and weaken the legal protection accorded to individuals.

The solution must instead be sought in the development of a new *modus vivendi* between the Court and national governments in which each party seeks to develop greater sensitivity to the agenda of the other. This would entail involving the Court in legal and policy developments of direct concern to it. There have been some small signs of movement in that direction. An advantage of the current procedures for amending its Statute and Rules of Procedure is that they require the Council, and sometimes the Commission and the European Parliament, to enter into a conversation with the Court which may improve mutual understanding.¹⁸² During the run-up to the 1996 IGC, the Court was invited, along with the other institutions, to submit a

Article 10 TEU and new Articles 280a-280i TFEU following the entry into force of the Treaty of Lisbon. *See* Treaty of Lisbon, *supra* note 112, art. 10, O.J. C 306/01, at 22; *id.* art. 280A-280I, at 127-130.

180. For a recent analysis, see generally HER MAJESTY'S TREASURY, DEPT. OF TRADE AND INDUS., *THE SINGLE MARKET: A VISION FOR THE 21ST CENTURY* (2007), available at <http://www.berr.gov.uk/files/file37083.pdf>.

181. *Cf.* 1958 CONST. arts. 56-63 (Fr.); JOHN BELL, *FRENCH CONSTITUTIONAL LAW* (1992).

182. In 2006 during the discussions over the introduction of an urgent preliminary rulings procedure in the context of the Area of Freedom, Security and Justice, the President of the Court, Judge Skouris, appeared in person before both the Permanent Representatives Committee and the national Ministers for Justice. *See* Council of the European Union, Supplement to the Discussion Paper on the Treatment of Questions Re-

report to a Study Group set up by the European Council on the operation of the Maastricht Treaty. In 1999 before the pre-Nice IGC, the Court forced onto the agenda the question of reforming the Community's judicial architecture by issuing a discussion paper on the subject.¹⁸³ At Tampere later the same year, the European Council decided that the body (later called a Convention) charged with drawing up the Union's Charter of Fundamental Rights should include two representatives of the Court as observers.¹⁸⁴

Since then, there seems to have been something of a retreat. The Court had no observers of the Convention on the Future of Europe, which drew up the draft Constitutional Treaty, the Praesidium of that Convention merely having the right to invite the President of the Court to address the Convention.¹⁸⁵ In the event, several members of the Court contributed to the deliberations of the Convention's Working Groups.¹⁸⁶ It was only belatedly, however, that the Convention set up its so-called Discussion Circle on the Court to consider the implications for it of some of the proposals being considered.¹⁸⁷ The ordinary Treaty revision procedure set out in the Treaty of Lisbon¹⁸⁸ provides for a Convention to be convened. Although the European Central Bank will have to be "consulted in the case of institutional changes in the monetary area," the Court will have

ferred for a Preliminary Ruling Concerning the Area of Freedom, Security and Justice, 17013/06 (Dec. 22, 2006).

183. See *The Future of the Judicial System of the European Union, Proposals and Reflections*, sent to the Council on May 10, 1999. The text is reproduced in *THE FUTURE OF THE JUDICIAL SYSTEM OF THE EUROPEAN UNION* 111-43 (Alan Dashwood & Angus Johnston eds., 2001).

184. See Tampere European Council, Presidency Conclusions (Oct. 15-16, 1999), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0042:0133:EN:PDF>.

185. See Presidency Conclusions, European Council Meeting in Laeken, at 25, SN 300/1/01 REV 1 (Dec. 14-15, 2001).

186. For example, A.G. Jacobs (Working Group I: Subsidiarity); Judge Skouris (Working Group II: Charter/ECHR); A.G. Tizzano (Working Group III: Legal Personality).

187. In the course of its work, the Discussion Circle heard both the President of the Court of Justice, Judge Rodriguez Iglesias, and the President of the Court of First Instance, Judge Vesterdorf. See Final Report of the Discussion Circle on the Court of Justice, CONV 636/03 (Mar. 25, 2003).

188. See Treaty of Lisbon, *supra* note 112, art. 1, O.J. C 306/01, at 38 (amending art. 48(1) TEU).

no formal involvement in the process.¹⁸⁹ The Court was not consulted on the final text of the draft Constitutional Treaty, much of which was reflected in the Constitutional Treaty and the Treaty of Lisbon, even though (to paraphrase) it envisaged important “institutional changes in the judicial area.”¹⁹⁰ It will be important in the future for the Court to be involved informally in discussions on changes to provisions in the Treaties and elsewhere which are of direct concern to it if a climate of mutual understanding is to be nurtured.

What contribution can the Court itself make to this process? Many of the decisions discussed above were amply justified both on their own terms and in the broader context of the Community’s then state of development. But some of the more recent case law¹⁹¹ suggests that the Court has failed to adapt to a changing landscape in which Member States are seeking different ways of collaborating in new policy areas. In *Van Gend en Loos*, the Court said that, in order to establish whether treaty provisions had direct effect, it was necessary “to consider the spirit, the general scheme and the wording of those provisions.”¹⁹² The Court must learn to accept that it is not only the wording of the Treaties that has changed since 1963.

189. The new Article 48(2) and 48(3) TEU provide for two simplified Treaty revision procedures, but these are less likely than the ordinary revision procedure to affect the Court directly. *Id.* art. 1, O.J. C 306/1, at 38-39 (amending art. 48 TEU).

190. It is unclear whether the Court was consulted on the agreement reached with Poland towards the end of the 2007 IGC that it should have a permanent Advocate General alongside Germany, France, Italy, Spain and the United Kingdom and cease to take part in the rotation system applicable to the remaining Member States. *See id.*, Declaration on Article 222 of the Treaty on the Functioning of the European Union regarding the number of Advocates-General in the Court of Justice, O.J. C 306/1, at 262. That declaration requires the Court to make a request under Article 222 in order to take effect.

191. *See, e.g.*, *Gestoras Pro-Amnistía v. Council*, Case C-354/04 P, [2007] 2 C.M.L.R. 22; *Pupino*, Case C-105/03, [2005] E.C.R. I-5285; *Commission v. Council*, Case C-176/03, [2005] E.C.R. I-7879.

192. *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, at 12.