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Current Legal Issues in the External Relations  
of the European Union

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## **Abstract**

This paper is based on a lecture delivered during the Academy of European Law Summer School 2006. It provides an examination from a legal perspective of three current themes in the external relations of the European Union. First, the legal implications of the pillar structure for external relations, including recent case law and practical issues arising from the application of Article 47 TEU, the borderline between Community external policies and the Union's common foreign and security policy, and practical inter-pillar cooperation. It concludes that it is easier to combine the pillars by means of pragmatic solutions, whereas it is much more difficult in the case of a strictly legal construction which takes into account the requirements of Union coherence and the separate character of each pillar. Second, the paper turns to the balance between Member States and the European Union/Community in external policy and in particular the application of the "AETR test" in recent case law including the "Open Skies" cases, the Lugano Convention Opinion and the "Mox Plant" case. It concludes that a proper application of the AETR remains a practical challenge that transcends the narrow issue of pure legal deduction as to whether Community competence is "affected" or not. And third, the paper considers the position of the EU within, and participation in the work of, international organisations such as the United Nations, the WHO and the WTO. The paper concludes by emphasising the need for collaboration between the institutions and for pragmatic solutions to the problems that are inevitable while the Union retains its current complex structure

## **Keywords**

Competences – dispute resolution – European law – international agreements – legal personality – CFSP/ESDP – common commercial policy – development policy – European Court of Justice



# *Current Legal Issues in the External Relations of the European Union*

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## **I. Introduction**

Ladies and Gentlemen,

The city of Florence is one of the fountainheads of European culture and art. It was with his eye on this city that Machiavelli wrote “The Prince” in order to get back into the good graces of the Medici family. It was here that Vasari was inspired to write the first history of art. It was here that a principled Dominican monk, Girolamo de Savonarola, preached and wrote, in many ways as a precursor of the Reformation, expressing himself most radically in the “bonfires of the vanities” that he organized. Here art is everywhere, in the buildings, churches and convents, and even in the street.

It is striking how the two most important museums of this city, the Uffizi and the Palazzo Pitti, have found very different ways of displaying their riches to the public. The Uffizi shows the most wonderful works of the Rinascimento in a strictly modern way : each painting or sculpture separately, to be enjoyed in its uniqueness, on its own. The Palazzo Pitti, however, has returned to the museum practices of the 18<sup>th</sup> and 19<sup>th</sup> century and has hung its walls full with paintings from top to bottom, while its ceilings are lavishly furnished with frescoes, thus creating an overload of artistic impressions descending on the viewer.

In some ways today, I will give you a Palazzo Pitti approach to the current legal issues in the external relations of the European Union. I will show you some paintings on the walls under a decorated ceiling. They are far from perfect, as you suspect. And I will try not to overwhelm you, by putting these painting in three different rooms.

The first of these rooms will have three pillars, the three pillars of the Union, and I will discuss with you how the Community Institutions these days cope with the continued parallel existence of the three pillars, now that the single legal personality of the Union laid down in the Treaty establishing the Constitution will not come about in the near future.

The second room will show some old and well-known external relations theme: the relations between the EC and the Member States. What are the recent developments in this room?

Finally in the third room I will comment on some works of art that relate to an eternal problem in the Union's external relations: the position of the Union in international organisations. The developments shown in the first two rooms will make their influence felt in this room: both the pillar structure and the old competence question have their influence on the Union's position in international organizations

## **II. The First Room : Inter-pillar Relations**

The three pillars in this room are massive at first sight: there is the Community pillar, there is the second pillar concerned with the Common Foreign and Security Policy and finally the Third pillar: the judicial and police cooperation. Moreover, the Community pillar and the Community method are conspicuously protected by Article 47 TEU against any encroachment by the intergovernmentalism of the other two pillars. In the words of the Court, if an act taken in either pillar 2 or 3, in the light of its object and purpose, could have been taken on the basis of the Community treaty, this means that the Community is affected by that act and accordingly the act has to be annulled on the basis of having infringed Article 47 TEU.

On the basis of these fairly simple criteria the Commission has lost one case for the protection of the Community pillar (the transit visa case) and won another (the criminal sanctions in environment case). They both concerned, nearly ten years apart, the border line between the first and the third pillar. And as little interest was stirred by the transit visa case, so excessive have been the reactions to the criminal sanctions case. Member States and criminal law experts have been up in arms about this ruling. And we all get prepared for the next Court judgement on the same subject: criminal sanctions in the field of maritime pollution.

In the field of external relations, the Commission has similarly invited the Court to shed greater light on the border line between the Community domain and the Common Foreign Policy. This is not without reason, since especially development policy has many objectives in common with the CFSP, such as the furtherance of peace, the rule of law and democracy, respect for human rights and fundamental freedoms. In this respect Article 177 TEC and Article 11 TEU are almost identical: what is for the CFSP one of the primary objectives is for development policy at least a very important ancillary objective. This is further borne out by Article 11 of the Cotonou Agreement which among other things declares that combating the spread of small arms and light weapons is an integral part of ACP development.

When, therefore, at the moment the Commission was preparing one of its Small Arms projects in collaboration with the West-African organization Ecowas, the Council took a CFSP decision initiating a similar project, also with Ecowas, the Commission decided

that it was time to ask the Court for clarification and hence request the annulment of the Council decision for breach of article 47 TEU.

The case is before the Court and I shall refrain from going into greater detail. But whatever the outcome, the repeated border skirmishes between CFSP and Community will hopefully diminish as a result of the Court's ruling. In that way there will be less reason to depict the Commission as a kind of Savonarola who indulges in misguided protection of Community purism.

On the other hand there are also those who want to defend the purity of intergovernmentalism against encroachment by the Community, in particular the UK is minded this way. In the negotiations on the Constitution the British government achieved that the Constitutional equivalent of Article 47 would give a two-way protection: not just of the Community against the intergovernmental, but also the other way around (Article III-308 Constitution). At present those who want thus to protect intergovernmentalism, have to have recourse to the plea of incompetence before the Court.

Recently the Parliament has had a resounding success with that plea in the PNR case.<sup>1</sup> You will remember that in the course of 2004, after the US had suspended for a long-time the application of its legislation which required foreign airlines to communicate to its Border Police the so-called Passenger Name Records of passengers, the Commission took a so-called Adequacy Decision under the Community Data Protection Directive. This was after the Commission had received certain reassurances from the US Department for Homeland Security as to the treatment of the personal data from the airlines – treatment which in the Commission's view guaranteed that the data were indeed 'adequately' protected compared to the level of protection guaranteed by the Directive. This Adequacy Decision was complemented by a small international agreement which gave a certain international legal status to the assurances of the Department of Homeland Security and served as legal basis for constraining the airline companies to transmit the PNR data to the US authorities.

The Parliament felt that it should have been put in a position to give its assent to the agreement instead of its mere opinion, and – more importantly – it argued that the Commission and the Council had acted *ultra vires* by adopting the Adequacy Decision and the international agreement respectively. As I said, the Parliament was stunningly successful before the Court of Justice, although one may wonder whether – with the benefit of hindsight – this was the success it really wanted.

For the Court, in a few pithy paragraphs, declared that it was obvious from the preamble of the Adequacy Decision that it was taken for reasons related to US security and that, since the Data Protection Directive contained an exception for data transmission for security reasons, it was *ultra vires* the Community to adopt the Adequacy Decision and the closely related international agreement. In other words, the Parliament was right in having the PNR agreement annulled, but as it was not a "1<sup>st</sup> Pillar" domain, the Parliament had nothing to do with it.

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<sup>1</sup> Cases C-317/04 and C-318/04 of 30 May 2006.



The Court's judgment sheds no light whatsoever on the question under whose "vires", in whose power these measures would belong, though Advocate-General Leger had suggested the third pillar. And that is the choice the Commission made in reaction to the Court's judgment, but it is not self-evident, since the third pillar would seem to require co-operation between Member States in the criminal field while it is an agreement with the US we are talking about here. So, second Pillar?

Hence we are confronted in the external relations domain, not only with the border between first and second pillar, but also between second and third. Why this should be important is clear once we realize that in Amsterdam and Nice the Court's jurisdiction over the third pillar has been extended (also through declarations Member States have made under Article 35(2) TEU), whilst the second pillar has been entirely excluded from the Court's jurisdiction (This would still have been the case under the Constitution, see Article III-376). This, in the absence of an equivalent to Article 47 TEU to protect the third pillar from encroachment by the second.

### *Convergence between the Pillars*

Anticipating the next room we will move on to, the one with the exposition on Community powers and Member State powers, we now come to an area where recently the relationship between Community and Member State powers has transfigured into the relationship between the first and second pillar.

As you may know, there is a strong tendency in the Council to make certain clauses in the broad international agreements, such as cooperation agreements, that the Community concludes with third States into standard or obligatory clauses. Thus there are *inter alia* the anti-terrorism clause; the human rights and democracy clause; the weapons-of-mass-destruction clause; the cooperation-with-the-International-Criminal-Court-clause etc. Together with the classical Political Dialogue clause, they would make a Community agreement, mixed. This has many practical drawbacks. With fifteen Member States the national ratifications required for mixed agreements took three to four years. The Cotonou agreement is a good example of this. The problem was not the ratification by the more than 70 ACP States, but that by the 15 Member States: it lasted nearly four years. One can only guess at how long it would take with 25, even 27 Member States.

In the meantime the Community part of the agreement could be provisionally applied in accordance with Article 300(2) EC Treaty, but not the national competence provisions, such as the standard clauses. The consequence would be a very imbalanced application of the agreement during the period of national ratification.

Since the clauses that make the agreement mixed can equally be said to fall under the second (or possibly the third) pillar, a new idea has come up, namely the conclusion of two parallel agreements : a Union (second pillar) agreement that would encompass the standard clauses just mentioned and the Political Dialogue provision, as well as a normal Community cooperation agreement, each to be concluded by its own procedure

under Article 24 TEU (by unanimity) and Article 300 EC (by qualified majority or unanimity with opinion from the EP) respectively. The conclusion on the Union and Community side would be quick, according to these procedures, and no recourse would have to be had to provisional application of the Community part of the agreement only.

The only drawback would be that the two agreements would be separate and hence any suspension clause of the type that has become standard in EC cooperation agreements would work only in the Community agreement and not in the Union (CFSP) agreement. It was considered, therefore, that a link needed to be created between both agreements.

And here is where Article 47 TEU creates a problem again. Such a link cannot be too narrow or of a strictly legal character, since that would inevitably entail that, when a decision concerning suspension would need to be taken, for instance for non-respect of the clause on non-proliferation of weapons of mass destruction, the Community side of the agreement would be suspended because of a decision relative to the Union side - which would constitute an affectation of Community law by Union decision-making and hence an infringement of Article 47 as interpreted by the Court.

These are matters that have been extensively discussed in preparing the agreements with Iran (in relation to which for obvious reasons the negotiations are stalled) and recently with Thailand. Creative lawyers have tried to get around this objection by fashioning a political link between the CFSP agreement and the Community agreement, which would confirm the parallelism between the fate of the two agreements, but would formally leave the autonomy of decision-making about suspension on respectively the CFSP and the Community side intact.

Others, however, have wanted to go a step further and integrate the two agreements into one that would be concluded on the combined legal basis of Article 24 TEU and the relevant substantive Community basis plus Article 300 EC Treaty. Such a cross-pillar mixed agreement inevitably leads to another breach of Article 47 TEU or to such a sharp separation of the Community and CFSP parts inside the single agreement that one might just as well revert to the solution of two parallel agreements. In a certain way it amounts also to an anticipation of the Constitution, since it would *de facto* treat the Union as having a single legal personality, but would nevertheless try to respect the separation between the CFSP and Community pillars that is also a feature of the Constitution (see Article III-308).

Parenthetically I should say here that this was and is one of the big weaknesses of the Constitution. It has always been a mystery to me how the Union was supposed to conclude international agreements spanning both the CFSP and the Community domain and uphold the integrity of both pillars.

But then, just as Vasari was not always capable of appreciating the art of certain of his contemporaries – for instance he did not appreciate Botticelli very much; he dismissed the “Primavera” and the “Birth of Venus” as “paintings of nude women”, be it “expressed with grace”, so we may not be fully able now to appreciate the design of the Constitution in all its glory.

*Practical cross-pillar cooperation*

One thing is certain, it has recently turned out to be easier to find pragmatic solutions for the coherence between the CFSP and Community pillars in the domain of external representation of the Union, than to find a solution for the problems of treaty construction and adoption that I have just laid out for you.

Thus for instance, just recently, the Commission and the Council agreed that the same person should be head of the Commission delegation in Macedonia [FYROM] and European Union Special Representative (EUSR) for that country. This is not a solution that may always be possible, either politically or statutorily, but in this case it was possible and the experience has been positive, though it requires great discipline of the Ambassador/Special Representative concerned to respond separately to the two lines of command and control that end up in his person; a sort of anticipation of what under the Constitution, the “double-hatted” Minister of Foreign Affairs/V.P. of the Commission would feel like.

Another interesting challenge in the field of external representation to which the Union had to respond recently was thrust upon it by the reform of the United Nations, in particular by the creation of the Peace-building Commission. You will recall that this is the UN Commission that will be charged with post-conflict peace-building and recovery, involving reconstruction and institution-building with a view to laying the foundation for sustainable development, to use the words of the so-called World Summit outcome document.

This Peace-Building Commission in reality consists of different formations:

- In the Organisational Committee, the Commission will participate on behalf of the European Community as an “institutional donor”, in accordance with paragraph 9 of the GA and SC resolutions establishing the PBC. The Presidency and the SG/HR will be associated with the European Community’s delegation.
- In the country-specific meetings, the Presidency, assisted by the SG/HR, will participate representing the EU as a “relevant regional organisation”, in association with the European Community as “institutional donor” in a common delegation. The Presidency, assisted by the SG/HR, and the Commission shall take the floor in accordance with their respective competences and responsibilities.

This formula would be valid whether the Member State exercising the Presidency of the Council of the EU is a member of the Peace-Building Commission or not.

This fairly complicated arrangement is accompanied by a very elaborate internal mechanism for consultation and exchange of information within the EU which have been laid down in a European Commission, Presidency and Council Secretariat joint paper.

It is all convoluted and as yet untested; nevertheless it has the great advantage of having been agreed well in advance of the start of work of the Peace-Building Commission and to show a real wish to make Community and CFSP sides of the Union collaborate in pragmatic fashion.

## *Conclusion*

What have we seen in the first room, the one with the three pillars? Ultimately, the pillars are not in themselves a brilliant work of art. They have to carry a common vault, while maintaining their own identity and separateness, and where one pillar – the Community one – seems more valued and is better protected than the two others. It turns out to be easier to combine the pillars when the common vault can be pragmatically put together, as is the case in external representation. It becomes much more difficult if the common vault has to be a strictly legal construction, since then the requirements of Union coherence and maintenance of the separate character of each pillar lead to an architectural riddle which still defies any clean solution.

## **III. The Second Room: Relations between EC and Member States**

We are now venturing into the second room, and here I would like to comment on some developments in the ECJ's jurisprudence on the relations between the Community and its Member States in external relations. Undoubtedly, the landmark case "ERTA" of 1971 set the foundations for potentially very broad external competences of the European Community<sup>2</sup>. As you are aware, the ECJ deduced from the international legal personality of the Community (as laid down in Article 281 EC) that it enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty. According to the Court, whenever the Community "*with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules.....the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules*". It is thus the Community alone which can "*assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system*".<sup>3</sup>

Reading ERTA may appear an easy task – applying it in practice is, however, more tricky. Under which conditions are Community rules "*affected*" by member State agreements? Again, guidance from the Court is essential. With a certain simplification, we may identify in the following case-law the following two methods:<sup>4</sup>

- The quantitative approach – does secondary Community law cover to a large extent or entirely a certain subject matter?<sup>5</sup> –
- and, since 1994,<sup>6</sup> the more formal test whether a specific EC legislative act contains provisions relating to the treatment of non-EU nationals or an

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<sup>2</sup> Case 22/70 *Commission v Council* [1971] ECR 263.

<sup>3</sup> Case 22/70 *Commission v Council* [1971] ECR 263. paras. 17-18.

<sup>4</sup> P.-J. Kuijper, comment on Case C-239/03, *Commission v. French Republic*, judgment of the Court of 7 October 2004, (2005) 42 CMLRev 1491-1500; F. Hoffmeister, comment on the *Open Skies* cases, (2004) 98 AJIL 567-572.

<sup>5</sup> Opinion 2/91, para. 21: directives laying down minimum requirements do not create an exclusive external competence, whereas harmonisation directives, covering to a large extent the scope of an international commitment do (ibid., paras. 25-26). See also Opinion 2/00, ECR-I 9713 (2001), para. 46.

authorisation to negotiate with non-member countries. The most recent developments in this regard point to four relevant cases.

### *1. The Open-Skies Case*

In the “*Open Skies*” the Commission had brought claims against eight Member States, (the UK, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany). It alleged that these Member States had infringed the Treaty by concluding and applying Air Services Agreements with the United States of America since the mid-1940’s (also known as “Bermuda” Agreements). In 1992 the US started offering the new type of “Open Skies” Agreements, which were intending to facilitate alliances between US and European carriers, if they were in conformity with a number of criteria set out by the US government. Most Member States agreed with that policy approach and amended their existing bilateral air services agreements accordingly. Before the ECJ, the Commission claimed that Community legislation adopted in 1991 had established an internal market in the air transport sector, and thus the aviation Agreements concluded between these Member States and the United States were incompatible with the Community’s exclusive competence in the area. The Commission also alleged that the Member States were contravening the right of freedom of establishment under Article 43 of the EC Treaty, because they were not according to nationals of other Member States, in particular to airlines of other Member States established in their territory, the treatment they were reserving for their own nationals.

The Court came out applying the ERTA principle in the narrow way. It investigated whether the Community air transport legislation contained specific rules dealing with non-Community carriers, and whether these rules would have been affected by the conclusion of the new “Open Skies” Agreements. The Court found such rules only in three specific areas which it concluded to be exclusive Community competence, and rejected the remainder of the claims. Nevertheless, the Commission was successful on the other ground, namely that the Member States had breached the freedom of establishment under Article 43 EC. The Court found that the clause on ownership and control of airlines in the “Open Skies Agreements” was discriminatory with regard to other EU nationals. Therefore – although having a mixed result on the competence claim, the practical effect of the case was beneficial for the Community in the field of air transport. In 2004, the Council and the European Parliament adopted a Regulation<sup>7</sup> that established a procedure for the notification and authorisation of bilateral negotiations conducted by the Member States, and the introduction of standard clauses within the existing “Open Skies Agreements” in order to ensure that they were compliant with Community law. The Commission has ever since been working on this entirely new basis.

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<sup>6</sup> The second method was first spelt out in Opinion 2/94, paras. 95-96 and confirmed in Opinion 2/92, para. 33.

<sup>7</sup> Regulation EC No 847/2004

## 2. The Lugano Convention Opinion

Let me now comment on the recent Opinion of February 2006 given by the Court, on the question of the competence of the Community to conclude the new Lugano Convention with EFTA Member States on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>8</sup> The request for an Opinion was made by the Council which asked whether the conclusion of this Convention fell entirely within the sphere of exclusive competence of the Community or within the sphere of shared competence of the Community and the Member States.

There, according to the Court, it is not necessary that the areas covered by the agreements and Community legislation “*coincide fully*”. Where the quantitative test is to be applied, “*the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law ....but also its future development.”<sup>9</sup> This comprehensive and detailed analysis must be carried out in order to ensure that the “*agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system which they establish*”.<sup>10</sup> The Court found that the new Lugano Convention would “*affect the uniform and consistent application of Community rules*”<sup>11</sup> concluding that it fell entirely within the sphere of the exclusive competence of the Community. This is of high significance in an area of civil jurisdiction, at present in rapid growth.*

## 3. The “Etang de Berre” Case of July 2004.

Let me now refer to the “Etang de Berre” case. In 1983, both the Community and its Member States ratified the Barcelona Convention on the protection of the Mediterranean Sea against pollution. The “Etang de Berre” is a saltwater marsh located in the south of France which is in open connection with the Mediterranean. A trade association of local fishermen took legal action against Electricité de France claiming discharges of water from a hydro-electric power station into the Etang de Berre, were unlawful. The French Court referred the case to the ECJ<sup>12</sup>. The latter confirmed that the relevant provision of the Protocol to the Barcelona Convention had direct effect<sup>13</sup>. As the government did not carry out the international obligations in due time, the Commission then brought an infringement case against France<sup>14</sup>. Our competence question was raised as regards the admissibility of the action. France had defended itself with the argument that the *said provision of the Protocol* fell within national jurisdiction only. The Court rebutted this argument, stating that the *provisions* of the Convention and the Protocol covered a field which fell in large measure within Community competence. Environmental protection was, according to the Court, in a

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<sup>8</sup> Opinion 1/03 of the Court of 7 February 2006.

<sup>9</sup> Opinion 1/03 of 7 February 2006. Para. 126 – emphasis added.

<sup>10</sup> Opinion 1/03 of 7 February 2006. Para 133.

<sup>11</sup> Opinion 1/03 of 7 February 2006. Para. 172.

<sup>12</sup> Case C-213/03 of 15 July 2004.

<sup>13</sup> Case C-213/03 of 15 July 2004. Para. 39.

<sup>14</sup> Case C-239/03 of 7 October 2004.

very large measure regulated by Community legislation, triggering a Community interested in compliance by both the Community and its Member States to ensure compliance. The Court established that the fact that the discharges of water and alluvia into the marine environment had not yet been subject to Community legislation, could not call that finding into question<sup>15</sup>.

#### 4. Finally, The “Mox Plant” Case of last May.

In a nutshell, the facts of the case are as follows. In 2001, Ireland initiated proceedings against the United Kingdom before the Arbitral Tribunal of the Convention on the Law of the Sea. Ireland attacked the continued operation of the MOX and THORP plants, which recycled plutonium and other nuclear material located at Sellafield next to the Irish Sea. For the Commission, however, Ireland had failed to respect the exclusive jurisdiction of the European Court of Justice in regard to disputes concerning Community law in breach of the hitherto never used Article 292 of the EC Treaty. Furthermore, the Commission alleged that Ireland had encroached up EC competence, thus failing to comply with its duty of co-operation under Article 10 of the EC Treaty. It thus brought an infringement case against Ireland.

The Court commented on the external competence of the Community in the area of the protection of the marine environment. It held that competence in this area is not exclusively vested in the Community, “*but rather in principle, shared between the Community and the Member States*”.<sup>16</sup> However, for the Court, “*the question as to whether a provision of a mixed agreement comes within the competence of the Community is one which relates to the attribution, and thus, the very existence of that competence, and not to its exclusive or shared nature*.”<sup>17</sup> It specified that the existence of the Community’s external competence is not “*in principle, contingent on the adoption of measures of secondary law covering the area in question and liable to be affected if Member States were to take part in the procedure for concluding the agreement in question...*”<sup>18</sup>

Applying these principles to the facts, the Court found that the provisions relied upon by Ireland in the UNCLOS dispute were part of the Community’s legal order. It was thus the Court itself which had “*jurisdiction to deal with disputes relating to the interpretation and application of those provisions and to assess a Member State’s compliance with them.*”<sup>19</sup> The ECJ also held that “*the obligation of close cooperation within the framework of a mixed agreement involved, on the part of Ireland, a duty to inform and consult the competent Community institutions prior to instituting dispute-settlement proceedings concerning the MOX plant within the framework of the Convention.*”<sup>20</sup>

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<sup>15</sup> Case C-239/03, para. 27-30.

<sup>16</sup> Case C-459/03 of 30 May 2006. Para. 92.

<sup>17</sup> Case C-459/03 of 30 May 2006. Para 93 – emphasis added.

<sup>18</sup> Case C-459/03 of 30 May 2006. Para 94.

<sup>19</sup> Case C-459/03 of 30 May 2006. Para. 121

<sup>20</sup> Case C-459/03 of 30 May 2006. Para 179

## *5. Conclusion to this chapter*

What is the essence of these recent cases? Applying the formal test in the Open-Skies judgment, the Court was careful not to antagonize Member States in a very sensitive policy field, namely air transport. On the other hand, reverting to the qualitative test in the Lugano Convention, the *Etang de Berre* and to a certain extent in *Mox Plant*, it firmly defended external Community powers when broader institutional implications were at stake: in Lugano, its finding on Community exclusive competence on private international law issues covered by the Convention was necessary to preserve the internal *acquis*. In *Etang-de Berre*, the Court was sensible to the need for uniform obligations in relation to mixed agreements which should not be overshadowed by internal quarrels about Community competence. Finally, in the *Mox-Plant* situation the findings on Community competence stopped attempts from Member States to circumvent the Court's jurisdiction by resorting to an international dispute settlement mechanism. In sum, these cases show that a proper application of the ERTA doctrine as to how to construe external Community powers remains a practical challenge that transcends the narrow issue of pure legal "deduction" whether Community competence is "affected" or not. The Court's approach is to be praised for being nuanced, but that makes it not always easy to apply by the other Institutions on a prospective basis.

## **IV. The Third Room: EC Participation in international organisations**

We are now entering the third room and turning to the multilateral arena. One of the most significant recent developments relates to the status of the Community in international organizations. As the Community's external powers gradually evolve in many policy fields, they are more and more exercised in those international organizations that are dealing with these matters. Let me give you two concrete examples, one on trade and one drawing from the internal market.

### *1. Trade*

Nowadays, multilateral trade negotiations and disputes are unthinkable without the Community. Following the "International Fruit Company" decision of the European Court of Justice in 1972, the Community exercised *de facto* membership rights in the GATT. In 1994, the Community became even a founding member of the WTO (Article XI (1) of the Marrakesh Agreement) next to the Member States. In practice, the Commission is the main partner for other WTO members in negotiations and it has won respect when it comes to dispute settlement. In approximately 30% of the over 300 cases brought in the last twelve years the Community was involved as a party. Furthermore, it intervenes as a third party in almost all other cases. With a little dose of pride I may say that our offensive cases have generally been successful. We have even won some defensive cases, which is statistically a rare occurrence in the WTO. On the other hand, we have also lost important defensive cases (like the *Banana* and *Hormones* cases) and have recently received a critical panel report in the *GMO* case.



Such defensive cases do not only create legal challenges in Geneva. Their repercussions are also felt in Brussels, at the implementation stage. The Court does not accept the direct effect of WTO-law within the Community legal order. Nevertheless, individual companies keep invoking WTO-law. Currently, we are dealing with situations, where companies seize the Court because of cross-retaliation. One example is the ongoing FIAMM case, where the applicant's line of argument is the following:

*“Because the Community did not implement recommendations from a panel report to bring Community law in line with the WTO obligations in due time, the United States were authorised by the Dispute Settlement Body (DSB) to retaliate. The additional US tariffs on their exports have caused great damages to me, that the Community should now reimburse”.*

The Court of First Instance rejected the claim in December last year. It argued that such action would jeopardize the margin of manoeuvre the Community enjoys under the WTO system to remove incompatibilities only after a certain time, during which US sanctions are entitled to cross-retaliate. The company had brought forward an additional claim, namely liability of the Community *in the absence* of an unlawful act. Here, the idea is that the company suffered “unusual and special” damage in facing the US cross retaliation. While finding a general principle common to all Member States to that effect, the Tribunal ruled that the risk of cross-retaliation belongs to the normal risks of an exporter, thereby denying the existence of an “unusual and special” damage. The case is now pending on appeal before the Court of Justice. We keep our fingers crossed.

## 2. Internal market

My second example relates to the internal market. After the entry into force of the Single European Act in 1987, Community legislation in these areas grew extensively. How does this translate into EC participation in relevant international organizations? Not being a State, the Community often does not find a natural place. Hence, a lot of obstacles need to be addressed before the Community can play a proper role there. Nevertheless, we can record remarkable progress in this field as well. Take the World Health Organisation. Upon invitation by the World Health Assembly, the Community participated recently both in the negotiations on the Framework Convention on Tobacco Control and the International Health Regulations. Intensive coordination between the institutions led to a situation, where Europe came up with one single position. One or two controversial points were resolved beforehand in Brussels, then Europe indeed spoke with one voice – either from the Presidency or from the Commission. This positive result now “spills over” to the ordinary meetings of the WHO-Executive Board and the World Health Assembly where more and more coordinated positions are being prepared.

Comparably, EC input into the UNESCO is on the rise. This time, the Commission fought hard to secure an appropriate status for the Community in the negotiations on the Convention on cultural diversity. Only after an intensive half-a-year campaign with UNESCO members, did UNESCO allow for the participation of the Community on an equal footing (without the right to vote) within the organization.

On the other hand, there are cases where Member States are unable to agree on further coordination of positions or to support an upgrading of Community status. Curiously enough, these examples also involve internal market fields, such as transport. Without going into detail, the Community still faces considerable obstacles for achieving a satisfactory status in now obvious places of common policy, such as the International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO). The Council simply did not authorise the Commission to seek EC membership in these organizations and intermediate steps such as “full participation” meet obstacles from within these organizations. Hence, the Community cannot properly exercise its competences in those fields, albeit internal harmonisation is almost completed.

### *3. Conclusion of this chapter*

What can we learn from this overview? For me, the WTO example shows that the Community can contribute to the development of WTO law and is faced with questions of domestic application that have been hitherto the domain of States only. In order to solve these questions, the Community has recourse to the common traditions of Member States, adapted to its own special situation. In return, such a role is much more difficult to play in organizations where the Community is not a member. Overcoming the status handicap is, however, not only a matter of distinguished legal reasoning, but foremost a matter of political ability to convince the other members of an organization and, sometimes, certain EU Member States. I hope to have demonstrated that membership or full participation of the Community may offer a value added.

Finally, as I have already shown, when discussing the problems of the three pillars in relation to international agreements, the problem of which international personality represents the Union/Community can also arise in international organizations or their organs, such as the Peace-building Commission of the UN. The problem ought to be pretty simple, when it concerns single issue organizations that are either clearly economic or clearly political in their orientation. Then it is either the Community or the Union/CFSP which accedes to the organization or fulfils the role of observer or “full participant” as the case may be, usually next to the Member States, since they have consented to be replaced entirely only in very few and rather minor cases (fisheries agreements and possibly in commodity agreements). It becomes more complicated in multi-issue organizations which span both the political and the economic terrain. The Community has a recognized international personality and the Union *qua* CFSP has possibly obtained one through practice, by concluding agreements in the domains of peace-keeping and police actions – which is in line with the way in which the UN was seen by the International Court of Justice to have acquired international personality in the famous Advisory Opinion on “Injuries suffered in the service of the United Nations”. However the personality of the Union as a “vault”, held up by the three pillars, is much more controversial, since accepting it as a matter of Union law would amount to the *de facto* introduction of a major point of the Constitution. Hence the awkward but pragmatic solution found in the case of the Peace Building Commission – which may find application elsewhere. The whole picture is further blurred by the old insistence of the Member States that the Community or the Union is not represented as as such in third States and international organizations – that might make our delegations too much like

Embassies and our Representatives too much like Ambassadors – but that they are representations of the Commission and in a few cases (Geneva, New York) of the Council. This is certainly an outdated sensitivity that should be overcome and in some organizations we have begun to think about it (IMO), especially when this situation is used as a pretext by the organization to say that they do not know the Community or the Union, but only the Commission as observer.

## **V. Conclusion**

After this guided tour – Palazzo Pitti style- through the three rooms which represent three problem areas of Community/Union external relations, it is not easy to draw the strands together. Especially not, since I have not said anything at all about another serious problem in the Community's external relations, namely the variable geometry that is the consequence of the total exclusion of Denmark and the partial self-exclusion of the UK and Ireland from the measures taken on the basis of Title IV of the EC Treaty on visas, asylum and immigration. I have also left untouched the virtually complete non-application of Article 111 of the EC Treaty and, as a consequence, the non-representation of the Community in the field of international monetary policy and in the international financial organizations. With another observer of external relations one may well exclaim: "When will the Community ever be a normal participant in international relations?"

The answer is "probably never, if only because the Union/Community will never be comparable even to a federal State in international relations". But specifically at the present juncture, the earthly paradise represented by a fairly regular, calm and non-contentious application of a number of clear rules on the external relations of the Union/Community will continue to elude us. I have already alluded to the fact that the Constitution itself is far from Eden, since it could not find a solution to the contradiction between the single international personality of the Union and the continued separation between the pillars. But now that the Constitution, or anything like it, is for the moment out of reach and the separateness between the pillars is therefore accentuated by the fact that the over-arching function of the Minister of Foreign Affairs of the Union is not in place, the coming years are more than ever going to be an exercise in the art of muddling through, especially as the older problems, such as the division of powers between the Member States and the Community/Union, have not been very much clarified by the recent case law of the Court.

Seen from the perspective of the Commission, I can say that it is ready to positively engage with the other Institutions and the Member States, as it has shown in its Communication "Europe in the World - Some Practical Proposals for Greater Coherence, Effectiveness and Visibility" (formerly the "Concept paper"). This communication aims first to let the Commission put its own house in order and proposes some pragmatic reforms inside the Commission to enable it to work better in collaboration with the Council in areas where CFSP and Community policies are intertwined. It secondly invites the other institutions and the Member States to act pragmatically in the same way and thus to bridge together, as best we can, the period

until there will be greater clarity about the institutional set-up of the Union/Community, also in the field of external relations. This does not mean that the Commission will not remain faithful to its mission as guardian of the Treaty and will not need, occasionally, to request the Court to clarify certain legal issues that resist political solutions. But that should be taken to be a normal exercise of its privileges, seen against a background where day-to-day collaboration between Institutions among themselves and between the Institutions and the Member States is the norm.